

**THE RISKS OF SOCIAL MEDIA: ASKING AND ANSWERING THE  
HARD QUESTIONS FOR ATTORNEYS<sup>†</sup>**

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## I. INTRODUCTION

[1] Nearly every organization uses social media in some capacity, planned or unplanned, successful or not. Links between organizations and their employees and customers, regardless of whether intentional or not, are immediate, widespread, and present opportunity and risk bundled in a potent package.<sup>1</sup> Social media sites are set up to elicit rapid-fire responses and emotional reactions and to disseminate those quickly and permanently to a world-wide audience.<sup>2</sup> However, they do not exist without a variety of risks, including “fake news” and echo chambers<sup>3</sup> as well as general technical challenges to doing it “right.”<sup>4</sup> Adding to the challenges that this high-risk environment presents, organizations have the dual burden of both first-instance (their own profiles, advertising efforts, and direct customer interaction) and second-instance (employees, customers, and third-party postings) issues in a rapidly developing space without a lot of history, case law, or direct analogs.<sup>5</sup>

[2] Lawyers are not immune to these challenges. Whether it is a State Court Justice’s research attorney “live Tweeting” an ethics hearing for a

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<sup>1</sup> See James A. Sherer, Melinda L. McLellan, & Brittany A. Yantis, *The (Social) Media Is the Message: Navigating Legal and Reputational Risks Associated with Employee Social Media Use*, 36 COMPUTER & INTERNET L., no. 5, May 2019, at 2.

<sup>2</sup> See *id.*

<sup>3</sup> See Katie Harbath, *Hard Questions: Social Media and Democracy*, FACEBOOK (Jan. 22, 2018), <https://newsroom.fb.com/news/2018/01/hard-questions-democracy/> [<https://perma.cc/8TFE-EUH5>].

<sup>4</sup> See, e.g., Miranda Paquet, *Answers to 20 of Your Top Social Media Questions*, CONSTANT CONTACT, <https://blogs.constantcontact.com/top-social-media/> [<https://perma.cc/QH98-KDEU>].

<sup>5</sup> See Sherer et al., *supra* note 1, at 2.

former Attorney General,<sup>6</sup> or a State Court Judge reporting improper Facebook contact and conduct by a party's relative,<sup>7</sup> attorneys should be aware that their conduct on such platforms must maintain the professional standards for the practice of law.<sup>8</sup> Additionally, attorneys should keep in mind that such behavior might garner additional scrutiny given the audience reach, ease of use, and low bar to entry of the platforms.<sup>9</sup>

[3] Attorneys may therefore utilize some of the same strategies to deal with the actual risks of social media (as well as its benefits) as organizations do.<sup>10</sup> This analysis begins with the specifics,<sup>11</sup> which in turn starts with the platform.<sup>12</sup> Many practitioners break down the marketplace of social media into different segments comprising such ideas as “online communities” which include social networking sites, [and] even dating sites.”<sup>13</sup> “[O]nline communities may also be built into existing commercial

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<sup>6</sup> See generally Steve Fry, *Informal Admonishment: Judges Impose Mildest Sanction for Kline-inspired Tweets*, CJONLINE.COM (Jan. 13, 2014, 12:41 PM), <https://www.cjonline.com/article> [<https://perma.cc/9TN5-EVBT>].

<sup>7</sup> See *Youkers v. State*, 400 S.W.3d 200, 203 (Tex. Ct. App. 2013).

<sup>8</sup> See Blake J. Brockway, James A. Sherer, & Brittany A. Yantis, *After Reading These 10 Shocking Tips for Staying out of Trouble on Social Media, You'll Never Post the Same Way Again*, 31 INTELL. PROP. & TECH. L. J., no. 11, Nov. 2019.

<sup>9</sup> See *id.*

<sup>10</sup> See Sherer et al., *supra* note 1, at 1–2.

<sup>11</sup> See Veronika Baranovska, *25 Interview Questions for Your Next Social Media Manager*, SENDIBLE INSIGHTS (Jun. 22, 2018), <https://www.sendible.com/insights/25-interview-questions-for-social-media-managers> [<https://perma.cc/K2K2-456N>].

<sup>12</sup> See Sherer et al., *supra* note 1, at 1.

<sup>13</sup> *Id.*

applications, such as the feedback most online platforms offer to customers when browsing merchandise.”<sup>14</sup> Amazon’s extensive use of customer ratings, experiences, and feedback<sup>15</sup> is a “prime” example.<sup>16</sup> “Other sites may be considered microblogs, where the involvement—at least from post to post—is [much more superficial and] less involved.”<sup>17</sup> Examples include communication sites such as Twitter, video and picture-sharing applications, virtual worlds and social gaming sites,<sup>18</sup> dating sites, now-integrated platforms such as Yammer or Slack,<sup>19</sup> or even more focused sites such as Discord.<sup>20</sup>

[4] With these groupings and audiences in mind, a practitioner should get to know the specifics<sup>21</sup> and then build out an approach for her selected platforms.<sup>22</sup> Part of that knowledge will come from a careful consideration

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<sup>14</sup> *Id.*

<sup>15</sup> See *About Comments, Feedback, & Ratings*, AMAZON.COM, <https://www.amazon.com/gp/help/customer/display.html?nodeId=537806> [<https://perma.cc/Z6KQ-XV6P>].

<sup>16</sup> Sherer et al., *supra* note 1, at 1.

<sup>17</sup> *Id.*

<sup>18</sup> See Financial Institution Letter FIL-56-2013, Fed. Deposit Ins. Corp., Social Media: Consumer Compliance Risk Management Guidance (Dec. 11, 2013).

<sup>19</sup> See James A. Sherer, Aaron Singer, & Ben Barnes, *Picking up the Slack™ Legal and Information Governance Considerations for New(er) Technologies*, 25 RICH. J.L. & TECH., no. 4, 9 (2019).

<sup>20</sup> See Sherer et al., *supra* note 1, at 1.

<sup>21</sup> See Baranovska, *supra* note 11 (“Imagine: [site] has just devalued an SEO technique you have used successfully in the past. What do you do?”).

<sup>22</sup> See Sherer et al., *supra* note 1, at 2.

of what supports the attorney's practice, what makes the most sense for the attorney's clients, and should also incorporate what is already happening with the following:

- the attorney's existing online presence;
- the attorney's focus of practice and areas of experience—that is, her "brand;"
- the attorney's (current and future) clients;
- the attorney's employees, experts, and third-party assistance that may be working at her direction;
- courts and bar associations;
- professional networks;
- alumni groups; and
- the public at large.<sup>23</sup>

While there are rules requiring attorneys to maintain technical competence that might include social media savvy,<sup>24</sup> that knowledge should not be gained the "hard" way. Instead, attorneys should seek proper direction and may rely, in part, on consulting with or hiring the right people to steer the ship.<sup>25</sup> In the end, though, navigating the legal and reputational risks of integrating social media into the practice of law, related professional

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<sup>23</sup> *See id.*

<sup>24</sup> *See, e.g.,* THE VIRGINIA STATE BAR PROF'L GUIDELINES r. 1.1 cmt. (2018) ("To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology.").

<sup>25</sup> *See* Baranovska, *supra* note 11.

responsibilities, and an attorney's public profile generally all begins by asking and then answering the hard questions.

## II. SOCIAL MEDIA – ASKING THE HARD QUESTIONS

[5] In a previously published article, one of our co-authors conducted a case study of the cloud-based digital platform Slack<sup>26</sup> that examined specific legal and information governance considerations for new technologies in collaborative software generally.<sup>27</sup> That framework began with a series of questions aimed at whether a specific technology is appropriate for the organization, and then determining whether and how the technology can be responsibly integrated.<sup>28</sup> That approach (and the accompanying framework) is not limited just to collaborative software technologies like Slack;<sup>29</sup> it also applies to social media and the legal and reputational risks associated with its use, and specifically considered here, how *attorneys* may (or should) utilize like technologies. While not considered specifically for social media, this framework introduces the concept of the hard questions that attorneys and their employees, direct reports, and those working at lawyers' direction should be asking when utilizing social media, or the questions that an attorney may be responsible for answering regardless of whether anyone is asking them.<sup>30</sup> As the

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<sup>26</sup> See Sherer et al., *supra* note 19, at 4–5; see also *Why Slack?*, SLACK, <https://slack.com/features> [<https://perma.cc/4NEY-TW8Z>].

<sup>27</sup> See Sherer et al., *supra* note 19.

<sup>28</sup> See *id.* at 7–10.

<sup>29</sup> See *id.* at 7.

<sup>30</sup> See, e.g., LEADING PRACTICES: COMM'N VIA SOC. MEDIA, PRINCIPLE 6 (DEL. SUP. CT. COMM'N ON LAW & TECH. 2014) (noting “[l]awyers have a duty to ensure that those who are working on their behalf or under their authority understand and comply with the Rules.”); N.Y. RULES OF PROF'L CONDUCT, RULE 8.4., at 194 (N.Y. STATE BAR ASS'N

authors in the Slack piece noted, these questions are not magic.<sup>31</sup> Rather, these questions focus on understanding social media's operation and capabilities against the backdrop of the attorney's use, needs, and requirements.<sup>32</sup>

**A. Who is using social media on behalf of the attorney, the firm, or at the direction of counsel?**

[6] Is social media being used by the attorney, the attorney's employees, as part of case or client strategy, or as part of an overall publicity campaign? Can the attorney or law firm determine simply by querying the active IT environment to see if representations about the attorney's practice are being published, or is there a need to actively monitor the platforms? It may be that an attorney's direct reports, employees, or third parties who work at the attorney's direction are using social media for personal use or for work purposes, on a bring-your-own-device, or BYOD, platform, in which case the attorney's IT services may be unaware or even prohibited from determining such use.<sup>33</sup>

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COMM. ON PROF'L ETHICS 2018), <https://www.nysba.org/DownloadAsset.aspx?id=50671> [<https://perma.cc/L3K6-F5NC>].

<sup>31</sup> See Sherer et al., *supra* note 19, at 7.

<sup>32</sup> See *id.* at 7.

<sup>33</sup> See Melinda L. McLellan, James A. Sherer, & Emily R. Fedeles, *Where You Go, There You Are (With Your Mobile Device): Privacy Risks and Legal Complexities Associated with International 'Bring Your Own Device' Programs*, 21 RICH. J. L. & TECH., no. 3, 2015 at 1, 3–5 (2015), <http://jolt.richmond.edu/v21i3/article11.pdf> [<https://perma.cc/K4EX-Q4FE>].

**B. Is the attorney or law firm—or anyone supporting those services—actually paying for the social media services and the additional benefits and control that paid services can provide?**

[7] A firm may be using a paid version of the social media site or application that offers search functionality or export settings, or may be limited to “free software that does nothing more than allow...schedule[d] posts,” greatly diminishing functionality.<sup>34</sup> Payment for the platform also brings with it greater insight into where the law firm’s data (and sometimes secrets) reside, as well as providing slightly more comfort regarding the ongoing viability of the tool.<sup>35</sup> Such uses of a site can also provide greater control for solo practitioners, as seen in the various “tiers” of service offered by professional networking sites like LinkedIn,<sup>36</sup> as long as the attorney is treating such profiles properly such as by advertising where warranted and avoiding inadvertent leaking of client confidences.<sup>37</sup>

**C. Who holds the attorney’s data, including client and third-party information?**

[8] A given social media platform may store data according to a cloud-

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<sup>34</sup> See Baranovska, *supra* note 11; Melanie Ehrenkranz, *What’s Slack Doing With Your Data?*, GIZMODO (Jan. 10, 2018, 1:11 PM), <https://gizmodo.com/whats-slack-doing-with-your-data-1820838887> [<https://perma.cc/99K7-EHFV>].

<sup>35</sup> See Sherer, Singer, & Barnes, *supra* note 19, at 8.

<sup>36</sup> See *LinkedIn Free Accounts and Premium Subscriptions*, LINKEDIN, <https://www.linkedin.com/help/linkedin/answer/71/linkedin-free-accounts-and-premium-subscriptions?lang=en> [<https://perma.cc/ML74-GFDR>].

<sup>37</sup> See Zach Warren, *8 Dos and Don’ts for Surviving the Social Media Age as an Attorney*, LAW.COM: LEGALTECH NEWS (Aug. 14, 2018), <https://www.law.com/legaltechnews/2018/08/14/8-dos-and-donts-for-surviving-the-social-media-age-as-an-attorney/> [<https://perma.cc/BZZ8-6GSA>].

based, endpoint or device-based, or hybrid approach.<sup>38</sup> For example, many social networks rely exclusively on cloud storage, but such an accumulation “of diverse information” may raise issues “related to data security,” among others.<sup>39</sup> Other platforms may store information locally, which may require additional attorney monitoring of data entrusted to the attorney through the operation of an agreement or protective order.<sup>40</sup>

#### **D. Who else has access to the attorney’s stored data?**

[9] This may not be clear, even in paid instances, or in instances that involve “pricing tiers” that may limit the amounts of storage that users can utilize.<sup>41</sup> Access under these circumstances also has a dual line of questioning because, in turn, certain sites may use cloud services<sup>42</sup> (such

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<sup>38</sup> See James A. Sherer, *Social Media, Cloud Computing and European Philosophy: An Examination of Proposed Amendments to Directive 95/46/EC and Their Possible Effects on U.S. Multinational Corporations*, 3 BLOOMBERG L. REP. – TECH L., no. 15, 2011 (noting that the variety of cloud computing technology and social media services in different nations makes it difficult to provide uniform data protection).

<sup>39</sup> Naif A. Almudawi, *Cloud Computing Privacy Concerns in Social Networks*, 22 INT’L J. COMPUTER, no. 1, 2016 at 29, 29.

<sup>40</sup> See Jonathan Redgrave & James Sherer, *Seeing in the Clouds: Understanding Why You Need to Know Where Your Data Lives*, 2 BLOOMBERG L. REP. – TECH L., no. 24, 2010 (detailing implementable strategies to provide additional protection regarding cloud computing and data-location specificity).

<sup>41</sup> See Maceij Duraj, *MrOwl Rolls Out an Unlimited & Free Cloud Storage Platform for Content Sharing Enthusiasts*, FORBES (Feb. 13, 2019, 12:22pm), [https://images.mrowl.com/presspage/MrOwl+Rolls+Out+An+Unlimited+%26+Free+Cloud+Storage+Platform+For+Content+Sharing+Enthusiasts+\(1\).pdf](https://images.mrowl.com/presspage/MrOwl+Rolls+Out+An+Unlimited+%26+Free+Cloud+Storage+Platform+For+Content+Sharing+Enthusiasts+(1).pdf) [<https://perma.cc/DJX6-U87P>].

<sup>42</sup> See Almudawi, *supra* note 39.

as Amazon Web Services) to host the data.<sup>43</sup>

**E. How is the attorney using the social media platform, and is anyone else repurposing it for any reason?**

[10] Is the attorney simply using the platform for social purposes, is client information being provided, are facts being developed, and/or are serious business decisions being consummated on the platform? Can the attorney's employees upload files to the environment without attorney approval?<sup>44</sup> Can the employees communicate on the tool or otherwise generate new content in the environment without specific approval or direction?<sup>45</sup> Are employees using social media in service of or in reference to the firm, the attorney's practice, or in reference to clients, and who owns such content when generated?<sup>46</sup> Is content developed in connection with the attorney's personality as an individual or as a part of the attorney's employment with the organization?<sup>47</sup> Does the firm or an

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<sup>43</sup> See *Slack Case Study*, AMAZON: AMAZON WEB SERVICES (2015), <https://aws.amazon.com/solutions/case-studies/slack/> [<https://perma.cc/3FKR-HYXC>].

<sup>44</sup> See Brockway, Sherer & Yantis, *supra* note 8.

<sup>45</sup> See Sherer, Singer & Barnes, *supra* note 19, at 2.

<sup>46</sup> See generally *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at \*1 (N.D. Cal. Nov. 8, 2011) (questioning whether a former employee can use a social media account with trade secrets his former employer purports to own); *Ardis Health, LLC v. Nankivell*, No. 11 Civ. 5013(NRB), 2012 WL 5290326, at \*1 (S.D.N.Y. Oct. 23, 2012) (exploring whether a former video and social media producer had to return login information when terminated and could use images from her former employee on her private social media); *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350, at \*1 (E.D. Penn. Mar. 12, 2013) (exploring whether one's personal LinkedIn account can be used against their will after a corporate buyout).

<sup>47</sup> See Sherer et al., *supra* note 1, at 3.

individual attorney proactively engage across the platforms and simultaneously actively monitor mentions of their practice by employees, opposing parties, court and bar organizations, and the public?<sup>48</sup> Is an attorney required by statute to monitor employees' social media communications,<sup>49</sup> and does that responsibility differ from the requirement discussed above regarding attorney responsibility for third parties acting at the attorney's direction?<sup>50</sup> Is the attorney accumulating information to develop clients,<sup>51</sup> relying on social media to make employment decisions, accumulating facts that may require dissemination, or creating comprehensive background investigations that include the use of social media?<sup>52</sup> Lastly, is the content germane to the attorney's practice, and accurate in its representations?<sup>53</sup>

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<sup>48</sup> *See id.*

<sup>49</sup> *See id.*; Theodore Claypoole, *Privacy and Social Media*, AMERICAN BAR ASSOCIATION: BUSINESS LAW TODAY (Jan. 23, 2013), <https://businesslawtoday.org/2014/01/privacy-and-social-media/> [<https://perma.cc/D5BJ-EWF2>]; FED. DEPOSITORY TR. CORP., FIL-56-2013, SOCIAL MEDIA: CONSUMER COMPLIANCE RISK MANAGEMENT GUIDANCE (2013), <https://www.fdic.gov/news/news/financial/2013/fil13056.html#cont> [<https://perma.cc/V4VM-DSFU>].

<sup>50</sup> *See* N.Y. CODE OF PROF'L CONDUCT r. 8.4.

<sup>51</sup> *See* Sherer et al., *supra* note 1.

<sup>52</sup> *See id.*

<sup>53</sup> *See F.T.C. v. COORGA Nutraceuticals Corp.*, 201 F.Supp.3d 1300, 1308 (D. Wyo. 2016).

### **1. What information is stored or created by the social media platform that the attorney should be aware of?**

[11] Does the attorney upload files, and if so, what kinds?<sup>54</sup> Do the attorney's clients upload information?<sup>55</sup> Are these (or other) files modified or edited within the platform, and how might they be germane for discovery purposes?<sup>56</sup> Are user controls consistent with other applications being used to protect uploaded files?<sup>57</sup> What additional information or metadata from other platforms or systems is integrated into or stored on the new platform?<sup>58</sup>

### **2. Can the attorney export data from the platform—and, if so, how?**

[12] Some organizations can hold a client's data "hostage" until additional fees are paid, and/or an account is made current.<sup>59</sup> This is not a "ransomware" type situation, although some of the basic tenets of

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<sup>54</sup> See, e.g., Paquet, *supra* note 4.

<sup>55</sup> See Redgrave & Sherer, *supra* note 40.

<sup>56</sup> See *In re Milo's Kitchen Dog Treats Consol. Cases*, 307 F.R.D. 177, 183 (W.D. Pa. 2015); see also *Largent v. Reed*, 2011 WL 5632688 (Pa. Ct. Com. Pl. Nov. 8, 2011).

<sup>57</sup> James A. Sherer et al., *Picking up the Slack*<sup>TM</sup> *Legal and Information Governance Considerations for New(er) Technologies*, 25 RICH. J. L. & TECH., no. 4, 2019, at 1, 9.

<sup>58</sup> See *id.*

<sup>59</sup> See, e.g., Michael G. Van Arsdall, *When Dealing With E-Discovery Vendors, Do You Know Where Your Data Is?*, CROWELL & MORING (Jan. 24, 2013), <https://www.crowelldata.com/2013/01/when-dealing-with-e-discovery-vendors-do-you-know-where-your-data-is/> [<https://perma.cc/TJD7-J9YK>] (discussing an instance of a company holding sensitive and confidential data "hostage").

ransomware *preparedness* might apply.<sup>60</sup> Further, attorneys may need to consider how data exports might impact eDiscovery considerations where metadata can matter,<sup>61</sup> and an attorney undertaking fact development may have to determine the appropriate means by which native files can be exported in response to specific document requests.

### III. Social Media – *Answering the Hard Questions*

[13] This framework not only helps attorneys *ask* the hard questions, but also *answer* them. The attorney must use a variety of methods to answer these questions, some of which may, ironically, rely on good, old-fashioned direct communication with those individuals who are assisting with practice or case strategy,<sup>62</sup> employees generally, or other users of social media with some relationship with the attorney’s practice or a given client’s operations.<sup>63</sup> This framework should encourage discussions between the attorney and that constellation of individuals where the answers are specific, and determine how social media is currently, or could be, used for the attorney’s practice, client aims, and the particulars for that use on a firm’s and related employee devices.<sup>64</sup>

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<sup>60</sup> See James A. Sherer et al., *Ransomware – Practical and Legal Considerations for Confronting the New Economic Engine of the Dark Web*, 23 RICH. J.L. & TECH., no. 3, 2017, at 1, 39 (“[I]ndustry best practices for business continuity include maintaining robust backups that would protect against [data being held hostage] . . .”).

<sup>61</sup> See *MetLife Investors USA Insurance Company v. Lindsey*, 2018 WL 5292222, at \*2 (N.D. Ind. Oct. 25, 2018).

<sup>62</sup> See Baranovska, *supra* note 11.

<sup>63</sup> See Sherer et al., *supra* note 19, at 11.

<sup>64</sup> See Sherer et al., *supra* note 1, at 11.

### A. Building Consensus

[14] These conversations must begin with an understanding of what social media outlets the attorney, her employees, third parties acting at the attorney's direction, and the attorney's clients already use or are likely to use in the future.<sup>65</sup> Subsequently, such discussions should address what populations of individuals, both within and without the firm or practice, are going to be engaged to undertake this work.<sup>66</sup> The attorney should also develop a strategy that allows for comprehensive, preliminary assessments to determine every social media platform featuring representations of the lawyer, a firm, or its clients;<sup>67</sup> such a strategy must include a continued vigilance to evaluate and update that list at regular intervals.<sup>68</sup> The attorney should be realistic when defining what social media means for the practice of law, both in reality (what is already happening) and in aspiration (the plan).<sup>69</sup>

### B. Policy Considerations

[15] Policy considerations include the intent of the attorney and her practice focusing on the platforms already in use (as well as aspirational uses) in the world of social media.<sup>70</sup> The practitioner should intentionally

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<sup>65</sup> See Baranovska, *supra* note 11.

<sup>66</sup> See Sherer et al., *supra* note 1, at 11.

<sup>67</sup> See JAN L. JACOBOWITZ & JOHN G. BROWNING, LEGAL ETHICS AND SOCIAL MEDIA – A PRACTITIONER'S HANDBOOK (2017) 26 (“Being at least ‘socially aware’ (if not quite social media savvy) is now considered part of the most fundamental responsibility for attorneys: the duty to provide competent representation to clients.”).

<sup>68</sup> See Sherer et al., *supra* note 1, at 5.

<sup>69</sup> See *id.* at 2.

<sup>70</sup> See *id.*; Melinda L. McLellan & James A. Sherer, *Corporate Social Media Engagement*

map these various policy considerations, as applicable, to the different platforms and types of engagement she plans for.<sup>71</sup> The attorney should also determine to whom she may delegate responsibility for monitoring social media, who deals with raised concerns, and who can execute a response strategy.<sup>72</sup>

[16] While the attorney ultimately maintains responsibility for that social media related to the practice of law,<sup>73</sup> the attorney should also review and manage those aspects of the platform that are under the firm's control,<sup>74</sup> and research any "industry-specific requirements for use and retention."<sup>75</sup> The attorney should also outline how employees use social media in service to the practice and/or firm,<sup>76</sup> keeping other factors in mind as well, including considerations regarding discrimination arising from practices of using social media to make employment or

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– *Guidelines and Strategies for Managing Unpredictability*, 20 BNA ELECTRONIC COM. & L. REP. 31 (2015).

<sup>71</sup> See Sherer et al., *supra* note 1, at 5.

<sup>72</sup> See *id.*

<sup>73</sup> See, e.g., *Communication Via Social Media*, DEL. SUP. CT. COMMISSION ON L. & TECH.: LEADING PRACTICES, Principle 2, <https://courts.delaware.gov/declt/blogspot/socialmedia.aspx> [<https://perma.cc/XVF7-VYH4>] (providing one example of a state's guidance for attorneys using social media).

<sup>74</sup> Cf. Baranovska, *supra* note 11 (advising careful questioning of prospective social media managers).

<sup>75</sup> See Sherer et al., *supra* note 1, at 5.

<sup>76</sup> See *id.* at 6.

representational decisions,<sup>77</sup> conducting background investigations that may cause disparate impact concerns,<sup>78</sup> or even contacting witnesses or opposing parties.<sup>79</sup> Attorneys should consider the principle of “less-is-more” here, confining searches to publicly available information unless truly directed by a professional, as more states are enacting laws to prohibit employers from requesting usernames and passwords,<sup>80</sup> and as additional data privacy laws come online, which could implicate attorney ethical constraints as such laws sometimes do.<sup>81</sup>

[17] The attorney should outline how employees and directed third parties may appropriately use social media in reference to the practice. The attorney should also consider developing an ownership policy<sup>82</sup> to help define relationships between the attorney, any posted material, employee personal capacity, and the ultimate social site used.<sup>83</sup> Potential

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<sup>77</sup> See Darin M. Klemchuk, *Navigating the Legal Issues Surrounding Social Media*, KLEMCHUK LLP (Oct. 23, 2011), <https://www.klemchuk.com/legal-insights/navigating-the-legal-issues-surrounding-social-media> [<https://perma.cc/NSB3-KDFH>].

<sup>78</sup> See Sherer et al., *supra* note 1, at 4; Michael T. Pettry, *Social Media: Legal Challenges and Pitfalls for Law Enforcement Agencies*, FBI LAW ENFORCEMENT BULLETIN (Dec. 9, 2014), <http://leb.fbi.gov/2014/december/legal-digest-social-media-legal-challenges-and-pitfalls-for-law-enforcement> [<https://perma.cc/8YVS-WWAG>].

<sup>79</sup> See Brockway et al., *supra* note 8, at 5.

<sup>80</sup> See Sherer et al., *supra* note 1, at 4; Lisa Gingeleskie, *Social Media in the Hiring Process: Pitfalls and Protections*, NEW JERSEY LAW JOURNAL, (Mar. 20, 2018, 12:49 PM), <https://www.law.com/njlawjournal/2018/03/20/social-media-in-the-hiring-process-pitfalls-and-protections/?sreturn=20181026171048> [<https://perma.cc/63N2-P7LG>].

<sup>81</sup> See Sherer, *supra* note 38.

<sup>82</sup> See Klemchuk, *supra* note 77.

<sup>83</sup> See Sherer et al., *supra* note 1, at 3.

professional liability may arise when an employee's use of a site involves a questionable and threatening purpose<sup>84</sup> or seems to potentially waive privilege.<sup>85</sup> In those instances, the line between a firm and its employee can blur quickly, and an attorney or firm with (a) policies associated with such potential threats and (b) that actively monitors for such activity will be better situated for these types of issues.<sup>86</sup>

[18] Additionally, an attorney should consider what employees are doing with protected content on social media generally. These concerns range from confidential information disclosure or the waiver of privilege,<sup>87</sup> to unauthorized use of copyright-protected work,<sup>88</sup> or may even implicate infringement of individual privacy rights.<sup>89</sup> As noted above, if an attorney is appropriately regulating employee social media use, the attorney must also consider whether the state law that prohibits or restricts employers from requesting access for employees' private social media accounts applies to them.<sup>90</sup> Note, however, that having *no* policy at

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<sup>84</sup> See Heather Bussing, *Social Media's Real Legal Issues*, HREXAMINER (Mar. 25, 2013), <http://www.hrexaminer.com/social-medias-real-legal-issues/> [<https://perma.cc/LXD5-VT38>].

<sup>85</sup> See, e.g., *Lenz v. Universal Music Corp.*, 2010 WL 4789099, at \*2–3 (N.D. Cal. Nov. 17, 2010).

<sup>86</sup> Sherer et al., *supra* note 1, at 2.

<sup>87</sup> See, e.g., *Lenz*, 2010 WL 4789099, at \*2–3.

<sup>88</sup> See NEAL & MCDEVITT, LLC, TOP 10 LEGAL ISSUES IN SOCIAL MEDIA (2010).

<sup>89</sup> See Sherer et al., *supra* note 1, at 3, 5–6; Kathryn L. Ossian, *Legal Issues in Social Networking*, INSTITUTE OF CONTINUING LEGAL EDUCATION, May 2009, at 1–4.

<sup>90</sup> See Sherer et al., *supra* note 1, at 3; Tess Traylor-Notaro, *Workplace Privacy in the Age of Social Media*, 7 GLOBAL BUS. L. REV. 133, 134 (2018).

all also provides *no* defenses to these types of potential claims.<sup>91</sup>

### C. Access and Security

[19] Attorneys should take an active role as to user access and security permissions, especially when it is the attorney's professional license and livelihood on the line. There may be certain platforms containing information where access should be limited to those employees that require access to support the practice of the attorney.<sup>92</sup> Other platforms, especially internal social media, like Slack or the now-discontinued Google+, can contain sensitive, proprietary, or otherwise valuable information that requires restricted access.<sup>93</sup>

### D. eDiscovery and Spoliation

[20] Social media is an active part of electronic discovery.<sup>94</sup> When litigation or a regulatory investigation happens, an attorney is required to consider client data that may be held by third-parties,<sup>95</sup> whether in the cloud<sup>96</sup> or in a co-location environment.<sup>97</sup> The attorney and client must work together when fulfilling discovery obligations to preserve and

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<sup>91</sup> See Sherer et al., *supra* note 1, at 4.

<sup>92</sup> See Sherer et al., *supra* note 19, at 14.

<sup>93</sup> See *id.* at 15.

<sup>94</sup> See Sherer et al., *supra* note 1, at 5.

<sup>95</sup> See Sherer et al., *supra* note 19, at 16–17.

<sup>96</sup> See Almudawi, *supra* note 39, at 30–32.

<sup>97</sup> See Duraj, *supra* note 41.

produce relevant information that may be present on social media.<sup>98</sup>

[21] Understanding exactly how a client uses or manages social media can help the attorney best develop a plan for discovery. Certain discovery requests might require “a clear factual predicate in order to compel the production of social media records,”<sup>99</sup> while others with more focus can require a dissemination of facts.<sup>100</sup>

#### IV. CONCLUSION IN 280 CHARACTERS (OR SO)

[22] When it comes to social media, an attorney should ask harder questions of herself than she does to a witness in a deposition or a prospective candidate in a job interview.<sup>101</sup> These questions should extend to those individuals in the attorney’s employ, encompass those people working at the attorney’s direction, and should absolutely include appropriate questions to the attorney’s clients. Starting with these questions is the right beginning, and while the end-product may not be perfection, the resulting strategy, policy, and practices are better than no considerations at all.

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<sup>98</sup> See Van Arsdall, *supra* note 59.

<sup>99</sup> Fawcett v. Altieri, 960 N.Y.S.2d 592, 597 (N.Y. Sup. Ct. 2013).

<sup>100</sup> See Patterson v. Turner Constr. Co., 931 N.Y.S.2d 311, 311 (N.Y. App. Div. 2011).

<sup>101</sup> See, e.g., Baranovska, *supra* note 11 (providing example questions).