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CONFIDENTIALITY IN THE AGE OF SOCIAL MEDIA

By Ty Alper

Although the forms of communication today are fundamentally different from even ten years ago, the legal profession's conception of attorney-client communication and the rules of confidentiality have not kept up with the times. This article proposes that criminal defense offices and agencies adopt policies requiring strict compliance with a blanket rule against case-related posts on any social media platform because (1) the harm in posting about client matters is potentially great; (2) the harm is easy to avoid by not posting; and (3) the benefits of posting are nonexistent for the represented clients.

The rule and its violations. ABA Model Rule of Professional Conduct 1.6, prohibiting the disclosure of information relating to client matters, is famously broad. Specifically, it states: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation." There is no "public record" exception to Rule 1.6. Even if the information is already in the public domain, it is a violation of the rule for the lawyer to reveal it.

Not surprisingly, violations of Rule 1.6 come in a variety of different forms, with correspondingly different implications. Professor David F. Chavkin helpfully defines several categories of violations in his article "Why Doesn't Anyone Care about Confidentiality? (And, What Message Does This Send to New Lawyers?)" (*Georgetown Journal of Legal Ethics*, vol.

25, 2012). First, lawyers and judges tell "war stories" in both law school and continuing legal education settings. Chavkin views this practice somewhat generously, describing it as "facilitating learning . . . with the goal of helping students become more knowledgeable and more ethical practitioners." Second, lawyers discuss their cases with other lawyers in order to seek consultation or facilitate brainstorming about strategic decisions. These

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conversations are usually "impliedly authorized in order to carry out the representation," and thus usually not violations of Rule 1.6 at all. The final category is "shoptalk," which Chavkin describes as the sharing of "client stories with other practitioners, friends, or spouses or partners simply as a social device."

As for "shoptalk," surely most attorneys violate Rule 1.6, whether in teaching or in their personal lives. Some of these

violations are more defensible than others. But no form of "shoptalk" should ever occur over social media. Lawyers, and criminal defense lawyers in particular, should practice complete abstinence when it comes to posting about their cases on social media. The nature of social media multiplies exponentially the harm that can arise from communication among friends or partners that takes place not orally in a quiet conversation in a bar or bedroom but in writing, and in a public forum. The platform of social media transforms "shoptalk" from a practice of relatively little risk to one with a much greater chance of doing actual harm. Simply put, no criminal defense attorney should ever violate Rule 1.6 by discussing aspects of a case on social media.

Common violations of the rule on Facebook. Facebook posts violating Rule 1.6 can be grouped into three categories: "egregious," "innocuous," and "middle ground." In the category of "egregious" Facebook posts are examples of lawyers or law students who have posted highly sensitive or embarrassing information about their clients or cases online. On the far other end of the spectrum are the "innocuous" Facebook posts. This category would include the practice of posting flight information for upcoming or ongoing trips. For example, a lawyer flying from San Francisco to Atlanta to visit a client on death row might post "SFO=>ATL" as a status update on Facebook. Nevertheless, these seemingly innocuous posts can be harmful. An otherwise trivial violation of Rule 1.6 can have larger ramifications for the client when broadcast, potentially, to the judge, the prosecutor, the media, and others. Occupying a large "middle ground" between the egregious and the innocuous are inappropriate posts that mention aspects of

cases that are usually ongoing or recently completed. Sometimes the posts do not seem to refer to a specific case but refer to the prosecution generally or make rather vague allusions to previous cases, or both. Consider these examples: “Great result! Not guilty on the felony count!” “Wish me luck, I’m off to rescue my client from the prison-industrial complex.” “About to start a long capital trial. Fingers crossed for a life sentence.”

What’s the harm? First, to be clear, all of these examples violate Rule 1.6. All of them reveal information related to the representation of a client. None of the examples serve the client’s interests or are “impliedly authorized in order to carry out the representation,” nor do they even serve any public interest.

Second, once a statement is posted on social media, it can be shared, commented on, misquoted, misunderstood, and exploited—by anyone, to the possible detriment of the client’s interests. Few are those who understand Facebook’s frequently changing privacy settings well enough to ensure that a status update is seen only by one’s own Facebook “friends.” And even if one’s friends are the only people who are meant to see a particular status update, there is no obligation on the part of the friends not to share or discuss the update with someone else, who may then share it with others or post it in an even more public-facing forum. Clinical teachers often ask their students to imagine the prosecutor, judge, client, jury, witnesses, and media reading their posts on social media. Consider even some of the “non-egregious” examples above. Do you want all of these people to know you are pleased with a conviction on only the misdemeanor count? That your goal is to secure a life sentence? That you think the judge

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is complicit in the perpetuation of the prison-industrial complex? The nature of social media is such that a Facebook post that may fall into the “innocuous” category can take on a life of its own, particularly as it is shared and commented on in the social media arena.

Third, the lawyer’s reputation is at risk. It is not difficult for a Facebook post to be shared, and it does not have to “go viral” for it to cause significant damage to a lawyer’s reputation. No criminal defense lawyer should want a reputation for casually revealing information about a client in a public forum. Avoiding social media is an easy way to make sure it does not happen.

Finally, posting about our cases on social media sends the wrong message about the dignity of clients and the criminal defense bar’s regard for the sanctity of the rules of confidentiality. In a system in which our clients often literally have no voice, we have a duty not to speak in a way that further disempowers them or in ways that do not represent their views

and interests. The sample posts above not only undermine our clients, they also undermine the work we do to ensure that our clients are treated with dignity and respect in a system that too rarely acknowledges their humanity. Indeed, while many respected criminal defense lawyers post information about clients, the uncomfortable truth is that attorneys who work at large corporate law firms almost never post on social media anything about their firm’s cases. Most corporate firms have explicit policies against posting any information about a case in any social media forum. Nobody in our profession should more zealously guard the interests of our clients than lawyers representing people facing criminal charges. The fact that indigent clients are less likely to see social media posts about their cases than the paying clients of corporate law firms makes it even more important to avoid engaging in the practice. We owe this duty to clients who have no say in who ends up representing them or what is said about them in public forums. ■