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Ethics and Social Media

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Areas of Ethical Concern in Social Media

1. Attorney Considerations Regarding Social Media Posts, Responses, Comments, Re-Posting, and Endorsing
2. Attorney Considerations In Responding to Online Negative Comments/Posts
3. Non-Lawyers Considerations Regarding Social Media Posts, Responses, Comments, Re-Posting, and Endorsing
4. Other Special In-House ("Company") Considerations

Ignorance Is No Defense

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Model Rule 1.1

"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology***, engaging in continuing study and education."

Comment 6 to Model Rule 1.1



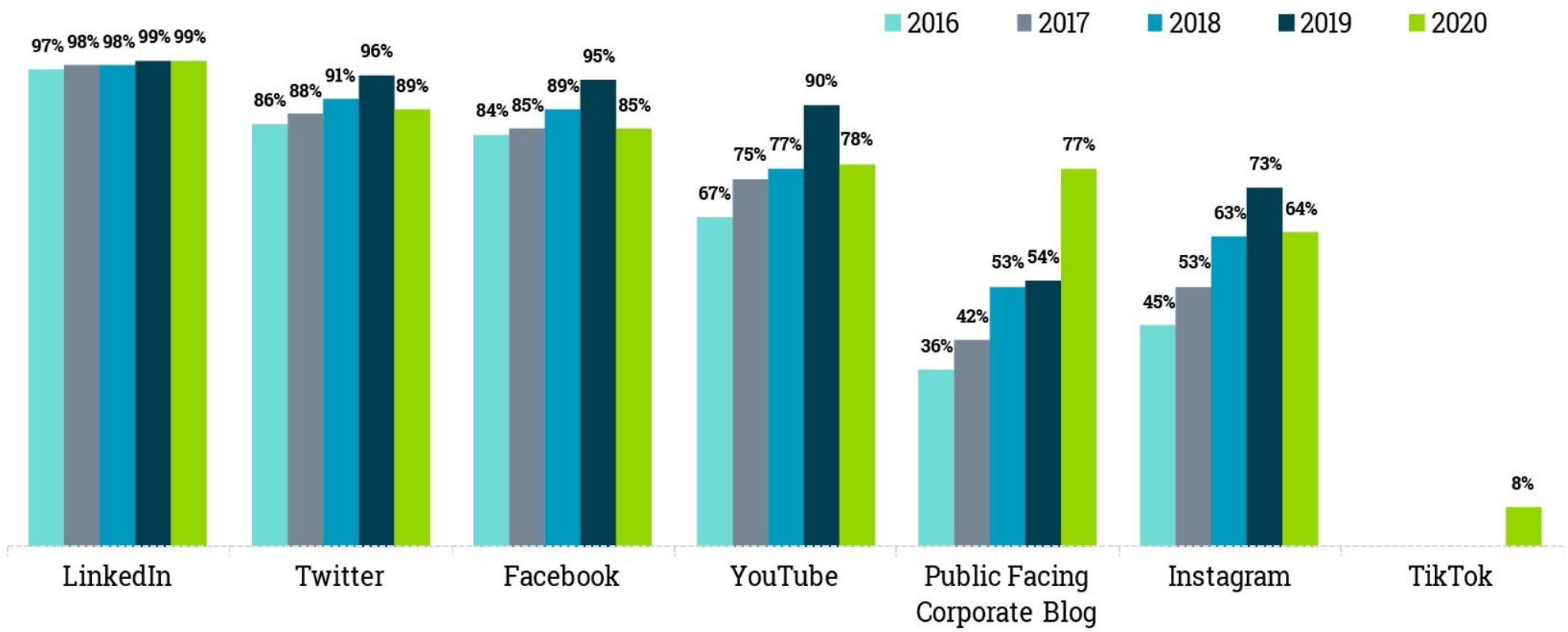


Social Media Defined

Web-based services that allow individuals and companies to:

- Construct public or semi-public profiles and articulate statements under those profiles within a bounded system;
- Find and select a list of other users with whom they share a common connection; and
- View and traverse their connections and the profiles of their connections, or those made by others within the system.

Fortune 500 Use of Major Social Media Platforms



Published on MarketingCharts.com in November 2020 | Data Source: Center for Marketing Research, University of Massachusetts Dartmouth

The Center for Marketing Research counted a company as having a presence on a platform if the primary/listed corporation (subsidiaries are excluded from the analysis) had an active account (activity within the prior 30 or in some cases 45 days)

Social Media Hygiene

If you would not do it, or cannot do it, in-person, then do not do it online.



Social Media Pitfalls

It Can Be Harmful

- To Clients
- To Attorneys
- To Non-Lawyers
- To Firms/Companies

Always On

- Accessible 24/7
- Moves at the speed of light

Misconceived Nature

- Blurred lines between private and public
- False sense of anonymity
- False sense of lack of "real time"



Attorney Risks on Social Media

- **Rules of Professional Conduct, Rule 1.6:** may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision.
- **ABA Formal Opinion 457:** must be careful to not give legal advice or create an unwanted attorney-client relationship.
- **Rules or Professional Conduct, Rule 5.5:** must not engage in the unauthorized practice of law
- **First Amendment/Constitution:** rights are constrained due to adherence with the Rules of Professional Conduct and your Company, e.g., freedom to post vs. your job/license
- **Rules of Professional Conduct, Rule 8.4:** must not post false statements or engage in conduct prejudicial to the administration of justice,

Responsible for all content posted, liked, retweeted, endorsed, etc. . .

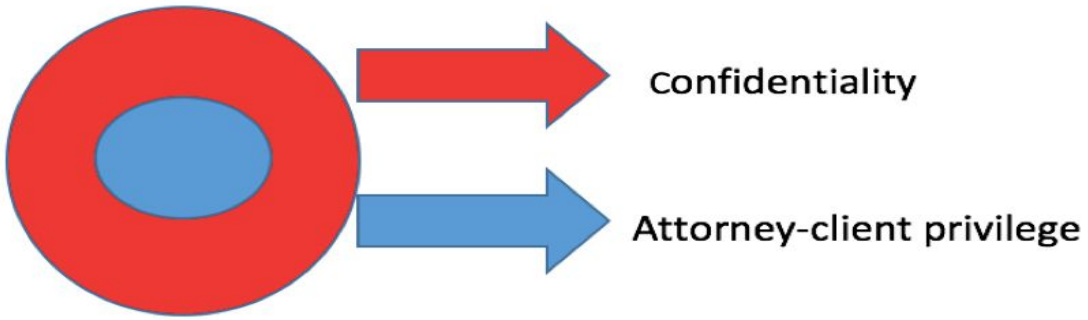
***Indiana Disciplinary Commission #1-20 (July 2020); ABA Formal Opinion 480; ABA Formal Opinion 457; Model Rules 1.6, 5.5, and 8.4

Rule 1.6 & 1.9 Confidentiality

Posting and Confidentiality

- A lawyer may not reveal information relating to a client's representation unless the client gives informed consent. Includes public information, e.g., on the docket information. Broader than the attorney-client privilege. Watch hypotheticals.
- *Model Rule 1.6; In Re Goebel, 703 N.E.2d 1045 (Ind. 1998);* ABA Formal Opinion 480

- A lawyer shall not use information relating to a former representation to disadvantage the former client except where the rules permit, or when the information becomes *generally known.*
- *Model Rule 1.9; ABA Formal Opinion 479*





Attorney Examples

Example:

An attorney decided to take to her blog to discuss an active matter. While blogging the attorney revealed confidential client information and client proceedings. The attorney revealed information that made the client identifiable, sometimes even using their names. The attorney's blog was public, and the attorney made no attempt to make the blog private. The attorney even posted information that indicated that the attorney may have knowingly failed to prevent a client from making a misrepresentation to the court.

Result: 60 Day Suspension

Illinois Disciplinary Board v. Peshek, No. M.R. 23794 (Ill. May 18, 2010)

Reciprocal suspension by Wisconsin in *In re Peshek*, 798 N.W.2d 879 (2011).

ABA Formal Opinion 480

Example:

Louisiana attorney Joyce McCool engaged in what is referred to as a "social media blitz" in which she was highly critical of two judges presiding over child custody cases. She targeted the judges, who had issued orders with which she disagreed, with an online petition, blog posts and Twitter messages that the state's high court later said, "amounted to a viral campaign to influence and intimidate the judiciary." The court said the online communications breached the ethics rule forbidding *ex parte* communications, dissemination of false and misleading information, and conduct prejudicial to the administration of justice.

Result: Disbarred.

In Re: Joyce Nanine McCool, No. 2015-B-0284 (June 30, 2015).

Example:

Florida Lawyer Sean Conway decided that he had a bad experience in a local judge's courtroom. Lawyer Conway decided to take to a popular, public legal blog (*Jaablog*) and post about his feelings and experience. Lawyer Conway posted that the judge was an "Evil, Unfair Witch".



Sean Conway

Result: Public Reprimand

Fined $1,200

The Florida Bar v. Sean William Conway

Supreme Court Case No. SC08-326,

Florida Bar File No. 2007-51,308(17B)



Example:

A corporate lawyer thought that only her "friends" would see a post on Facebook. So, in the wake of the October mass shooting in Las Vegas she wrote in a comment thread discussing the deadly attack on concertgoers. She wrote, "I'm actually not even sympathetic bc country music fans are Republican gun toters."

Result: Fired

Egregious career-killing misjudgment on social media

Public apology from the company that the lawyer's views were not the views of the company.


FIRED


Hayley Geftman-Gold
If they wouldn't do anything when children were murdered I have no hope that the Repugs will ever do the right thing. I'm actually not even sympathetic bc country music fans often are republican gun toters.
54m Like Reply
2

Example:

A male attorney was representing the father in a domestic/divorce matter. The female attorney for the mother was winning all the arguments in court. The male attorney did not care for losing and was becoming highly frustrated and angry. This female attorney was a frequent opponent.

The male attorney's frustration and anger grew to the point of needing released. So, the male attorney decided to get back at the female attorney for beating him in court. The male attorney created a "fake" online dating profile (Match.com) for the female attorney, even though she was married. The male attorney also subscribed the female attorney to several magazine subscriptions that were less than desirable and wrote negative reviews about her and her firm online.

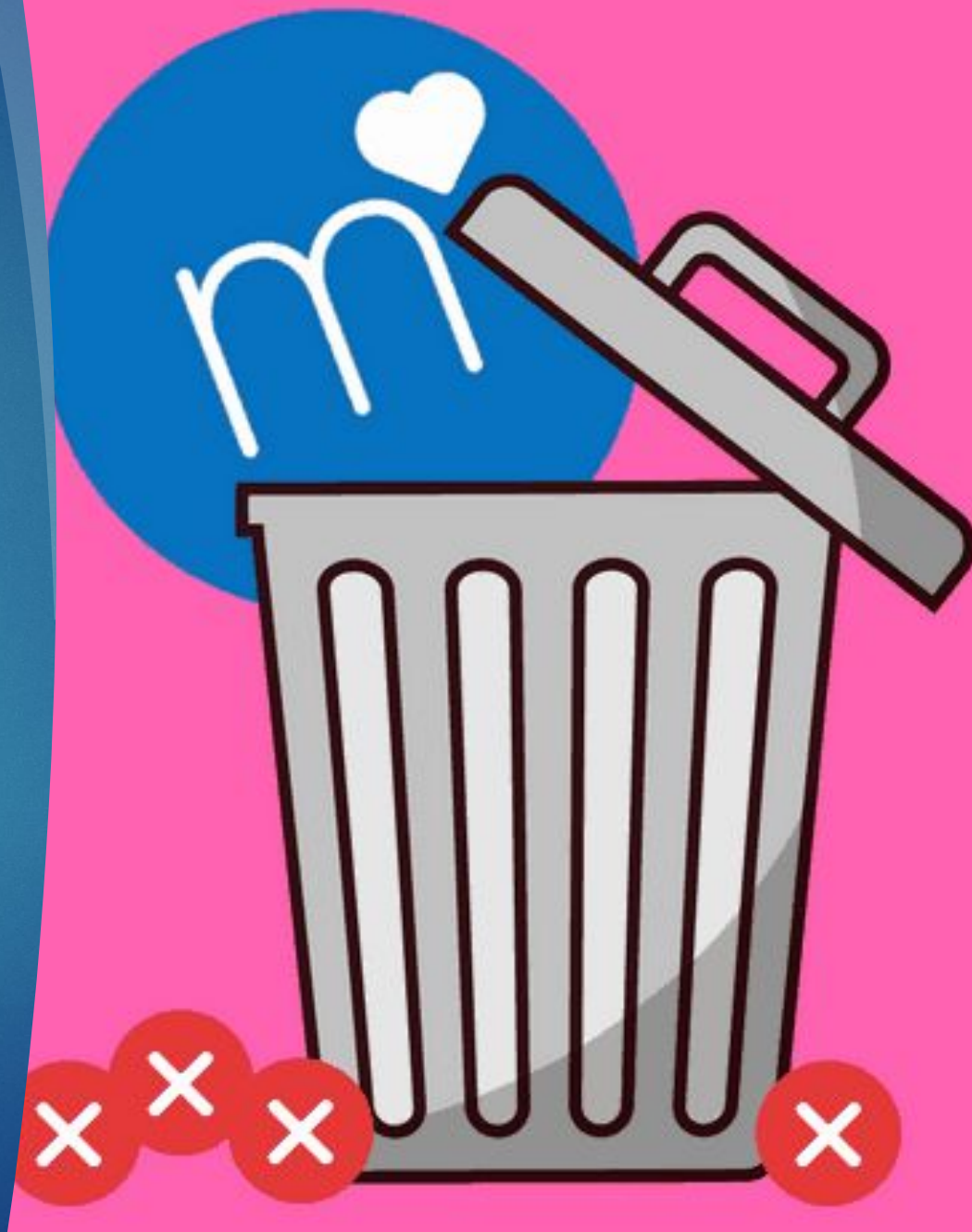
Result:

Suspended for minimum 6 months, and until further order from the Court (indefinitely)

Pled guilty to misdemeanor disorderly conduct

Cash Settlement of $100,000 paid to female attorney

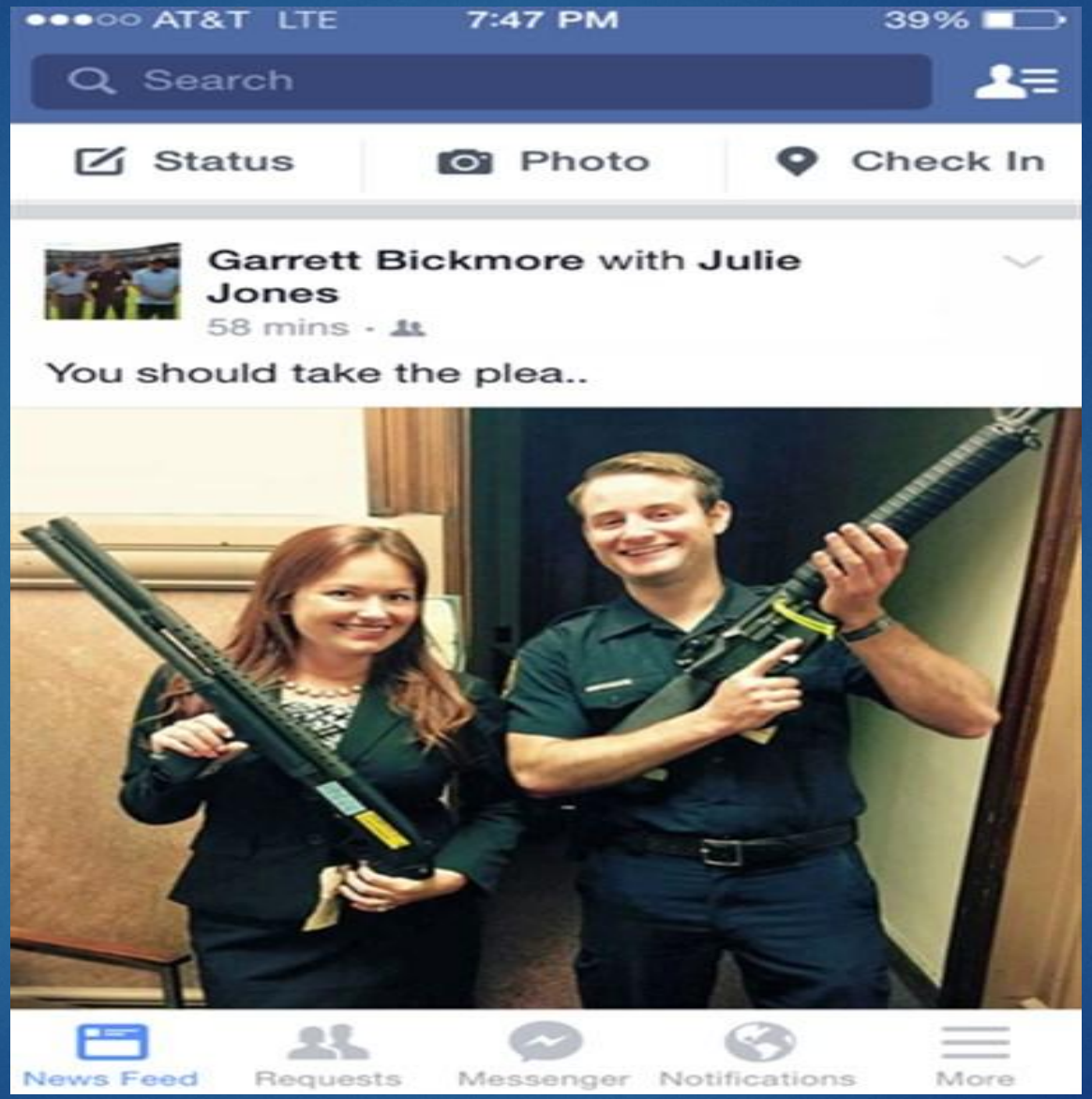
In re: Drew Randolph Quitschau, 1:18-mc-01026 (Ill. 2018)



Example:

Julie Jones, a young assistant district attorney in Allegheny County, Pennsylvania thought it would be humorous to pose with a Pittsburgh police officer, each of them holding a large gun that was evidence in a case the two worked on together. The police officer posted the photo to Facebook with the caption, "You should take the plea."

The district attorney's office called Jones' behavior "contrary to office protocol with respect to handling of evidence," and "her appearance in the photo was now a personnel matter."



Result: Fired

Example:

A judge checked a lawyer's Facebook page after the lawyer requested a continuance because of the death of her father. The young lawyer's Facebook posts revealed that "there wasn't a lot of grief expressed online". Instead, the lawyer's posts described a week of partying and drinking with friends. When the lawyer asked for a second continuance, the judge declined and disclosed the results of her research to the senior partner at the young lawyer's law firm.

Model Rule 3.3 – prohibits false statements to a tribunal

Lesson learned?

Ethical Rule violation?



Ethics:
Attorney Responses to Negative Online Reviews

Responding to Online Negative Comments/Posts

Ethical Risks in Responding:

- Model Rule 1.6 Confidentiality

- Negative online reviews **do not** fall within the self-defense [Model Rule 1.6(b)(5)] or any other confidentiality exception under Rule 1.6
  - A reply to a negative comment is not:

    (1) a proceeding;

    (2) establishment of a defense; or

    (3) a controversy

*** ABA Formal Opinion 496





Responding to Online Negative Comments/Posts

<u>Do Not Respond In This Manner</u>:

- Do not respond with your side of the story
- Do not set the record straight
- Set aside any urge you must respond where you would reveal any client confidential information, e.g., name of the client or anything public record

Responding to Online Negative Comments/Posts

"With a little ingenuity, a lawyer can respond to a bad review without disclosing confidences."

-- Stephen Gillers, a New York University School Law Professor

<u>Guidance from Los Angeles County Bar Association</u>:

A response is allowed so long as:

(1) no confidential information is disclosed;

(2) the response does not injure the former client with regard to the prior representation; and

(3) the response is "proportionate and restrained".

Responding to Online Negative Comments/Posts

Example Responses:

- Respond that due to ethical obligations you are prevented from providing a detailed response.

- State that you have reviewed the comment/claim and would be happy to discuss via telephone and provide your information where the poster can call you privately.

- If you know the name of the poster/contact information (former or current client), you can state that you are reviewing the comments/claim and will be reaching out shortly if he/she wanted to discuss and resolve the issue.

Responding to Online Negative Comments/Posts

Other Options

- Request the search engine/website/platform remove the post
- Counter-balance the negative review: a positive review



Be cautious about responding because it could draw more criticism and move up the page on the "google search" query



Examples

Example:

A lawyer responded to online reviews of former clients; lawyer revealed criminal charges against the clients, revealed that the client wrote check that bounced, and revealed that client committed other unrelated felonies.

Result: 6-month suspension

People v. Isaac, No. 15PDJ099, 2016 WL 6124510 (Colo. OPDJ Sept. 22, 2016)

Example:

Among other violations, a lawyer, by his own description, "actively manipulate[ing his] Avvo reviews by monetarily incentivizing positive reviews and punishing clients who wr[o]te negative reviews by publicly exposing confidential information about them" and including numerous false statements in the responses to the negative reviews.

Result: Disbarred

In re David J. Steele, No. 49S00-1509-DI-527 (Ind. 2015)

Example:

A lawyer disclosed confidential information beyond that necessary to defend herself on Avvo in response to a client's negative reviews of the lawyer. The lawyer wrote, "I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about."

Result: Public Reprimand

In re Tsamis, Commission No. 2013PR00095 (Ill. 2014)

Example:

Lawyer responded to multiple clients' online criticism by posting confidential and sensitive information about the clients.

Result: Suspended 18 months

People v. Underhill, 15PDJ040 (Colo. 2015)

Businesses, Employees, Candidates, and Non-Attorney Risks of Social Media





Poll Question

Can an employer fire/discipline an employee for a social media post?

Non-Attorney Considerations

Private companies/employers **can discipline or fire** an employee for posts on social media.

First Amendment only protects from gov't interference. It does not mean you can say whatever you want without suffering the consequences.

There are, however, a few **EXCEPTIONS:**

Employers cannot fire you for posting:

(1) Truthful statements about working conditions, like harassment or unsafe working conditions;

(2) Comments that indicate your interest in joining or supporting a union;

(3) Messages to other co-workers suggesting that they contact a lawyer to get information about workplace rights;

(4) Demographic information like race, sex, age, religious affiliation

First Amendment Protections?

- First Amendment protects you from **GOVERNMENT** interference with speech
- Under the First Amendment you can express your opinions (no matter how offensive) without being arrested or charged with a crime
- The First Amendment **DOES NOT** mean you can say whatever you want online without suffering consequences.

Non-Attorney Considerations

Social media is part of a **Company's Brand.**

- This does not mean you can not have fun with your friends or vent from time to time, but …. **remember NOTHING online is ever private**
- It takes a lifetime to build a reputation and less than a second (or less than 140 characters) to destroy it.



Non-Attorney Examples

Example:

A prospective employee/candidate applied to a prestigious company (imagine it is your company) for a highly competitive position.

As part of the interview/vetting process the company performed an extensive background check including a review of internet and social media postings/endorsements. When the prospective employee/candidate was in graduate school he and a bunch of friends nicknamed their house the "all **[females]** allowed house". It was meant as a joke and many people on campus knew about it. The prospective employee/candidate's friends embraced the name and made a website. The prospective employee/candidate "liked" the website, thereby endorsing it. Years have passed since the endorsement. The company finds the post and endorsement.

Company did not extend a job offer, indicating that past judgment is good indicator of future behaviors

Example:

A recent college graduate (candidate) held a degree in information management. The candidate was 22 years old and part of the social media generation. A California tech company, Cisco, offered the candidate a job. The candidate took to Twitter to brag about the job offer and insult the company - all at the same time!!

The Tweet:

"Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work."

Example (cont.):

- The tweet elicited a huge Twitter response - - including from a Cisco associate who responded he'd be happy to pass her sentiments on to HR: "Who is your hiring manager? I'm sure they would love to know that you will hate the work. We here at Cisco are versed in the Web."
- The employee (Connor Riley) to-be, was nicknamed "Cisco Fatty" when the tweet blew up on the internet.
- Job offer withdrawn. BUT – Riley contends (through a blog post) that the tweet was made AFTER she turned down the offer. Do you believe her?

Example:

A candidate secured a job at a local pizza restaurant in Texas. Prior to starting the job, the candidate tweets:



Example (cont.):

- Friends thought the post was funny, employer did not
- Employer replied that the employee didn't need to bother showing up, firing her before she even started or stepped foot into her new place of employment.
- Employer's tweet response: "And . . . No you don't start that FA job today! I just fired you! Good luck with your no money, no job life!"

Example:

The Senior Director of Communications for a highly public company decided to tweet out a message about her upcoming trip to Africa. The company she works for has a huge online presence and investor/owner in several websites and brands. As she was boarding her flight to South Africa, she tweeted: "Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!"

Result: Fired

The tweet went viral so fast that it was the number-one worldwide trend on Twitter before the plane landed.

A #hashtag was even created about it.

Example (cont.):

- Went from having 170 Twitter followers to being the most hated person on Earth with a single tweet that she thought was funny.
- Tech writer spotted the tweet, retweeted it to the 15,000 followers he had, and it went downhill from there.
- Thousands of people were outraged and the hashtag #HasJustineLandedYet".
- The person was interviewed and stated, "I thought there was no way that anyone could possibly think it was literal".

Example:

The Communications Director went too far with online postings (over-zealous). The Communications Director held that opinion that President Obama's two daughters were not good enough for their station in life and decided to post about such opinion.

The initial post included the following: "I get you're both in those awful teen years, but you are a part of the First Family, try showing a little class."

And a **final post** stated: "Act like being in the White House matters to you. Dress like you deserve respect, not a spot at a bar."

Result:

Public apology by the Communications Director "strongly suggested"

Followed by forced resignation.



Elizabeth Lauten

25 mins · Alexandria, VA ·

I wanted to take a moment and apologize for a post I made on Facebook earlier today judging Sasha and Malia Obama at the annual White House turkey pardoning ceremony:

When I first posted on Facebook I reacted to an article and I quickly judged the two young ladies in a way that I would never have wanted to be judged myself as a teenager. After many hours of prayer, talking to my parents, and re-reading my words online I can see more clearly just how hurtful my words were. Please know, those judgmental feelings truly have no place in my heart. Furthermore, I'd like to apologize to all of those who I have hurt and offended with my words, and I pledge to learn and grow (and I assure you I have) from this experience.

Like · Comment · Share

Example:

A nurse was employed at a hospital in New York City. The nurse worked in the emergency room and had been employed with the hospital for 7 years. During a shift, the nurse saw a messy, but empty, trauma room that was just used to treat a man hit by a NYC subway train. The nurse takes a picture of the chaotic mess because she found it amusing. The nurse posts the picture on Instagram with the hashtag "#Manvs6train". The hospital sees the post on Instagram.

Result: Fired

**But note, the nurse was not fired for violating privacy regulations (no confidential information disclosed.

Fired for insensitivity.


PHOTO
Profile
1w
96 likes
Man Vs 6Train...The After.
#lifesaving #EMS #NYC #ER #Nurses
#nymed #trauma #realLife
abcNEWS
.com

Example:

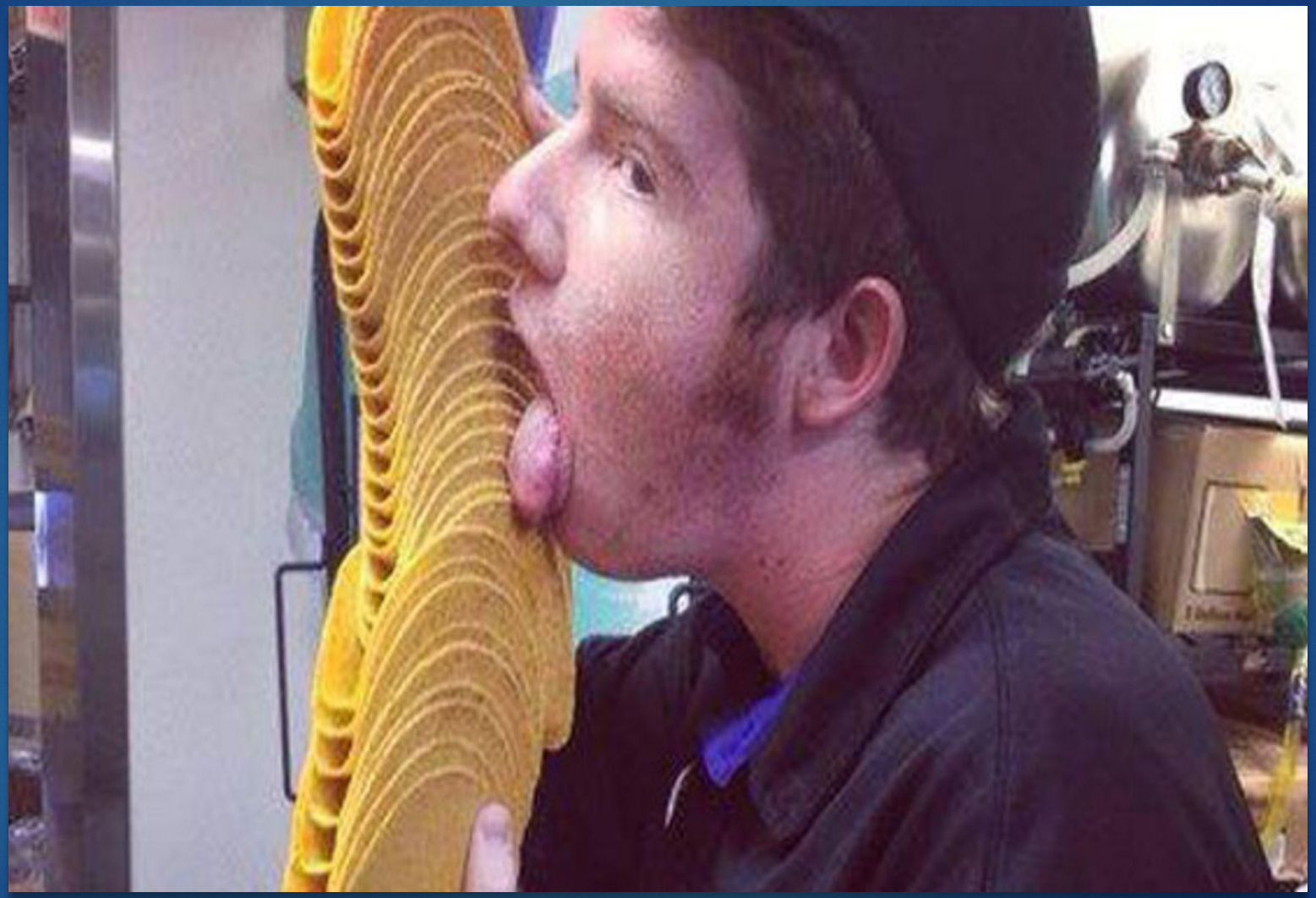
An employee of a taco restaurant chain was trying to pass the time at work and decided to take a picture of himself licking a stack of taco and post it on his personal social media account. In addition, the picture was posted on the restaurant chain's Facebook feed by a co-worker who was trying to win an internal contest where employees were encouraged to take the "***first bite***" out of the restaurant chain's new product/food.

Result: Fired.

Violation of restaurant chain's social media policy

Did not win the contest

Restaurant chain made a public apology stating the tacos were only used for training and were thrown out.



Example: (Safe Zone)

An employee of a restaurant believes that his wages are low, so he took to Twitter to vent about his frustrations.

"@******Tweets, nothing is free, only cheap #labor. Crew members make only $8.50/hour how much is that steak bowl really?"

The employee later deleted the tweet after a supervisor showed him the company's social-media policy which stated that an employee cannot make "disparaging, false" statements about the company publicly.

Result: Protected Post (labor laws) – settlement was humorous.

Ethics: Special In-House ("Company") Considerations



Special In-House ("Company") Considerations

Protect Your Company/Employees:

- Update your corporate social media policies
- Identify who can speak on behalf of the company, and on what topics
- Determine whether supervisors/employees may connect on social sites
- Determine whether employees can post about work/company
- Articulate privacy settings and regularly monitor
- Prohibit social media discussions about ongoing matters – circulate company reminders
- Regularly educate your employees on what is appropriate and what is not appropriate
- Avoid policies that impinge on free speech or statutory rights (a fine balance)
- Have a clear vision on the company's ethics

*** **Remember:** National Labor Relations Act allows certain employees rights to post about working conditions

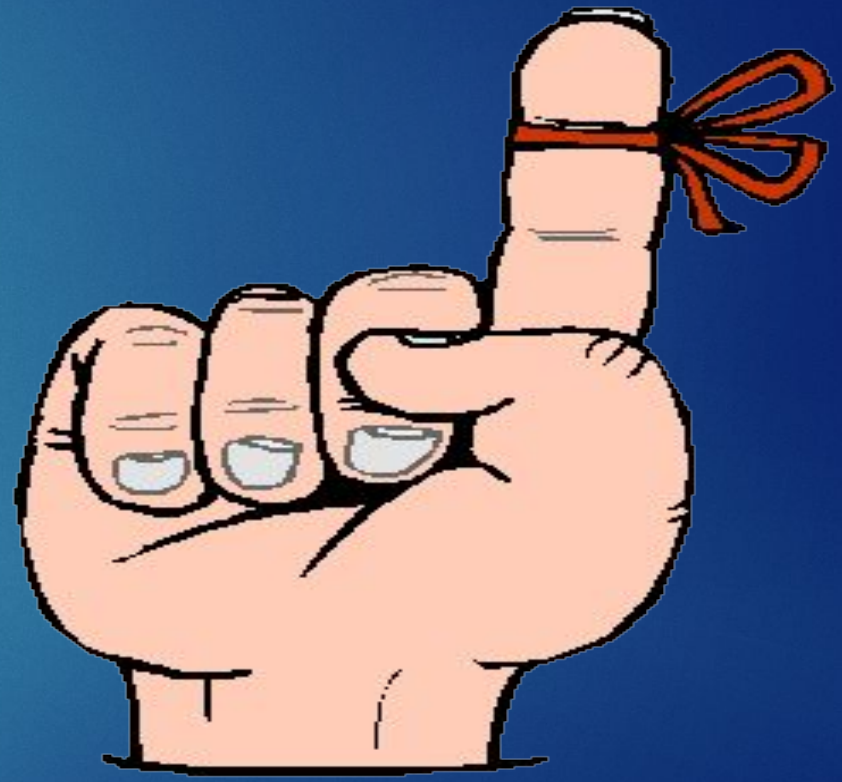
Take-Away

Attorney Specific Take-Aways:

- Always Use Your "Ethical" Hat Online
- Use Privacy Settings
- Do Not Disclose Client Confidences
- Do Not Engage in the Unauthorized Practice of Law
- Do Not Post False Statements
- Do Not Set the Record Straight As To Negative Online Comments

Non-Attorney (Everyone/Company) Take-Aways:

- Always Use Your "Ethical" Hat Online
- Watch Out for "Hot Political Topics"
- Use Privacy Settings
- Stay True to One's Authentic Self and Company Values
- Monitor Your Own Accounts
- Have a Company point person for social media inquiries
- Update and Regularly Monitor Social Media Policies
- Train Employees Regularly On Good Social Media Hygiene



QUESTIONS?



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