

## Safely navigating the ethical perils of social media

By Joseph M. Cacace



A recent decision by the Board of Bar Overseers should give all Massachusetts attorneys pause before they post any information about clients or their cases on social media.

The BBO publicly reprimanded an attorney for posting on his personal Facebook page confidential information about his client's guardianship case, which the BBO determined was a violation of Rule 1.6(a) of the Massachusetts Rules of Professional Conduct. (See "Facebook post prompts a reprimand from BBO," Dec. 9, 2019, issue of Massachusetts Lawyers Weekly.)

The lawyer was representing a grandmother seeking permanent guardianship of her grandson, who had been placed in foster care by the Department of Children and Families following an altercation between the boy's mother and another relative living in the grandmother's home.

Rule 1.6(a) prohibits a lawyer from revealing "confidential information relating to the representation of a client" absent the client's consent, or unless "the disclosure is impliedly authorized in order to carry out the representation" or otherwise permitted by the rule.

In his public Facebook post, the attorney did not identify the client by name but identified the court where the care and protection of a child hearing was being held, the age of the boy, the date of the court appearance, and the number of times the child was in foster care.

In response to two comments to the initial Facebook post, the attorney again did not identify the client by name but divulged additional information about the case, including that the DCF was opposing his client's guardianship petition because of concerns that she could not "control" her daughter (the boy's mother).

The boy's mother subsequently found the Facebook post and brought it to the attention

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of the attorney's client (the boy's grandmother). The mother and grandmother both recognized that the post pertained to the grandmother's guardianship case.

The client initially chose not to mention to the attorney that she had discovered his post, which she found despite not being a Facebook "friend" of the attorney.

She later hired the attorney to handle her divorce case, and when they had a falling out over billing and other issues in the divorce case, she then for the first time confronted the attorney over the Facebook post.

A BBO hearing committee recommended that the petition for discipline should be dismissed because the information posted on Facebook could not reasonably identify the client and was therefore not detrimental to her.

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### Benign comments?

However, on appeal the BBO disagreed with the hearing committee, finding that not only did the client and her daughter recognize that the Facebook post and comments concerned the guardianship proceeding, it was reasonably likely that a third party could identify the client based on the information in the posts.

The BBO noted by way of example that the grandmother could have mentioned to a friend that the attorney was representing her in a case, perhaps in the context of making a referral, and the friend could have researched the attorney on Facebook and discovered the post about the grandmother's litigation with the DCF.

"There is no [evidentiary] requirement that a third party actually connect the dots," the BBO wrote in its opinion. "If it would be reasonably likely that a third party could do so, the disclosure runs afoul of the rule."

Even if the information did not specifically divulge the names of the parties or any other identifying information, the lawyer's post disclosing the court, age of the grandson, and how many times the boy had been placed in foster care would likely be embarrassing or detrimental to the client if disclosed, the BBO found.

Comment 3A of the rule defines "confidential information" in part as that which "is likely to be embarrassing or detrimental to the client if disclosed."

Another key factor to the BBO's ruling was that care and protection proceedings are confidential by statute.

### Word to the wise

Using social media to promote a practice and to stay top of mind with clients and referral sources is certainly a legitimate and useful marketing tactic. But lawyers have to be ever mindful of their ethical obligations when participating on social media channels.

Key takeaways from the BBO's ruling are:

- Think twice, and then think again, about posting anything online about a client's matter, most especially confidential information, defined in Comment 3A of Rule 1.6(a) as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the lawyer has agreed to keep confidential."

- Obtain your client's consent before posting anything about a client matter on social media.

- If you need advice about a case, consider using a listserv or other means of communicating with a smaller, private audience, and always use hypotheticals that do not reveal the identity of the client or the matter. Comment 4 to Rule 1.6(a) allows lawyers to use hypotheticals to discuss issues related to representing clients "so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."

- If you need to vent about a situation in a client matter you are handling, find a colleague at your firm, or, if you are not part of a firm, consider speaking with someone at a lawyer assistance program, such as Lawyers Concerned for Lawyers or the Massachusetts Law Office Management Assistance Program, again keeping in mind the ethical obligation not to disclose client confidences.

- Even if you post something about a case that is consistent with Rule 1.6(a), resist getting sucked into the morass of comments on your post as doing so is fraught with danger. If you get caught up in a back and forth online, you might post something that includes client confidences or reveals a client's identity in response to inaccurate or misleading comments. In fact, you should avoid commenting at all. If something needs to be done to correct the record, either delete your post or respond very carefully to ensure compliance with the rule.

- In addition to Rule 1.6(a), you must be mindful of other applicable ethics rules, including Rule 3.6 concerning trial publicity, and Rules 7.1-7.5 governing advertising and solicitation.