



# Social Media and Divorce

BY GEMMA B. ALLEN AND TODD M. GLASSMAN

**S**ocial Media and Divorce present a cross-hatch of intersecting, parallel lines. Social media is arguably one of the “new” causes of divorce because it has made every temptation so accessible. Whether your weakness is an addiction, an old love, or endless longing for someone or something better, you can search on-line 24-7 from any location or device. The consuming public’s belief that pursuing these private, forbidden passions can be done without fear of being discovered is not only unfounded but also potentially dangerous to clients’ financial and emotional health. It may ultimately be devastating to their custody dreams if, or when, their relationship starts to fail.

## LEGAL CONCERNS AND EVOLVING LAWS

As smart and sophisticated as lawyers may be, our profession is still catching up with the impact of social media on clients and cases. Part of that is because the law itself is still catching up with technology, and, to be candid, lagging a bit behind. While social media has dramatically affected all types of relationships, the United States Supreme Court is currently dealing with the impact it has on the husband-wife dynamic.

As recently as December 1, 2014, the United States Supreme Court began oral arguments in *Elonis v. United States*, a case where a Pennsyl-

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vania husband began making on-line threats against his wife after she sought and obtained an Order of Protection against him.<sup>1</sup> Having granted a *writ*, it appears the Supreme Court will grapple with the new issues technology is presenting in the context of First Amendment rights.

In *Elonis*, the husband posted what would appear to be not only threatening but, in fact, bone-chilling statements to his wife (and his intentions toward his place of employment and a school). While making these

<sup>1</sup> 730 F.3d 321 (3d Cir. 2013), cert. granted, 134 S. Ct. 2819 (U.S. June 16, 2014) (No. 13-983).

on-line threats, he adopted a rap pseudonym and, thus, is invoking his First Amendment freedoms under claims of artistic creativity. One of Elonis' posted statements is truly intimidating to those who seek to protect clients with Orders of Protection, but realized their limitations. In a November 23, 2014 Washington Post piece, reporter Robert Barnes discusses the impact of Anthony Elonis' on-line statements to his soon-to-be ex-wife:

"Fold up your PFA [OP in our world] and put it in your pocket...Is it thick enough to stop a bullet?"<sup>2</sup>

The majority of us who labor in this field would likely side with the original judge in the *Elonis* case who instructed the jury that the government had to prove only that a reasonable person would view the threats as a "serious expression of an intention to inflict bodily injury or take the life of another person."<sup>3</sup> Our views would also likely echo the arguments set forth in the brief filed by the National Network to End Domestic Violence; namely, that victims of domestic violence "have experienced real-life terror caused by increasingly graphic and public posts to Facebook and other social media sites—terror that is exacerbated precisely because abusers now harness the power of technology 'enabling them to reach their victims' everyday lives at the click of a mouse or the touch of a screen."<sup>4</sup>

The outcome of *Elonis* is important to all of us who daily face the task of defining harassment and determining whether or not to seek an Order of Protection—and, in some cases, further litigating how and when the Order has been violated. It is equally important to all of us when counseling our clients as to how, when, and IF to use social media at all during, or even after a divorce.

#### ADVISING CLIENTS TO BE LESS "SOCIAL"

It is hard to explain to potential or actual clients how much the legal impact of social media smacks of the old "Wild West" re-purposed in a "Brave New World." The

2 Robert Barnes, *Supreme Court Case Tests the Limits of Free Speech on Facebook and Other Social Media*, Wash. Post, Nov. 24, 2014 available at [http://www.washingtonpost.com/national/supreme-court-case-tests-the-limits-of-free-speech-on-facebook-and-other-social-media/2014/11/23/9e54dbd8-6f67-11e4-ad12-3734c461eab6\\_story.html](http://www.washingtonpost.com/national/supreme-court-case-tests-the-limits-of-free-speech-on-facebook-and-other-social-media/2014/11/23/9e54dbd8-6f67-11e4-ad12-3734c461eab6_story.html)

3 *Elonis*, 730 F.3d at 327.

4 *Supreme Court Case Tests the Limits of Free Speech on Facebook and Other Social Media*, Wash. Post, Nov. 24, 2014 (quoting Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondent at 7, *Elonis v. United States*, 134 S. Ct. 2819 (2014) (No. 13-983)).

easiest advice to give a client is to "just say no" to any and all forms of social media while they are going through a divorce, and for a protracted time thereafter. That is, of course, the most difficult advice to hear and to follow. We use variations of the following persuasions when counseling our clients:

#### Careful What You Tweet!

- There is no better and easier place to find out what someone is thinking, or where someone is eating, vacationing, and spending money than Twitter, so if you want privacy and confidentiality, Twitter is not a place you should be.
- While Twitter's content is limited with a word maximum, people still post pictures and information that is shared with the world and can be damaging evidence in many ways. Lawyers can and do use this information on issues of finance and parenting and can

build whole cases around what a few words have revealed.

#### Facebook: Be Prepared to "Face" Your Past

- Family law attorneys have used Facebook to find damaging information regarding support and custody, and to highlight our own client's attributes, or to highlight the opponent's flaws. Among easy Facebook discoveries are "significant others," hidden assets, and "lifestyle."
- Two more words: Michael Phelps. The U.S.A. Olympic swimmer was suspended from competition for three months because of a picture that surfaced on Facebook showing him inhaling from a marijuana pipe. Consider what that also did to his sponsorship deals, and just think what that could have done were he involved in a custody case in Illinois.

#### LinkedIn: How Much is Enough

- If you are on LinkedIn, be careful as to the spin you put on your on-line resume. Exaggerated credentials might not only be unlawful if misleading, but can also come back to haunt you in a courtroom in deciding child support/alimony or money/property division.

#### E-mails are an Attorney's/Judge's/Media's Best Friend

- People in general, but especially the highly pro-

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*"Texting may  
be easy and efficient  
but can be detrimental  
to your legal health."*

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filed and unhappily coupled, should realize that they should never write anything in an e-mail they would not like their boss, a judge, or even the media to read. Picture it in a power-point before you hit "send."

- You can also be required by a judge to preserve and produce e-mails. What we can do is tell you to stop writing them.

### **Texting May be Easy and Efficient but can be Detrimental to Your Legal Health**

- Clients in family law cases take pictures of texts all the time and use them as exhibits on custody, support, and divorce/paternity cases. Records can also be subpoenaed.
- People have the misconception that texts are ultra-private, but, just like e-mails, think twice (or three or four times) about your audience and the body of your text before you hit send!

### **LEGAL ADVICE FOR LAWYERS ON SOCIAL MEDIA: NOTES TO SELVES**

The brave new world of social media and its pitfalls are not limited to its problems for clients. We, as attorneys, have a high degree of professional responsibility in

a relatively uncharted, exceptionally fluid, and, dare we say, "clouded" area. The ABA has issued some directives, Illinois has applied its existing rules to new media, and the New York State Bar Association Committee on the Social Media Committee of the Commercial and Federal Litigation Section published the *Social Media Ethics Guidelines* in March 2014 to provide more straightforward guidelines for how best to use social media networks. Candidly, what these written guidelines evidence is just how much has yet to be determined as to our own roles and duties in dealing with social media. Here, at least, are some red flags that might lead one to an ethicist's door.

### **BLURRED LINES**

Whether that line is between you and contacts you might make on Social Media with a judge before whom you are litigating, or with a litigant who is not your client: Beware. While none of us would deliberately engage in either of these practices, there are circuitous situations where "friends" of Facebook friends, or forwarded communications by our clients could leave us appearing vulnerable. As often as we all instruct clients to never, ever try to communicate with a judge, or with the opposing counsel, we all know a client who has tried.

Frequently, clients "forward" whole chains of emails

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inadvertently; therefore, one should never “Reply All” (and actually not even “Reply” at all) without checking the email trail. The less sophisticated the client is in using social media, the more help he or she needs and the more cautious the attorney should be in dealing with his or her communications.

Other unclear boundaries are now actually state lines: we might inadvertently be giving what could be considered legal advice outside of our licensed jurisdiction(s). Most of us remember to caution our media audience to consult with local counsel and are careful to differentiate our general opinions from legal advice. However, technology has highlighted the literally unknowable landing places of our words of wisdom, and should make us even more vigilant as to disclaimers.

We are all pretty clear as to who is a client and who is not, and that level of certainty for us is confirmed with a retainer agreement and a retainer; however, it would appear from the on-line ethics discussions on the topic that the lay public is not so clear. Sometimes on-line readers believe they are getting legal advice when that could not be further from the truth. If generalized legal discussions on-line appear to be leading to a potential attorney-client relationship in the future, that discussion should be taken off social media and redirected to private communications, and a conflict check should be done. Otherwise, privilege waivers and inadvertent conflict breaches could occur.

If the lines can be blurry on attorney-client contacts and relationships, they are clear but cloudy on advertising and our responsibilities for even what is said about us on websites and blogs. We all know that there are ethical limits as to lawyer advertisements and claims to being a specialist. What we may not be aware of enough is our ongoing duty to monitor our own websites, and to be sure that others attempting to “boost” or “endorse” us are not crossing prohibited advertising lines.

#### **TREASURE TROVES V. LEGAL PITFALLS**

What we can and cannot view on-line, even if it is technically available to us, is an ongoing concern. Viewing someone’s public profile is acceptable even when he or she is represented. However, at least the New York State Bar Association frowns on the fact that some sites might notify the “viewed” of the contact, thus causing an unauthorized communication with a represented party.

An attorney cannot and should not use any form of subterfuge, like setting up a fake “friend” or identity. New York State Bar Association Guideline No. 4.D permits a lawyer to use information provided by a client from even restricted social media against his or her represented spouse or partner, so long as the attorney did not solicit it, direct it, or participate in the overreaching.

Be very careful when directing your client as to the use of social media, even on a “going forward” basis. And with regard to the past, there is not only a duty for a client, in some instances, to preserve evidence (and you as an attorney must know and advise as to when that is), but you should also be well aware of the virtual eternal life of on-line postings, even those that were allegedly “deleted.” For future posts, of course, one can advise a client on all the dangers of social media, and even advise them to jump off entirely, but if the client is going to stay on-line, false or misleading statements may not be advised or facilitated by a lawyer anywhere, anytime.

#### **CONCLUSION**

We have long heard the maxim: “Ignorance of the law is no excuse.” The bad news is that the maxim applies to lawyers and clients alike when dealing with social media. What we are expected to know involves law we may love, and technology we may or may not love, while the latter is rapidly developing. The good news is that lawyers can apply the ethical rules to changing technology, and family lawyers have enough creativity to actually thrive on the challenges of today’s Wild West.

### **Seeking Nominations LCBA Board Member & Officers**

The nominating committee of the Lake County Bar Association will meet to consider applications for the offices of 2nd Vice President, Secretary, Treasurer and two Board of Director positions in February 2015.

The nominating committee is seeking to continue building a diverse Board which is representative of Lake County legal community. The Board of Directors meets once a month (3rd Thursday at noon) and Board members are asked to participate in various projects throughout the year. Terms commence the first Friday of June 2015. Send letters of nomination no later than February 13, 2015 to Christopher T. Boadt, Executive Director, Lake County Bar Association, 300 Grand Ave STE A, Waukegan, IL 60085

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