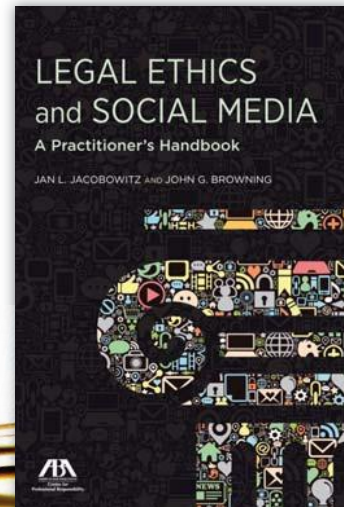


Legal Ethics and Social Media: A Practitioner's Handbook

By David Gurnick

“Social Media is an environment of instantaneous sharing and connecting, while the legal profession prides itself on confidentiality and careful, analytical thinking.”



THE ABOVE QUOTE, FROM *Legal Ethics and Social Media: A Practitioner's Handbook* (American Bar Association, 2017), addresses many tensions such as the clash between the lawyer's quest for professionalism and the public's freedom of speech; and the conflict between fast-paced, free-wheeling social media and the legal profession's commitment to high standards, deliberative analysis and methodical approach toward change.

The rapid expansion of online communications, networking, photo-sharing, cloud-computing, and a myriad of other uses of the internet have certainly created not only useful tools for the legal profession, but serious challenges to keeping up-to-date with ever-changing technologies and their accompanying ethical risks.

There are no safe harbors and no escape, and as the *Handbook* shows, lawyers face ethical risks from using, or not using, available technology to communicate.

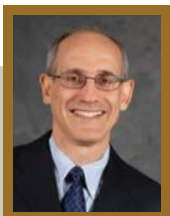
The *Handbook* was published by the American Bar Association's Center for Professional Responsibility and written by Jan L. Jacobowitz and John G. Browning, both of whom have strong backgrounds in the law, academia, and organizations focusing on legal ethics and professional responsibility. Their work is a useful overview discussing many kinds of social media, and how these tools—created for social, informational and networking purposes—can be utilized by lawyers to improve results for their clients.

The work dissects various ways—good and bad, right and wrong, with many involving ethical questions—in

which lawyers and judges use social media. In several eyebrow-raising discussions, particularly for those not versed in these new technologies, the writers examine why—as matters of competence, ethics and professional responsibility—lawyers have an obligation to make affirmative use of social media.

The *Handbook* does more than just identify issues—it provides well-formed and workable suggestions and resources for addressing the ethical and professional issues it raises.

The work is divided into thirteen chapters, with its early chapters covering the early background and development of social media. The authors are fond of noting that back in the day, technology caused lawyers to shift from employing scribes—who hand-copied and proofread



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documents—to using typewriters, telephones and copy machines. The conservative legal profession resisted new technology. For many years in the early 1900s, the storied law firm Cravath, Swain & Moore rejected telephones, and later when finally installed, told employees not to use them, but only to answer the phones when they rang.

Time-warp to today, with authors Jacobowitz and Browning noting that social media's investigative and informational tools are so powerful, that a competent lawyer must understand how to use technology and that a "duty to Google" is emerging in the practice of law.

The *Handbook* explores ethics issues in such developments as discovery, preserving social media evidence, client postings and jury research. Additional timely subjects covered include the ethics of judges befriending lawyers and parties, the prosecutorial uses—and misuses—of social media, attorney online advertising, social media's usefulness in estate planning, securities, bankruptcy and other transactional practices and responding, or not, to negative statements posted by clients.

In each area, the authors describe the circumstances and present a surprising range of interesting cases. For example, in a 2013 criminal case, the Ninth Circuit held that a lawyer's failure to find and use a purported sexual abuse victim's recantation on her social networking profile was ineffective assistance of counsel.¹ In the area of advertising, an Indiana bankruptcy attorney was suspended from practice for 30 days for advertising online "we have been screwing banks since 1992." The ACLU's defense of the attorney was unsuccessful. The same attorney has a bulldog pictured on his website. But the authors note another state—Florida—found it impermissible to show a pit bull, on the ground this sent the wrong message to the public.²

The *Handbook* thus summarizes or references numerous court and

ethics opinions of the ABA and state and local bar associations, and packs a lot of useful information and resources into a readable 239 pages. Here are several examples of other interesting and informative points made in the *Handbook*:

- Advising a client as to social media postings before and after filing a lawsuit is an element of competent, diligent legal representation.
- A lawyer may properly advise a client to remove social media posts that may hurt the client's case or interest, even after a matter is pending. Relevant information should be preserved so it may be produced in discovery.
- Monitoring a client's activity on social media may be appropriate for an attorney to stay informed of developments affecting the client's legal dispute.
- Social media may be used to conduct informal and effective discovery. The *Handbook* notes that with almost 2 billion people engaged in social media networking, an internet search will likely reveal relevant information in many litigation situations.
- A lawyer may look at an opposing party's public social media postings. Propriety becomes more nuanced when the party's social media is inaccessible due to privacy settings. Restrictions against contacting a party who is represented by counsel remain in effect.
- The *Handbook* discusses the current state of the legal, practical and ethical issues involved when researching social media activity of prospective and sitting jurors, and monitoring social media activity of jurors during trial. The *Handbook* suggests there are circumstances

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Jayd Banuelos

Thousand Oaks, CA
Litigation

Nancy Emad Bassali

Northridge, CA
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Alissa M. Vizzo

Ventura, CA

when the standard of practice makes it mandatory to do this research, and also discusses when doing such research on jurors may be prohibited.


- Criminal prosecutors have been disciplined for overaggressive investigative steps using social media. In Ohio, a prosecutor invented a fake online “baby mama” and used this fictitious persona to communicate on Facebook with a murder defendant’s ex-girlfriend’s alibi witnesses. The ploy convinced the witnesses not to testify. The defendant was convicted, but the lawyer was terminated from his position and suspended by the state bar. The suspension was later stayed by the state Supreme Court.³
- In California, a lawyer was nearly disciplined for an “incredible display of poor judgment” in commenting on Facebook about a pending criminal trial. But the attorney’s “foolishness” did not rise to the level of misconduct warranting a new trial.⁴
- The *Handbook* discusses best advertising practices on several social media platforms such as LinkedIn, Facebook, YouTube and Avvo, as well as the use of Google AdWords, pay-per-click lawyer advertising and even Groupon promotions. Doubtless, many lawyers are not fully aware of the availability of these advertising opportunities. The *Handbook* is informative as to both methods and related ethics issues.
- Sometimes lawyers have posted rants or other candid comments they felt had no connection to any pending matter or even, in a broader sense, to the practice of law. But lawyers have faced discipline for such comments. The authors point

out that a lawyer “is posting not only as a person, but also as a lawyer, a role that has a 24/7 connotation where legal ethics are concerned.” It seems that anything a lawyer posts automatically has a connection to the practice of law.

- Addressing another increasing challenge for lawyers, the *Handbook* discusses the problem of online negative postings made by clients, and considerations in evaluating whether or not, and how, to respond.

Both the technology of social media and law concerning this technology are evolving rapidly, in real time. For this reason, in many areas the *Handbook* obviously can’t provide definitive guidance. While it covers current incidents, recent cases and ethics opinions, many are not officially published and emanate from local and regional bar associations.

On some occasions, the book points out, different authorities have reached different conclusions. As a result, one senses that the *Handbook* will quickly need to be updated to reflect inevitable further developments in both technology and the law.

Lawyers are challenged to be aware of all the ways the internet and social media affect the practice of law; the ways these tools can and must be used; as well as the ethical dangers in failing to use or misuse available technological tools. Because there is, at present, no other single source, the *Handbook* is an important resource for lawyers to consult—informative and happily for non-savvy practitioners, easy to read and presented the old-fashioned, low-tech way with ink on paper, bound at the spine, and readily accessible to all. 

¹ *Cannedy v Adams* (2013) 706 F.3d 1148.

² *Fla. Bar v Pape* (Fla. App. 2005) 918 So.2d 240, 243.

³ *Disciplinary Counsel v Brockler* 48 N.E.3d 557 (Oh. 2016).

⁴ *People v Armstrong* 2014 WL 125939 (Cal.App. 2014) (review denied Apr. 9, 2014).