

Duty Calls? When Someone Is Wrong on the Internet

“You’re good at arguing. You should be a lawyer.” – Every lawyer’s origin story, ever.

In summer 2023, the State Bar of Wisconsin’s Professional Ethics Committee released a formal opinion¹ addressing what to do when someone – be it a current or former client or a complete stranger – is wrong in their online criticism of a lawyer.

But the bigger issue is that people are wrong *all over* the internet. Seriously, have you seen the internet recently? It’s a garbage fire. And given the average lawyer’s penchant for arguing about just about anything, it’s hard for some of us to avoid participating.² (“Are salt mines real?” “Is World War Z actually about zombies or is it an allegory?” “Is a beanie a hat with a propellor or a fluffy knitted pompom?” These are actual shouting-match arguments that have occurred at my law firm’s lunch table.)

You are almost never obligated to engage in online error-correction discussions, friendly or otherwise, but if you choose to do so in a law-related context, be mindful of the potential ethical implications of such engagement.

Your Seventh-Grade Lab Partner Is Wrong on Facebook

It’s late and you’re about to go to bed, and in defiance of everything you’ve ever learned about sleep hygiene, you fire up your phone one last time and see that you’ve been “tagged” in a Facebook post from someone you last saw in person when you wrote a Def Leppard lyric in their yearbook.

I sometimes call these tags “social media subpoenas” because even though they carry no legal weight, many of us feel as compelled to respond to the tag as we would to an actual subpoena. You know that getting into an internet

discussion right before bed will just keep you up another hour.³ You click anyway and learn that your buddy who had mall hair in 1987 has tagged “my friend the lawyer” in a post seeking a gut check about their own lawsuit in an area of law in which you don’t practice, but you know enough to know they’ve completely missed the mark. (Who’s bringin’ on the heartbreak now?)

If you decide to answer, be careful. The line between friendly banter and legal advice is not always clear. You’re not running conflict checks on your Facebook friends, are you? You might find yourself making a prospective client⁴ out of someone you shouldn’t – maybe someone in your firm represents the other party and you wouldn’t know about it unless you checked, and you inadvertently end up with a conflict of interest.⁵

Also, if you do decide to respond substantively, make sure you know what

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Informed consent to respond is generally required – SCR 20:1.6(a) requires consent for most communications and it is unlikely that responding to internet commentary is “impliedly authorized” by the client “in order to carry out the representation.”



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you're talking about.⁶ During the day, most of us are pretty good at turning down potential clients when they call with questions about, say, admiralty law in North Dakota.⁷ At midnight from our own bed, our guard may be down. If you're the one who ends up wrong on the internet, and Aqua Net Amy believes you were representing her and relied on your advice, that could lead to malpractice liability or disciplinary problems.

Finally, keep in mind that your conversation on a Facebook thread is not confidential or privileged. Even if the thread is limited only to "Friends" or a small custom group. Even if it is deleted later. If you must, take that conversation offline to your firm email or another private channel (and run that conflict check).

Opposing Counsel Is Wrong in the Comment Section

When we think of lawyers who practice in the public sphere, what usually comes to

mind are lawyers with prominent clients or a deliberate media presence. But even if you prefer to lie low, you might find yourself in public anyway – perhaps you represented a client at an unexpectedly contentious board of zoning appeals meeting that ended up on the news. Maybe opposing counsel has a podcast or YouTube channel and decided your divorce client's former bank's 30(b)(6) deposition was excellent clickbait.

And of course you take that bait (it's a social media subpoena in a different form), and when you do, you notice someone, identifiable as another lawyer involved with the matter, in the podcast, video, or comment section, completely mangling your client's position. Setting aside the propriety of the other lawyer making those comments in the first place, what can you do?

This scenario might be similar to responding to online criticism in that responding at all might bring unwanted

attention to a matter that otherwise could die down quietly. But your client might have reputational or other interests that suggest a response. Go ahead and confer with your client about how to proceed – SCR 20:1.4 (a)(1) and (3) requires lawyers to promptly communicate circumstances that would require their client's informed consent and to more generally keep clients apprised of the status of their matters. And, yes, informed consent to respond is generally required – SCR 20:1.6(a) requires consent for most communications and it is unlikely that responding to internet commentary is "impliedly authorized" by the client "in order to carry out the representation."

Additional considerations apply when the matter is an adjudicative proceeding (particularly one involving a criminal matter or a civil jury trial). SCR 20:3.6 limits what lawyers can say, if they know or reasonably should know their comments will be publicly disseminated and will have a "substantial likelihood of materially prejudicing"⁸ the adjudicative proceeding. What to say and whether to say anything is a fact-intensive analysis, but the good news is that lawyers may correct the record when they reasonably believe doing so is necessary "to protect a client from the substantial likelihood of undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." Even then, the correction must be limited to what is reasonably necessary to mitigate the prejudice.

"PoodleLover53207" Is Wrong on X (fka Twitter)

Some people go completely incognito on the internet (adopting non-identifying usernames and profile pictures), while others choose partial anonymity. They may have full-face pictures but, to avoid easy identification, only use their first and middle names or a different form of their name (such as a current or former married name) from one they use professionally.



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You might expect to be told, if an apparent stranger catches your attention on social media, “you don’t even know this person, why bother engaging at all?” This is useful to some extent, but the bigger issue may be that you *do* know the person.

The poodle aficionado on X might be Mrs. Peggy Smith on other social media sites but Hon. Margaret Williams on LinkedIn and, oops, on the bench in a case you have. One would hope that a judge isn’t discussing open cases in public forums, but it’s not difficult to get from “wow, PoodleLover, you’re totally wrong about World War Z” to “which reminds me of this ridiculous case I have right now.”⁹

Even when we pause for a moment and remember that there is no doom-scrolling exception to SCR 20:1.6 and then delete that unwitting ain’t-no-party-like-an-ex-parte comment before we hit “post,” it’s easy to get trapped

in heated, meaningless arguments and say something offensive. It is unlikely, absent more, for an attorney to be disciplined simply for being rude or obnoxious on the internet about something having nothing to do with law.¹⁰ Although lawyers can be disciplined for engaging in “offensive personality” in violation of the Attorney’s Oath and for harassing people on the basis of certain protected characteristics,¹¹ there

generally must be some nexus between the behavior and the lawyer’s professional activities. That said, careers are long and screenshots are forever.

Conclusion

Just put down your phone and go to bed already. I promise something new and also wrong will be there in the morning.

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ENDNOTES

¹EF-23-01, available at 96 Wis. Law. 39-42 (Sept. 2023).

²This article’s title was inspired by the excellent webcomic, XKCD: <https://xkcd.com/386/>.

³This is sometimes referred to as “revenge procrastination.” No, really. Eric Suni & Alex Dimitriu, *What is “Revenge Bedtime Procrastination”?* (updated Sept. 27, 2023), <https://www.sleepfoundation.org/sleep-hygiene/revenge-bedtime-procrastination>.

⁴SCR 20:1.18.

⁵SCR 20:1.7.

⁶SCR 20:1.1.

⁷Admiralty law in North Dakota is apparently enough of a thing for its version of Rule 7.4 to address it specifically.

<https://www.ndcourts.gov/legal-resources/rules/ndrprofconduct/7-4-1>.

⁸SCR 20:3.6(a).

⁹SCR 20:3.5(b).

¹⁰SCR 40.15, enforced by 20:8.4(g).

¹¹SCR 20:8.4(i). **WL**

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