AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Straight & Narrow

By James B. Kobak, Jr. and Ignatius A. Grande[1]

Social Media Ethics: Keeping Up with Changing Obligations

James B. Kobak, Jr.
Hughes Hubbard & Reed LLP; New York

Ignatius A. Grande
Hughes Hubbard & Reed LLP; New York

James Kobak, Jr. is general counsel with Hughes Hubbard & Reed LLP in New York and a member of its Corporate Reorganization Group. Ignatius Grande is the firm's Senior Discovery Counsel.

Social media continues to impact the legal world in ways that could not have been foreseen only 10 years ago. Bankruptcy attorneys in particular are finding themselves using social media more often and are utilizing it for a variety of purposes, with the rise of bankruptcy blogs and the active use of applications such as LinkedIn. Many active users undoubtedly have a mix of motives: staying in touch with colleagues; commenting about and keeping up-to-date with legal developments; letting people know of important events in their personal or professional lives; and, in the back of some minds but undoubtedly in the forefront of others, using it as a tool to cultivate name recognition and develop business.

Social media and the ease with which one can store and post information and communicate with large groups of people continue to create challenges for all attorneys, including bankruptcy attorneys. An attorney must think before he/she tweets, posts on Facebook, Snapchats[2] — or puts anything on the Internet, for that matter.[3] An attorney also has an obligation — or at least a professional interest — to advise clients on how to manage their social media accounts consistently with legal positions, but an attorney must abide by professional responsibility rules and obligations when doing so.

Over the past year, ethics committees and bar associations have continued to issue opinions and guidance on how attorneys can use social media, and attorneys and their clients have demonstrated how these platforms can be misused in ways that create ethical issues. It is more important than ever before for attorneys to be aware of the pitfalls, as well as the opportunities, that have been created by changing technology.

A bankruptcy attorney who uses any form of social media — or has clients who do — needs to understand how different social media platforms work and needs to be aware of the existence of any ethics rules or opinions that may affect the attorney's use or their client's use of social media. In other words, developments in this area affect virtually every bankruptcy professional, both technophobe and technophile alike.

This article alerts insolvency practitioners to recent developments in three areas: the duty to advise clients on social media use without running afoul of spoliation rules; the possible need to conform online communication to a number of disparate state advertising and solicitation rules; and the duty to protect confidential information in electronic, as well as physical, form. The case law, professional responsibility rules, and ethics opinions and comments are rapidly evolving and can vary by state.

1 Mr. Kobak is a member of the New York County Lawyers Association Ethics Committee, whose opinions are referenced in this article, and the Committee on Standards for Attorney Conduct, which recommended the changes to the comments to the New York Rules of Professional Conduct. Mr. Grande teaches a course on e-discovery at St. John's University School of Law and co-chairs the Social Media Committee of the New York State Bar Association's Commercial and Federal Litigation Section, whose guidelines are referenced in this article.

2 Although he is not an attorney, Royal Bank of Scotland Chairman Rory Cullinan recently resigned after his daughter took screenshots of Snapchat posts of Cullinan being bored at work and posted them online, where they were found by reporters. Snapchat puts a time limit on how long recipients can view and download photos, videos or messages, but Cullinan's daughter took screenshots on her phone and proceeded to upload them to the photo-sharing social media platform Instagram. While it is not clear whether Cullinan resigned due to the Snapchat issue, the media has alleged that it was the reason for his departure. *See* Lianna Brinded, "RBS Boss Leaves Weeks After These Snapchat Pictures Were Put on Instagram by His Daughter," *Business Insider*, March 31, 2015, *available at* uk.businessinsider.com/rbs-boss-rory-cullinan-leaves-just-weeks-after-snapchat-pictures-were-unveiled-on-instagram-2015-3#ixzz3i6BkhiYT (unless otherwise indicated, all links in this article were last visited on Aug. 18, 2015).

3 In recent years, attorneys have posted inappropriate information about their clients on social media, have tweeted profane comments to large audiences when childishly debating Supreme Court holdings on social media, and have misrepresented their attorney admission status and work experience on social media. *See* Erin Fuchs,"A Facebook Photo of Leopard-Print Underwear Caused a Murder Mistrial in Miami," *Business Insider*, Sept. 13, 2012, *available at* www.businessinsider.com/facebook-photo-and-murder-mistrial-2012-9; Debra Cassens Weiss, "BigLaw Partner's Twitter F-Bomb Is Aimed at SCOTUSblog Snark," *ABA Journal*, Oct. 21, 2013, *available at* www.abajournal.com/news/article/biglaw_partners_twitter_f-bomb_is_aimed_at_scotusblog_snark/; Eric Turkewitz, "NJ Files Ethics Complaint Against Rakofsky (And Why It's Important to You)," *New York Personal Injury Law Blog*, March 26, 2014, *available at* www.newyorkpersonalinjuryattorneyblog.com/2014/03/nj-files-ethics-complaint-against-rakofsky-and-why-its-important-to-you.html.

Social Media Use and Privacy Settings

Clients may post information or remarks on social media that might be inconsistent with later legal positions that they may wish to adopt in insolvency proceedings or other contexts. Such postings may inadvertently divulge information that they would have preferred that creditors or a trustee not know. Social media postings may also serve as fodder for endless and embarrassing discovery or cross-examination, as well as unwittingly violate the rights of third parties. An attorney may consider it good practice, and even part of diligent representation, to advise about what should or should not appear on a client's website, social media feeds and even blogs.

Although content on a social media platform may seem to be different from emails or electronic files, the information stored on social media platforms is subject to the same preservation requirements as other forms of data. (Since social media can provide a treasure trove of information in many cases, it is becoming more and more important for attorneys to advise clients on the proper use of social media as it relates to their cases.) It has been clear for several years that an attorney cannot advise a client to delete a social media account or delete content when the information found on the social media account is subject to a litigation hold.[4] More recently, ethics opinions have focused on the related issue of how a lawyer can — and may have a duty to — advise a client regarding changing social media privacy settings.

The Philadelphia Bar Association recently issued an ethics opinion that stated that a lawyer may advise a client to change the privacy settings on his/her social media page, as long as the lawyer does not instruct or permit a client to delete or destroy any "relevant" content "so that it no longer exists."[5] The committee found that changing the privacy settings was acceptable; even though a change would restrict immediate access to the content of the site, a change in privacy settings does not prevent the opposing party from being able to obtain such information through discovery or by a subpoena.

Florida also has issued guidance on this point. In January 2015, the Florida State Bar Association's Ethics Advisory Committee issued a proposed advisory opinion, noting that "a lawyer may advise a client to use the highest level of privacy setting[s] on the client's social media [accounts]."[6] The committee also concluded that, "[p]rovided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, a lawyer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as an appropriate record of the social media information or data is preserved."[7]

4 *Lester v. Allied Concrete Co.*, Nos. CL.08-150, CL.09-223 (Va. Cir. Ct. Sept. 1, 2011); *Painter v. Atwood*, 2014 WL 1089694 (D. Nev. March 18, 2014); *Gatto v. United Air Lines Inc.*, 2013 WL 1285285 (D.N.J. March 25, 2013).

5 The Philadelphia Bar Association Professional Guidance Committee, Opinion 2014-5 (July 2014).

6 Professional Ethics Committee of the Florida Bar, Proposed Advisory Opinion 14-1 (Jan. 23, 2015). The Professional Ethics Committee has since affirmed Proposed Advisory Opinion 14-1, with slight modifications after receiving comments. The Florida Bar Board of Governors will review the proposed advisory opinion in October 2015.

7 Other states have echoed this finding, including New York. The updated Social Media Guidelines issued by the New York State Bar Association's Commercial and Federal Litigation Section conclude that "[a] lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings." NYSBA Social Media Ethics Guideline 5.A (June 2015), *available at* www.nysba.org/socialmediaguidelines/.

What Makes Social Media Communications Advertising?

For several years, bar associations and ethics opinions have found that attorneys who advertise on social media should be subject to the same requirements that are otherwise in place. In 2012, a California Ethics Opinion held that "[t]he restrictions imposed by the professional responsibility rules and standards governing attorney advertising are not relaxed merely because such compliance might be more difficult or awkward in a social media setting."[8] New York attorneys were also recently provided with specific guidance on what usage may constitute advertising.

On March 10, 2015, the New York County Lawyers Association (NYCLA) Professional Ethics Committee weighed in on the ethical implications for lawyers who use social media websites to promote their services when it issued Formal Opinion 748. The opinion focused solely on the use of LinkedIn by attorneys. The committee determined that attorneys may maintain profiles on LinkedIn "containing information such as education, work history, areas of practice, skills and recommendations written by other users."[9] However, if a lawyer wants to include information other than education and employment history, such as a detailed description of practice areas and work done in previous employment positions, that attorney may need to use the words "attorney advertising" if the purpose of the profile could reasonably be deemed to be seeking to be retained by clients and the audience included was not limited to lawyers and present or former clients. A LinkedIn profile in New York should also have the disclaimer, "[p]rior results do not guarantee a similar outcome" if it includes "(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve, (2) statements that compare the lawyer's services with the services of other lawyers, (3) testimonials and endorsements of clients, or (4) statements describing or characterizing the quality of the lawyer's or law firm's services."[10]

This opinion is the first to provide such detailed information on attorney advertising. The New York State Bar Association (NYSBA) Social Media Guidelines had previously stated that social media posts used "primarily" for business purposes are subject to the attorney advertising and solicitation rules. The NYCLA opinion and others have not addressed how to deal with other forms of social media, such as Twitter and Facebook. Attorneys, especially those in New York, must now be cognizant that advertising activity on social media will likely be treated similarly to advertising activity that is in print or on the Internet. In some states, this treatment could entail storing copies of social media profiles or even filing with disciplinary authorities.

Another notable requirement of Formal Opinion 748 is the requirement that attorneys should "periodically" check their LinkedIn profiles in order to monitor what is posted on their profiles by others, by way of endorsements or recommendations that originate from other users. The

8 The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2012-186 (Dec. 21, 2012).

9 New York County Lawyers Association, Professional Ethics Committee, Formal Opinion 748 (March 10, 2015).

10 *Id.*

NYCLA opinion states that "[w]hile we do not believe that attorneys are ethically obligated to review, monitor and revise their LinkedIn sites on a daily or even weekly basis, there is a duty to review social networking sites and confirm their accuracy periodically, at reasonable intervals."[11] This requirement is another example that attorneys can no longer glide by with an ignorance of what social media is; once they set up profiles, they may need to actually monitor them in some way and keep track of what people might be posting on their sites. Some may well evaluate whether participation in too many forms of social media is worth the effort.

Duty of Competence in Technological Matters

Times have changed in the practice of law, and many governing bodies are now indicating that attorneys should have some expectation or duty of competence as it relates to technology. In 2012, the American Bar Association's (ABA) House of Delegates voted to amend Comment 8 to Model Rule 1.1, which pertains to competence, to revise the section that requires lawyers to "keep abreast of changes in the law and its practice" to include keeping up with "the benefits and risks associated with relevant technology." In January 2015, New York State adopted a version of the ABA Comment that similarly imposes a duty to keep abreast "of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information."[12]

In addition, some ethics committees have directly tied this duty of competence to the social media world. In September 2014, the Pennsylvania Bar Association interpreted Rule 1.1 of the Model Rules of Professional Conduct to require that lawyers have "a basic knowledge of how social media websites work," as well as the ability to advise clients about the legal ramifications of using these sites.[13] In June 2015, the updated Social Media Ethics Guidelines from the Commercial and Federal Litigation Section of the New York State Bar Association suggest that an attorney possess an understanding, at a minimum, of the most basic functions of how each system works, what information (particularly client confidences) might be exposed, to whom and how, and the ethical impact of the usage.[14]

The practice of law and the manner in which professionals and nonprofessionals alike function and communicate have changed dramatically in recent years. Understanding how social media and technology works and will impact one's practice is becoming more of a necessity, both practically and as a matter of professional responsibility. Some large companies are now insisting on strict guidelines for communication protocols and protection of sensitive data, and a market for cyber insurance has even developed. Ethics rules and opinions have not yet opted to require specific measures such as encryption, but some ethics committees and bar associations are beginning to consider such measures. Good bankruptcy lawyers devote time to staying up to date with developments relevant to their chosen field, which now includes developments in the new and changing technologies that they use to interact with colleagues, adversaries and clients. abi

Editor's Note: *Stay connected with ABI on Facebook (facebook.abi.org), Twitter (twitter.abi.org) and LinkedIn (linkedin.abi.org).*

Reprinted with permission from the ABI Journal, Vol. XXXIV, No. 10, October 2015.

11 *Id.*
12 New York Rules of Professional Conduct, Rule 1.1, Comment 8.
13 Pennsylvania Bar Association, Formal Opinion 2014-300 (September 2014).
14 Social Media Ethics Guidelines, New York State Bar Association, Commercial and Federal Litigation Section (May 2015).