he way attorneys communicate with each other personally and professionally has undergone a well-documented sea change over the past decade. What used to be said to one friend over a beer after work is now projected to hundreds of friends on social media, semi-public fora in which stray thoughts, posted without deliberation, can be shared and commented on by thousands of people, some of whom are personal friends, some of whom are professional contacts, and many of whom are complete strangers.

Although the forms of communication are fundamentally different from even 10 years ago, the profession’s conception of attorney-client communication and the rules of confidentiality have not kept up with the times. Specifically, neither indigent defense offices and agencies nor law schools have done a very good job of training lawyers (young ones, who have grown up with social media, as well as older ones, who did not) about the pitfalls of talking about their clients and their cases on social media.

Some state bar associations have begun to address new ethical questions that arise from social media and technology, but these guidelines tend to focus on advising clients about their own uses of social media, as well as lawyers’ use of social media when advertising themselves or giving out advice. (See, e.g., COMMERCIAL & FED. LITIG. SECTION, N.Y. STATE BAR ASS’N, SOCIAL MEDIA ETHICS GUIDELINES (2015), available at http://www.nysba.org/socialmediaguidelines/.) In general, they do not acknowledge, address, or provide any guidance on a lawyer’s discussion of case-related information on social media.

This article argues that the community of criminal defense lawyers needs to be more intentional about this training and about its own behavior, and adopt (as many corporate law firms have) a rigid rule against social media posts that have anything at all to do with client matters. For example, many law school clinics employ bright-line rules about posting any information about the cases students are working on, in any online or social media forum. This prohibition goes farther than suggested by some who have written about ethics and social media. (See Michael E. Lackey Jr. & Joseph P. Minta, Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging, 28 TOURO L. REV. 149, 166–67 (2012).) These authors assert that an appropriate solution to avoid sanctions occurring out of social media use is to “never communicate a false statement or post disparaging comments.” (Ibid.) But the prohibition on social media posts should not be limited to false or disparaging comments. In many law school clinics, posting anything at all related to any clinic case is strictly prohibited, and violation of the rule is grounds for expulsion from the clinic.

As this rule is explained to clinical students, faculty acknowledge that the students will see, and likely have already seen, lawyers whom they admire and respect violate this rule, sometimes daily. This presents an opportunity to teach the importance of the ethical rules, and also the reality that these rules are not always followed, even by good lawyers.

Some of the bright-line rules required of law students in a clinical setting may be unrealistic or even unnecessary to expect of seasoned lawyers who have the judgment and experience...
to assess when it might be permissible, in furtherance of the client’s interest, to treat some of the rules as more gray than black and white. And surely the vast majority of lawyers have at one time or another discussed a client matter with a friend or partner in violation of the ethical rules discussed in this article. But whether justified or not, the casual, oral violation of ethical rules governing the revelation of information about client matters should never be extended to social media. For the reasons discussed in this article, the rule against ever posting anything about a case on social media is one that all criminal defense lawyers can and should follow, with virtually no exceptions.

In short, this article proposes that criminal defense offices and agencies adopt policies requiring strict compliance with a blanket rule against case-related social media posts because (1) the harm in posting about client matters is potentially great; (2) the harm is very easy to avoid by not posting; and (3) the benefits of posting are nonexistent for the represented clients.

THE RULE AND ITS VIOLATIONS

Forty-six states adopt ABA Model Rule of Professional Conduct 1.6 virtually verbatim. Four states have minor variations. This rule, prohibiting the disclosure of information relating to client matters, is famously broad. Specifically, it states: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation.” The provision goes on to include exceptions allowing (or in some states mandating) disclosure of information in relatively rare situations, such as when disclosure may prevent the client from committing a crime or to establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

Just because a certain fact related to a case may be in a public record (say, in the court file maintained by the clerk) does not provide justification for revealing the fact in public. There is no “public record” exception to Rule 1.6. Even if the information is already in the public domain, it is a violation of the rule for the lawyer to reveal it. This aspect of the rule often surprises young lawyers, whose inclination is usually that it cannot be an ethical violation for a lawyer to “reveal” information that is already a matter of public record. But indeed, as noted above, Rule 1.6 contains no such exception, and it is not difficult to conjure scenarios in which the disclosure of information that is technically in the public domain would work against a client’s interests. For example, discussion on social media of the fact that a particular lawyer has represented a particular client in a criminal case violates Rule 1.6 unless it falls within one of the narrow permitted exceptions.

Not surprisingly, the violations of Rule 1.6 come in a variety of different forms, with correspondingly different implications. Professor David Chavkin helpfully defines several categories of Rule 1.6 violations. (David F. Chavkin, Why Doesn’t Anyone Care about Confidentiality? (And, What Message Does That Send to New Lawyers?), 25 GEO. J. LEGAL ETHICS 239, 241 (2012).)

First, lawyers and judges tell “war stories” in both law school and continuing legal education (CLE) settings. Chavkin views this practice somewhat generously, describing them as “facilitat[ing] learning . . . , with the goal of helping students become more knowledgeable and more ethical practitioners.” (Id.)

Second, lawyers discuss their cases with other lawyers in order to seek consultation or facilitate brainstorming about strategic decisions. These conversations are usually “implicitly authorized in order to carry out the representation,” and thus usually not violations of Rule 1.6 at all.

The final category is “shoptalk,” which Chavkin describes as the sharing of “client stories with other practitioners, friends, or spouses or partners simply as a social device.” (Id.) The conventional view of “war stories” is closer to what Chavkin calls “shoptalk,” but this article adopts his terminology for now, the difference being that “war stories” are used in some kind of educational setting, and “shoptalk” is more likely to be for entertainment, community building, or therapeutic release (i.e., “blowing off steam”).

Chavkin argues that the first category of Rule 1.6 violations (“war stories”) serves a public purpose vis-à-vis advancement of the legal profession, and the second category (consultation with other lawyers) promotes the private purpose of advancing the representation of a particular client. He proposes refinements of Rule 1.6 that would clarify the appropriateness of these kinds of disclosures. Chavkin, however, proposes no accommodation for the final category—“shoptalk.” Such disclosures, he contends, are never justifiable: “Whatever societal interests might be furthered by disclosure of client confidences in other contexts, entertainment of one’s friends hardly advances important public policies.” (Id. at 260.)

Professor Carol Andrews, on the other hand, has argued that Rule 1.6 is a “flawed” rule that “does not reflect the realities of law practice” and is nearly impossible for lawyers to fully comply with in all instances. (Carol Rice Andrews, Highway 101: Lessons in Legal Ethics That We Can Learn on the Road, 15 GEO. J. LEGAL ETHICS 95, 108–09 (2001).) Andrews argues that one could imagine a different rule, one that precluded the disclosure only of information that was not otherwise in the public domain. Indeed, the Restatement (Third) of the Law Governing Lawyers section 59 would not exclude “information that is generally known” from the definition of information that must not be disclosed. But the Restatement is not the governing law in any jurisdiction, and ethical rules in virtually every state do prohibit a lawyer from revealing any information “related to the representation of the client,” even if it is a matter of public record and even if the name of the client is not used. There is virtually nothing about a case that is not “related to the representation of the client.” Revealing anything about a case violates Rule 1.6 unless it falls within one of the narrow permitted exceptions.

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[a] strict reading of Model Rule 1.6 would not permit a lawyer to talk about her client or her client’s matter even if she were to cloak her description through use of anonymous names or omission of details because such discussions necessarily reveal some information relating to the representation. The literal terms of the rule also would bar the lawyer from engaging in “shoptalk” with lawyer friends and getting advice from others, including ethical advice from former law professors or others. Even the time-honored tradition of telling “war stories,” including those that I tell as a professor, are seemingly within the Model Rule 1.6 prohibition.

( Id. at 109 (footnotes omitted).)

Andrews’s descriptive interpretation of the rule appears correct, with one exception. What she calls “getting advice from others” is the kind of consultation that likely falls within the exception for revelations that are “impliedly authorized in order to carry out the representation.” Those revelations are not barred by Rule 1.6. But it is true that Rule 1.6 indeed prohibits “shoptalk” and “war stories,” even if identifying details are excised and even if the relevant facts are or were in the public domain.

Chavkin also agrees with Andrews’s broad reading of the rule, but he is less convinced that compliance with the rule is impractical. Chavkin asks “whether [compliance] is merely ‘unlikely,’ given the human tendency to gossip. Why would it be so terrible if lawyers could not talk about their cases with their spouses/partners and others? Why couldn’t a lawyer answer the question ‘How was your day, honey?’ while respecting all ‘information relating to the representation of a client’?” (Chavkin, supra, at 263.)

It is true that the human tendency to gossip does not excuse routine violations of clear ethical rules. But, it must be readily acknowledged that there are times when strict compliance with Rule 1.6 can be impractical, and that the rule could be sensibly revised (as Chavkin proposes) to allow, in particular, for the use of teaching examples that the experienced lawyer/teacher is confident in his or her judgment will not in any way negatively impact the client.

As for “shoptalk,” surely most attorneys (and clinical teachers) violate Rule 1.6, whether in teaching or in one’s personal life (with friends or partners). In the criminal and capital defense context, there can be a therapeutic value to “shoptalk” that goes beyond the mere entertainment of friends. Some of these violations of Rule 1.6 are more defensible, more justified than others. Many thoughtful lawyers who engage in “shoptalk” that technically violates Rule 1.6 practice what is essentially a “harm reduction” approach to inevitable violations of the rule. It’s going to happen, so be careful and discreet in a way that minimizes the risk and potential damage to the client’s interests.

Disclosure of information “relating to the representation of a client” over social media, however, and particularly “shoptalk,” demands the practice of complete abstinence. (The only rare exception is when there is an explicit social media strategy on behalf of a client, such as during a clemency campaign or to raise public awareness about some aspect of a case. Such disclosures would not violate Rule 1.6 because they are impliedly (and sometimes explicitly) authorized in order to carry out the representation.) The nature of social media multiplies exponentially the harm that can arise from communication among friends or partners that takes place not orally in a quiet conversation in a bar or bedroom but in writing, and in a public forum. The platform of social media transforms “shoptalk” from a practice of relatively little risk to one with a much greater chance of doing actual harm.

In other words, there is one routine violation of Rule 1.6 that is neither impractical nor difficult to avoid violating. Simply put, no criminal defense attorney should ever violate Rule 1.6 by discussing aspects of a case on social media. As discussed below, large corporate law firms have strict prohibitions on social media posts about client matters, and it is exceedingly rare to see corporate attorneys violate those policies. When criminal defense lawyers post information about their cases on Facebook—any information—not only are they undeniably violating a clear and unequivocal ethical rule, they also are sending a damaging message about the value of client confidentiality in the criminal defense context and unnecessarily risking harm to their clients’ interests.

COMMON VIOLATIONS OF THE RULE ON FACEBOOK

With the rule in mind, here are examples taken from Facebook, because it is the most prevalent form of social media among lawyers. Note that the principles discussed here apply with equal force to Twitter, Instagram, and any future medium of social media that involves disseminating information to anyone other than members of a legal team protected by attorney-client privilege. These are all actual social media posts culled from news stories (a forum in which one never wants a case-related Facebook post to emerge) and Facebook posts of criminal defense attorneys. They are divided into three categories, and identifying details have been removed or changed.

The “egregious.” There have been some highly publicized examples of lawyers or law students, mostly young ones, who have posted highly sensitive or embarrassing information about their clients or cases online. For example, in 2009, a law student intern at the San Francisco Public Defender’s Office published a blog that mixed “personal accounts described in a sarcastic and light tone with stories about her internship,” including accounts of confidential strategy discussions within the office, some of which made their way into the local legal newspaper. (See Evan Hill, PD Intern Blog Alleges Stereotyping, Recorder, Jan. 12, 2009, available at http://www.allenmatkins.com/~media/111BE01F9FE40B68812A30207AD6844.ashx.) Additionally, one Illinois public defender was fired in 2008 and faced disbarment for posting detailed information about individual clients and court proceedings on her blog. (See In re Disciplinary Proceedings against Peshek, 798 N.W.2d 879 (Wis. 2011).)

Anyone but the small number of people who would engage in such conduct can easily see why it is professionally unacceptable and personally disastrous. The fact that these cases pop up from time to time does highlight, though, the ethical
responsibility to train new lawyers about the consequences of discussing client matters on social media, particularly when the next generation of lawyers will have been raised in an environment where social media is such a predominant mode of social interaction. (Lawyers also need to be warned about and trained to avoid even blogs and social media posts that they think are anonymous but are actually both Google-searchable and capable of being de-anonymized by government officials.) (See If You Think You Are Anonymous Online, Think Again, NPR: ALL TECH CONSIDERED (Feb. 24, 2014), http://www.npr.org/blogs/alttechconsidered/2014/02/24/282061990/if-you-think-youre-anonymous-online-think-again.)

The “innocuous.” On the far other end of the spectrum are Facebook posts that would likely strike many as innocuous. For example, this category would include the practice of posting on Facebook flight information for upcoming or ongoing trips. For example, a lawyer flying from San Francisco to Atlanta to visit a client on death row might post “SFO => ATL” as a status update on Facebook.

Other examples do not explicitly refer to specific cases, but nonetheless reveal “information related to the representation of a client.” For example: “I’m preparing for my oral argument in the Sixth Circuit tomorrow.” (A friend of the poster commented, “Which one is yours? Mine is in the afternoon. This is a tough panel.”)

Another example: “I’m so sick of writing this brief.” And a similar one: “I wish this suppression motion would write itself.” Another one: “Studying up on statutes of limitations . . . again.”

This article explains in more detail below how these seemingly innocuous posts can be harmful, i.e., how an otherwise trivial violation of Rule 1.6 (telling a friend where you are traveling, for example) can have larger ramifications for the client when broadcast, potentially, to the judge, the prosecutor, the media, and others.

The “middle ground.” Occupying a large middle ground between the “egregious” and the “innocuous” are inappropriate posts that mention aspects of cases that are usually ongoing or recently completed. Sometimes the posts do not seem to refer to a specific case but refer to the prosecution generally, or make rather vague allusions to previous cases, or both. Consider these examples:

• “We have a jury . . . and they don’t suck this time! Woo hoo!” (A friend responded to this post: “Unless they convict . . . then they SUCKED!”)
• “Why do all prosecutors (especially the one I am in trial with right now) lie so much?”
• “Great result! Not guilty on the felony count!”
• “My oral argument tomorrow may not be pretty (because I didn’t prepare over the weekend) but if anyone is in town, come watch!”
• “I crossed a lying cop today. I am such a badass.”
• “Wish me luck, I’m off to rescue my client from the prison-industrial complex.”
• “Tried to pull one over on the judge today thinking he wouldn’t know the law, but it didn’t work. Oh well.”
• “ Didn’t win it, but I poured everything into my first trial and it was a great learning experience.”
• “ I want to thank everyone who supported us in this grueling nine-week trial. Our social work expert was heroic in her ability to develop a trusting relationship with our client (not an easy task, as many of you know), and of course the 12 members of the jury were incredibly brave to hold firm and do the right thing.”

• “About to start a long capital trial. Fingers crossed for a life sentence.”

WHAT’S THE HARM?
One of the frustrations of holding new lawyers to a bright-line rule of never violating Rule 1.6 is that they see experienced lawyers whom they respect posting about their cases on Facebook all the time—usually quick, often breezy status updates like the ones excerpted above. And of course, lawyers, even those careful never to post information about their cases on social media, violate Rule 1.6 in other ways quite often. In addition to seeing lawyers violate the rules, students often ask, what’s the harm anyway? Why do the examples listed above, particularly those in the “innocuous” and “middle ground” categories, warrant censure?

Violates the rule. To be clear, all of these examples violate Rule 1.6. All of them reveal information related to the representation of a client. And, using Chavkin’s taxonomy, discussion or even brief mention of a case on social media is—at best—“shoptalk.” None of the examples above serve the client’s interests or are “impliedly authorized in order to carry out the representation,” nor do they even serve any public interest. These posts were not necessarily written in bad faith or as expressions of ill will. The same statements made in the confines of an office protected by the attorney-client privilege and the bounds of confidentiality would be perfectly appropriate, and indeed sometimes necessary to foster collegiality and comradery.

But lawyers have, by taking the oath of office, given up the right to find professional comradery among friends and family members who are not members of the legal team. Moreover, lawyers representing indigent clients (who had no choice in their representation) have an especially heightened duty to comply with ethical rules designed to protect their client’s interests. And while, as discussed below, it is difficult for most lawyers to entirely excise all “shoptalk” from their interactions with friends, colleagues, and partners, it is actually quite easy to avoid engaging in shoptalk on social media, where the potential for harm is much greater. The fact that it inarguably violates the governing ethics rules is reason enough to avoid doing it. But there are other reasons as well.

Lack of control. Once a statement is posted on social media, it can be shared, commented on, misquoted, misunderstood, and exploited—by anyone, to the possible detriment of the client’s interests.

Few are those who understand Facebook’s frequently changing privacy settings well enough to ensure that a status update is seen only by one’s own Facebook “friends.” And even if one’s friends are the only people who are meant to see a particular status update, surely there is no obligation on the part of the friends not to share or discuss the update with someone else, who may then share it with others, or post it in an even more public-facing forum.
Clinical teachers often ask their students to imagine the prosecutor, judge, client, jury, witnesses, and media reading their posts on social media. Consider even some of the “innocuous” examples above. Do you want all of these people to know when you are flying across the country to meet with a client? (Even if the post just contains the airport identifiers, (1) sometimes that is enough to identify the reason for the trip, and (2) a commenter may reveal this information in response to your post.) Do you want all of them to know you are struggling to finish a brief that is due tomorrow? Do you want all of them to know you think the prosecutor you are up against in court tomorrow is a liar? Do you want all of them to know that you are researching the law around a particular subject? That you are pleased with a conviction on only the misdemeanor count? That your goal is to secure a life sentence? That you think the judge is complicit in the perpetuation of the prison-industrial complex? That you believe your client is too difficult to develop a trusting relationship with? That you think you are a badass? Would you ever call up the prosecutor and share any of this information with him or her? Would you put it in an e-mail to the judge?

The nature of social media is such that a Facebook post that may fall into the “innocuous” category can take on a life of its own, particularly as it is shared and commented on in the social media arena. Consider a Facebook post celebrating a trial victory: “Jury came back today—we won!” While the post did “relate to the representation of a client” and thus violated Rule 1.6 (and therefore should not have been posted), it was, in fact, relatively innocuous. A friend of the poster, however, commented: “Despite wacko witnesses and a stupid judge, you prevailed—nice work!” It is not difficult to imagine this exchange making its way around a small legal community, and the troubling implications and ramifications are numerous. (For example, one concrete concern would be that the judge or his or her law clerk would somehow get wind of the post, and the comment, and assume that the poster had told the commenter that the judge was “stupid”.)

There is admittedly some gray area at the margins of what counts as “related to the representation of a client.” For example, consider a Facebook post stating that “I’m going to be traveling a lot this spring—anyone have a recommendation for a good suitcase?” The statement might relate to the representation of a client (or more than one), and may violate Rule 1.6 under the strictest possible interpretation. Reasonable people could differ on whether it is an appropriate social media post. A concern that weighs against posting, however, is the lack of control one has over the comments on Facebook. This innocuous post may generate an unwelcome comment such as the following from a friend or colleague: “Oh, is this for the Jones case you told me is probably going to trial in Alabama next month? Good luck, I know you think you have an uphill battle.”

**Lawyer’s reputation.** The lawyer’s reputation is also at risk. Consider this one example from a different context: a Missouri obstetrician posted the following about one of her patients: “So I have a patient who has chosen to either no-show or be late (sometimes hours) for all of her prenatal visits. . . . She is now 3 hours late for her induction. May I show up late to her delivery?” (Amy Graff, *OB-GYN in Trouble for Complaining about Patient Online*, S.F. CHRON., Feb. 7, 2013, [http://blog.sfgate.com/sfmoms/2013/02/07/ob-gyn-in-trouble-for-complaining-about-patient-online/](http://blog.sfgate.com/sfmoms/2013/02/07/ob-gyn-in-trouble-for-complaining-about-patient-online/)) Although the doctor posted this comment on her private Facebook page, it was quickly shared, and ended up in the news. In fact, it became the subject of great debate about whether she should be fired for discussing a patient on Facebook, and whether doctors should ever post information about patients, even without naming them.

The relevant ethical rules for the medical profession are obviously beyond the scope of this article, but the case serves a cautionary function. It is not difficult for a Facebook post to be shared, and it does not have to “go viral” for it to cause significant damage to a lawyer’s reputation. No criminal defense lawyer should want a reputation for casually revealing information about a client in a public forum. Avoiding social media is an easy way to make sure it does not happen.

**Sends the wrong message about the dignity of our clients.** In addition to concern for the client’s legal interests and the lawyer’s professional reputation, when experienced lawyers post about their cases on Facebook, it sends a troubling message to young lawyers—about both the dignity of their clients and the criminal defense bar’s regard for the sanctity of the rules of confidentiality.

Consider the Facebook post above celebrating a win “on the felony count” in a criminal trial. The implication that the client was “only” convicted on the misdemeanor count may very well be cause for celebration—within the confines of one’s office. But the public celebration of a client’s conviction—even on a misdemeanor—is both unseemly and disrespectful to the client. In a system in which our clients often literally have no voice, we have a duty not to speak in a way that further disempowers them, or in ways that do not represent their views and interests. The sample posts above not only undermine our clients, they also undermine the work we do to ensure that our clients are treated with dignity and respect in a system, and in a society, that too rarely acknowledges their humanity.

Indeed, while many respected criminal defense lawyers post information about their cases on Facebook, the uncomfortable truth is that attorneys who work at large corporate law firms almost never post anything about their firm’s cases on social media. Most corporate firms have very explicit policies against posting any information about a case in any social media forum. For example, the huge corporate firm Milbank has a clear policy stating that “[a] lawyer or administrative employee may not post or otherwise disclose any information (anonymous or otherwise) that relates to, or can be construed to relate to, client matters.” (See Joe Patrice, *BigLaw Firm Holds Associates to Strict Social Media Policy*, ABOVE THE L. (Dec. 9, 2013), [http://abovethelaw.com/2013/12/biglaw-firm-holds-associates-to-strict-social-media-policy/](http://abovethelaw.com/2013/12/biglaw-firm-holds-associates-to-strict-social-media-policy/).) Every public defender office and law school clinic should have a similarly unequivocal rule.

Nobody in our profession should more zealously guard the interests of our clients than lawyers representing people facing criminal charges. The fact that indigent clients are less likely to see social media posts about their cases than the paying clients of corporate law firms makes it more important to avoid engaging in the practice. We owe this strict duty to indigent
clients who have no say in who ends up representing them or what is said about them in public fora.

CONCLUSION
The prohibition on using social media as a medium for discussing cases is as simple as it is routinely violated, at least by criminal defense lawyers. Are all of the examples posted above likely to result in harm to the client, damage to the lawyer’s reputation, or a weakening of the criminal defense bar? No. But some will, and every one of them both violates Rule 1.6 and is easily avoided.

Clinical law students are taught that every action taken in a case should be a deliberate decision, a conscious choice. The best litigators think through every aspect of their work, from wording in a brief to what they wear to court to what time of day they interview a key witness. Hundreds of microdecisions like these form and shape the representation of a client. When an attorney writes a post about a client matter on Facebook, she is making a choice—not just about her own social life, but also about her client’s case. Viewed through that lens, it is virtually never appropriate to click “post.”

The focus on improper disclosures on social media, and Facebook in particular, is not meant to suggest that other oral and written violations of Rule 1.6 are not equally problematic. Many of them are. The difference is that there is no acceptable justification for posting information about a case on Facebook or some other form of social media, and sending your comments or thoughts about a client matter into an uncontrollable public space.

Carol Andrews argues that, “[l]ike most people, lawyers seem to have a ‘need’ to talk about their work even though such talk violates their professional duty. Indeed, leading scholars on legal ethics have argued that some forms of prohibited revelations, such as lawyer shoptalk, not only are commonplace but are valuable to the training and support of lawyers.” (Andrews, supra, at 109–10.) The use of “shoptalk” is not an acceptable violation of Rule 1.6, but it must be acknowledged that many, if not all, lawyers have crossed that line on occasion.

The difference between oral “shoptalk” with one’s spouse, friends, or students and posting the online equivalent of “shoptalk” on Facebook is that the latter is significantly easier to avoid doing altogether, and potentially more harmful. Until social media interaction entirely supplants actual person-to-person communication, it will always be quite easy to follow the rule advocated here: never, ever post anything even remotely “related to the representation of a client” in any social media forum.