

# SOCIAL MEDIA AND THE CORPORATE CLIENT: ADVISING YOUR CLIENT ON THEIR SOCIAL MEDIA PRESENCE

---

Presented by:

Jessica Loesing

Eric Au

Drinker Biddle & Reath LLP

# Lawyers on Social Media

- The results of the American Bar Association's 2017 Legal Technology Survey show:
  - 81% of lawyers have personally used social media for professional purposes.
  - The lawyers most likely to maintain a personal presence on social media were 40-49 year olds (93%), followed by attorneys 40 and under (90%), and attorneys 50-59 year old (86%).
  - The most popular reason lawyers used social media was career development and networking.
    - The most popular social network among lawyers was LinkedIn.

# Common Questions Posed Regarding Social Media

1. Whether attorneys may advise clients about the content of the client's social networking websites, including removing or adding information?
  - Attorneys may advise clients about the content of their social networking websites, including the removal or addition of information.
2. Whether attorneys may contact a represented person through a social networking website?
  - Attorneys may not contact a represented person through social networking websites.

# Common Questions Posed Regarding Social Media

3. Whether attorneys may contact an unrepresented person through a social networking website, or use a pretextual basis for viewing information on a social networking site that would otherwise be private?
  - Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.
4. Whether attorneys may use information on a social networking website in client-related matters?
  - Attorneys may use information on social networking websites in a dispute.

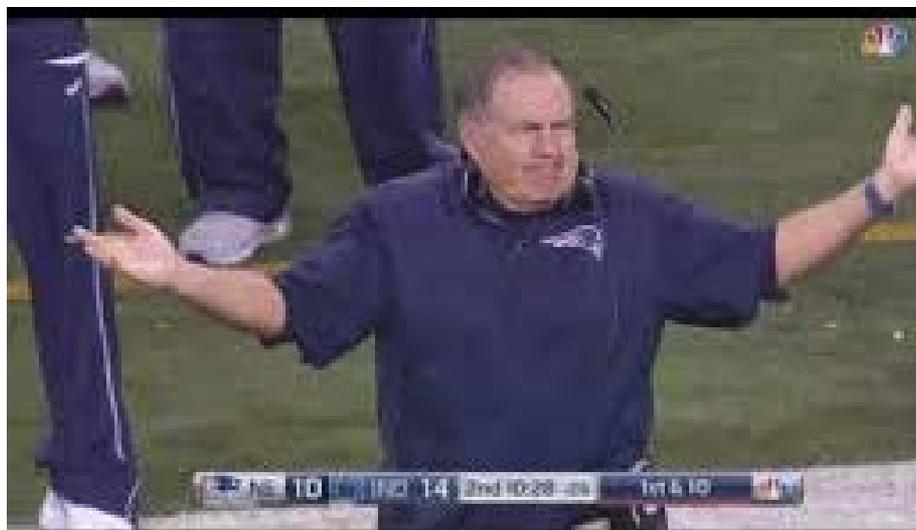
# Common Questions Posed Regarding Social Media

5. Whether attorneys may comment on or respond to reviews or endorsements?
  - Attorneys may generally comment or respond to reviews or endorsements, and may solicit such endorsements.
6. Whether attorneys may review a juror's internet presence?
  - Attorneys may review a juror's internet presence, but only that which is available to the public.

# General Tips: Viewing Social Media

- Lawyers may view the public portion of a person's social media account.
  - Keep in mind that certain sites will inform the account owner about who is looking at his/her account.
- Lawyers may “friend” a party and gain access to private social media information on his/her account, but may only do so “forthrightly,” or by revealing that he or she is an attorney in the litigation.
- Lawyers cannot order or direct an agent or friend to “friend” someone where it would violate the ethical rules for the lawyer .
  - Rule 5.3 (discussed later)

# But Wait... What If You Don't Use Social Media?



# Rule 1.1 – Competence

- **Rule 1.1:** “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
- **PA Bar Formal Opinion 2014-300:** Lawyers should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. Thus, in order to provide competent representation in accordance with Rule 1.1, a lawyer should:
  - (1) have a basic knowledge of how social media websites work; and
  - (2) advise clients about the issues that may arise as a result of their use of these websites.

# Advising the Client on Content – Commonly Implicated Rules

- **Rule 3.3** – Candor to the Tribunal
- **Rule 3.4** – Fairness to Opposing Party and Counsel
- **Rule 4.1** – Truthfulness in Statements to Others

# Rule 3.3 – Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
  - (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;...
  - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, to disclose to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

# Rule 3.4 – Fairness to Opposing Party and Counsel

- A lawyer shall not:
  - (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act.

# Rule 4.1 – Truthfulness in Statements to Others

- In the course of representing a client, a lawyer shall not knowingly:
  - (a) make false statement of material fact or law to a third person; or
  - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

# Attorneys Who Haven't Used Social Media Properly

- Rule 3.3: A lawyer shall not knowingly make a false statement of material fact or law. . .
- In 2016, a New York attorney filed a motion two weeks past the deadline.
- According to the attorney, she was unable to timely file the motion because she had to travel for a family emergency.
- Opposing counsel discovered that the attorney's Instagram page showed that she was vacationing in Miami during the time she claimed to have been away for the family emergency.
- In April 2018, the court sanctioned the attorney \$10,000.

# Attorneys Who Haven't Used Social Media Properly

- Rule 3.3: A lawyer shall not knowingly make a false statement of material fact or law. . .
- In January 2018, a Philadelphia judge sanctioned two plaintiffs' lawyers \$2,500 after discovering that the lawyers posted an Instagram picture with the hashtag "killinnazis" following a favorable verdict against a German-based pharmaceutical company.
- Although the verdict was overturned for other reasons, one of the defendant's arguments in favor of overturning the verdict was that the post was part of a xenophobic strategy designed to turn the jury against defendant.

# Attorneys Who Haven't Used Social Media Properly

- Rule 3.6(a): A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows, or reasonably should know, will be disseminated by means of public communication and will have a substantial likelihood of material prejudicing an adjudicate proceeding in the matter.
- The Supreme Courts of Illinois and Wisconsin suspended an attorney for 60 days for writing about confidential client information and client proceedings on her personal blog.
  - The attorney revealed information that made her clients easily identifiable, sometimes even using their names.
  - The attorney also made derogatory statements about judges who were easily identifiable.

# Attorneys Who Haven't Used Social Media Properly

- In the Matter of *Matthew B. Murray/Lester v. Allied Concrete Co.*
  - **Three Wrong Actions:** 1) Instructed client to delete damaging photographs from his Facebook account; 2) withheld those photos from opposing counsel during discovery; and 3) withheld from trial court the emails discussing the plan to delete the information from the client's Facebook page.
  - **Consequences:**
    - Virginia State Bar Disciplinary Board – 5 year suspension based on violations of ethical rules
    - \$722,000 in sanctions (\$542,000 upon the lawyer and \$180,000 upon the client)

# General Tips for Social Media Use After Litigation

- Neither the rules of professional conduct nor the terms of confidentiality orders/agreements get set aside following the close of litigation.
- Monitor social media following the close of litigation.
- For example, after the parties to a lawsuit in Miami, Florida agreed to settle the lawsuit for \$80,000, the plaintiff's daughter posted on social media, "Mama and Papa [] won the case against [defendant]. [Defendant] is now officially paying for my vacation to Europe this summer. S\*\*K IT."
  - Post violated terms of confidentiality agreement in the settlement.

# Advising the Client on Content

- Need to advise client that anything they post is discoverable by way of a subpoena or discovery in a lawsuit.
- Guidance from Pennsylvania Bar Association Formal Opinion 2014-300:
  - A lawyer may advise a client to change the privacy settings on a client's social media page but may not instruct a client to destroy (delete) any relevant content on a page.
    - Review all posts and preserve any relevant posts in the event of a lawsuit
  - Must respond to a discovery request with any relevant social media content posted by the client.

# Do's and Don'ts for Managing Employee Social Media Use

- **Do:** Have a social media policy
  - Rule 1.6: Confidentiality of Information
  - Risks exist whether employees are inside the office or at home
  - Avoid legal and regulatory liability
  - Leaks of sensitive information or the improper use of IP and trade secrets

# Social Media Policy – Best Practices

- Ensure truthful disclosures
  - Recall: lawyers may advise clients on what they should or should not post going forward, so long as they do not advise clients to post false or misleading information
- Limit employee access
  - If employees do anything illegal on business's social media accounts, business can be held fully liable under doctrine of respondeat superior
- Emphasize that all employees have the right to use social media for self-expression at their own time

# Do's and Don'ts for Managing Employee Social Media Use

- **Don't:** Take action without ensuring the basis is sound.
  - Social media policy should outline the company's procedure regarding actual or potential violations.
  - Ensure compliance with the National Labor Relations Act ("NLRA").
    - The NLRA offers certain protections for employees who act together online to improve their terms and conditions of employment.
  - Interference constitutes a violation.
    - Disciplining or threatening discipline is considered interference.

# Do's and Don'ts for Managing Employee Social Media Use

- **Don't:** Enforce the policy inconsistently.
  - Uniform enforcement of the policy will protect the company in potential litigation.
  - Failure to enforce the policy consistently may support claims for retaliatory discipline or discharge and/or discrimination.

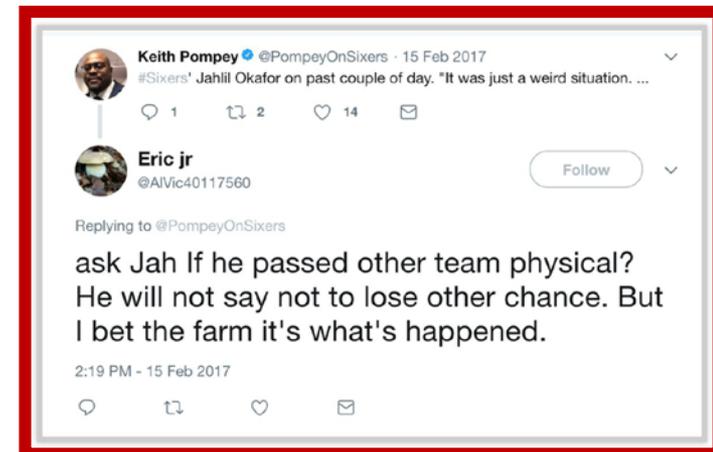
# Do's and Don'ts for Managing Employee Social Media Use

- **Don't:** Assume you're the only person who can violate the rules.
  - Employees leaking information can impute liability on lawyers, particularly those who work directly with lawyers.
  - Rule 5.3(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 if:
    - The lawyer has knowledge of the conduct; ratifies the conduct; or learns of the conduct and does not take reasonable remedial action.
- Does not apply solely to employees, but also associated non-lawyers...

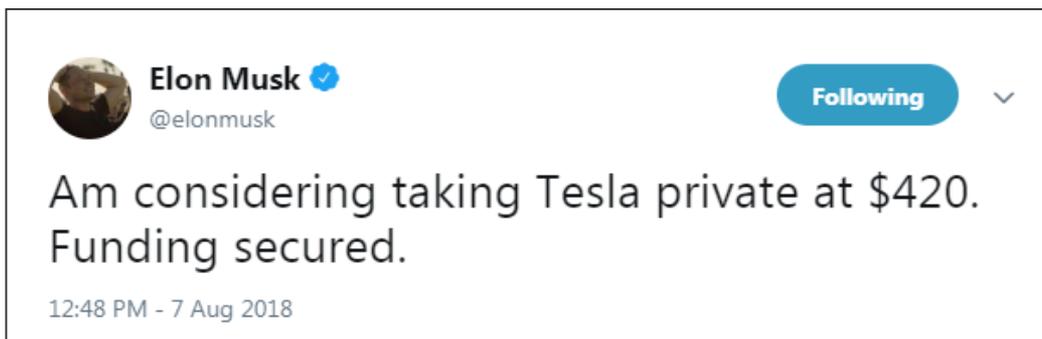
# Case Study: Bryan Colangelo



- May 2018: The Ringer publishes article concerning five twitter accounts allegedly linked to Bryan Colangelo
- Sixers' investigation determines accounts were run by Colangelo's wife



# Elon Musk – “Taking Tesla Private” Tweet



# Elon Musk – “Going Private” Tweet

- Chain Reaction:
  - On Aug. 7, from 2:08 PM to 3:45 PM NASDAQ halted TSLA trading due to violation of rule requiring ten minutes notice prior to publicly releasing information about corporate events.
    - TSLA closed at \$379.57/share, up over 6% prior to tweet .
  - Stock price rose 11%, costing short sellers \$1.3B in market-to-market losses.
  - Aug. 13: Musk revealed via blog post that the private funding was not actually secure; investors sold off shares and share value plummeted.
    - “I left ... With no questions that a deal with the Saudi sovereign fund could be closed, and that it was just a matter of getting the process moving.”
    - Short sellers made back almost the entire \$1B+ lost in the original price run.

# Elon Musk – “Going Private” Tweet

- Chain Reaction:
  - Aug. 15: NY Times reports Tesla was served with a subpoena regarding alleged funding; rumors swirl about SEC investigation for violation of Rule 10b-5.
  - Aug. 24: Tesla posts blog post saying efforts to take company private have been abandoned; Musk says that he still believes sufficient capital existed to close deal.
  - Aug. 27: TSLA closes at \$319.27, down 15% from the Aug. 7 closing price.
  - Sept. 18: U.S. Justice Department launches a probe into Tesla over the Musk tweets, shares close at \$284.96.
  - Morning of Sept. 27 (51 days after tweet):
    - Musk rejects settlement with SEC calling for two-year ban as chairman and \$10M fine.
    - Not allowed to publicly state he had done nothing wrong, not something he could live with.

# Elon Musk – “Going Private” Tweet

- Afternoon of Sept. 27:

Case 1:18-cv-08865 Document 1 Filed 09/27/18 Page 1 of 23

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

<b>UNITED STATES SECURITIES AND EXCHANGE COMMISSION</b>	:	
<b>Plaintiff,</b>	:	
vs.	:	<b>Civil Action No. 1:18-cv-8865</b>
<b>ELON MUSK,</b>	:	<b>Jury Trial Demanded</b>
<b>Defendant.</b>	:	
	:	

**COMPLAINT**

Plaintiff United States Securities and Exchange Commission (the “Commission”), alleges  
as follows:

# Elon Musk – “Going Private” Tweet

- Sept. 27:
  - SEC files complaint alleging violations of §10(b) of the Exchange Act and Rule 10b-5.
    - Gravamen was that Musk had not discussed specific deal terms with any potential financing partners, and he knew the potential transaction was uncertain and subject to numerous contingencies.
- Sept. 28: Stock price drops almost 14 percent.
- Sept. 29: Musk enters settlement with SEC.
  - \$20M fine to Musk, \$20M to Tesla
  - Allowed him to remain as chief executive, but must step aside as chairman for three years
  - Tesla must hire two independent directors
  - Tesla also must take steps to monitor Musk’s communications with investors and create permanent committee of independent directors to monitor disclosures and potential conflicts of interest
  - Jay Clayton, SEC Chairman: “[W]hen companies and corporate insiders make statements, they must act responsibly, including endeavoring to ensure the statements are not false or misleading.”



# Other Considerations

- *SEC v. McKeown and Ryan*
  - “Scalping” allegations resulted in SEC complaint and \$3.7M in disgorgement of profits, \$300K in civil penalties
- HIPAA Violations
  - Facebook posts with patient information; Instagram or Snapchat videos showing patients’ faces or other identifying information
- Martin Shkreli
  - Negative perception in the media is damaging to company as a whole

# Conclusion

- Social media is constantly changing
  - Stay abreast of developments in order to remain competent and ensure compliance with the rules
- Generally, any conduct that would not be permissible using other forms of communication would also not be permissible using social media
  - Ensure that a sound social media policy is in place that complies with the NLRA
  - Should employees whom you are responsible for or family discover otherwise confidential information, ensure that it is not disclosed