

New Suggested General Professional Standard VII. – Use of Social Media for Business Purposes

GENERAL PROFESSIONAL STANDARDS

VII. – Use of Social Media for Business Purposes

Trial consultants may utilize social media for a variety of purposes. ASTC Members shall be aware of and sensitive to how their social media posts can create potential violations of sections of the ASTC Professional Code or pose other risks to themselves or their clients.

A. *Maintaining Confidentiality on Social Media*

As stated in General Professional Standard I.A., trial consultants shall ensure all consultant-client communications are kept confidential under the attorney/client privilege and/or the work product doctrine, unless the client gives express permission for the trial consultant to make their involvement public.² Trial consultants have an obligation to maintain the confidentiality of their clients' case information and work they do for their clients, including not disclosing case-identifying information.

B. *Providing Commentary on Active or Past Litigation*

Trial consultants shall not provide any commentary on social media sites about a case for which the consultant is currently retained or was retained in the past, without express client permission.

C. *Avoid Creating Formal Relationships via Social Media*

Trial consultants shall be diligent in not having any communications on social media that could inadvertently create a formal consulting relationship. Trial consultants shall not provide consulting advice to a non-client that the trial consultant would not otherwise give without an engagement letter in place.³

D. *Avoid Creating Conflicts with Social Media Posts*

Trial consultants shall be mindful of their connections on social media platforms and their privacy settings in order to not inadvertently create a conflict of interest via a social media post.⁴ For example, trial consultants shall not post anything about current or previous engagements that they would not want opposing counsel or the judge overseeing the matter to see.

E. *Do Not Make Any Knowingly False Statements*

Trial consultants shall not make knowingly false statements or provide false information about their competencies, areas of expertise, services they provide, or skill sets on social media.⁵ Trial consultants are responsible to monitor their own profiles and request any false information provided by others be removed.

GENERAL PROFESSIONAL GUIDELINES

II. Use of Social Media for Business Purposes

A. *Maintaining Confidentiality on Social Media*

The trial consultant should be specific in what they ask the client to approve (for example, the trial consultant's role, services provided, names of the trial team, photos, if any, that will be included in the post, and which platform on which the message will be posted).

This includes anything posted on social media such as LinkedIn, Facebook, Instagram, or TikTok, or any other social media platforms. The trial consultant should get permission, either verbally or in writing, for sharing information, including the fact of their involvement in the matter. If the client makes the trial consultant's involvement public, the trial consultant can acknowledge the client's disclosure but not disclose anything beyond that. For example, if a client thanks a trial consultant in a post, the trial consultant can acknowledge and respond directly to that post. Any disclosure beyond acknowledging the client's post should only be done with the client's permission.

Trial Consultants should not disclose any information on social media that could, whether directly or indirectly, reveal the identity of a case or the consultant's involvement in it. For example, "from my experience in a bribery case" is vague enough that no one could identify a case from just that information. However, "I helped prepare the whistleblower in a bribery case in XX venue 3 yrs ago" or, more specifically, "I helped prepare the whistleblower in a bribery case in this venue 3 yrs ago involving XX type of public official" might make it very easy for someone in the legal community in that venue to identify the case.

Similarly, trial consultants often post congratulatory statements to trial teams on social media and should also be cautious about the wording in these posts. A post that shares an article about a courtroom victory and simply says, "So happy for this team" or "Congratulations to a great team" does not disclose whether the consultant was involved – that could be said whether the consultant was retained or not. On the other hand, a post that says, "So proud to have been part of this team" does disclose involvement and should only be posted with client permission.

B. *Do Not Make Any Knowingly False Statements*

Trial consultants shall monitor their social media profiles to ensure both their own information is current and accurate, and that others have not posted inaccurate information about them on the consultant's social media sites. This includes monitoring LinkedIn endorsements to ensure no one makes false claims about a trial consultant's skills or expertise.

GENERAL PROFESSIONAL STANDARDS AND GUIDELINES: COMMENTARY

Standards

Maintaining Confidentiality on Social Media

² The Professional Code references trial consultants' need to maintain confidentiality in the following sections:

General Professional Standards I – Consultant-Client Relationship (I.A., I.B., I.C., I.D. [if passed])

General Professional Standards IV – Advertising and Publicity

Practice Area C – Small Group Research Duty to Clients (C.II.A.) and Duty to Participants (C.II.B)

Practice Area F – Online Research Duty to Clients (F.I.B. and F.I.C.)

Practice Area G – Visual Communication/Trial Technology (G.I.)

Avoid Creating Formal Relationships on Social Media

³ This is both for the trial consultants' and potential client's protection. This standard is similar to guidance given to attorneys about communications initiated via their website in *ABA Formal Opinion 10-457 (Lawyer Websites)*.

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-10-457.pdf

Avoid Creating Conflicts with Social Media Posts

⁴ The Professional Code includes a standalone General Professional Standard regarding conflicts of interest, upon which this General Professional Standard expands specific to social media.

General Professional Standards – Conflicts of Interest

Do Not Make Any False Statements

⁵ The Professional Code includes Ethical Principles and General Professional Standards regarding not making false statements, upon which this General Professional Standard expands specific to social media. This application to the use of social media is similar to the New York County Lawyers Association Professional Ethics Committee Formal Opinion on attorneys' use of social media.

Ethical Principles I – Competence

General Professional Standards III – Training and Provision of Services

General Professional Standards IV – Advertising and Publicity

New York County Lawyers Association Professional Ethics Committee Formal Opinion 748 (March 10, 2015)