

Social Media and Common Ethical Problems

The California Rules of Professional Conduct govern attorney and law firm content published on the internet and attorney or law firm advertising or marketing websites and lay out the general requirements all lawyers and law firms must abide by in advertising and solicitation.





LINKEDIN. AVVO. FACEBOOK. TWITTER. THESE are just a few of the many social networking websites in today's digital world that provide professionals with a variety of new avenues for communication, networking and marketing.

Today, attorneys have the unprecedented ability to grow their presence in the legal field, make a name for themselves in the blogosphere, and market their practices to potential clients as social media traverses old barriers such as time and distance and allows new relationships to be built and fostered.

Though the advantages of social media and the digital age are seemingly limitless, this new world also comes with a minefield of hazards for unprepared attorneys, while the ever-changing digital landscape raises ethical questions attorneys must address before reaping its benefits.

For example, how can attorneys make sure their websites and blog posts comply with their state's advertising requirements? How should they monitor their online presence so they do not disclose privileged client information? How do they avoid the unauthorized practice of law when blog posts are sent across the world? Or, how can attorneys avoid inadvertent attorney-client relationships when they answer postings in online chat groups?

This article discusses these social media quandaries and tries to provide some guidance for attorneys to monitor their presence in the social media sphere.

Legal Advertising

The California Rules of Professional Conduct govern attorney and law firm content published on the internet and attorney or law firm advertising or marketing websites. These rules state the general requirements all lawyers and law firms must abide by in advertising and solicitation.

The rules for websites and advertisements maintained by California attorneys were revised on November 1, 2018, when the state's new Rules of Professional Conduct became effective.¹

The California State Bar's regulation of attorney advertisements and solicitation, previously under Rule 1-400, were reorganized under Rules 7.1 through 7.5.²

However, the fundamental principle of Rule 1-400 remain unchanged. Both Rule 1-400 and new Rule 7 focus on ensuring that attorney advertisements or solicitations are truthful, not misleading, clearly identifiable as advertisements, and ensure the advertiser's accountability.

The Rules also prohibit lawyers from making any false or misleading communication, regardless of the medium.

This prohibition includes statements which are simply untrue, as well as statements which may be intentionally deceptive or misleading due to omitted facts.³

In 2012, the State Bar's Standing Committee on Professional Responsibility and Conduct issued a formal ethics opinion with guidelines and ethical restrictions on California attorneys when using social media advertising.⁴

The opinion states that Facebook and other social media advertising is subject to the same California Bar Rules as traditional advertising and those rules prohibit false and misleading advertising.⁵

In California, "material posted by an attorney on a social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a 'communication' within the meaning of Rule 1-400 (Advertising and Solicitation) of the Rules of Professional Conduct of the State Bar of California."⁶

The same is true under new Rule 7 of the Rules of Professional Conduct.⁷

A communication is defined as "any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present or prospective client."⁸

Further, a "communication or solicitation shall not contain any untrue statement or any matter, or present or arrange any matter in a manner or format which is false, deceptive or which tends to confuse, deceive, or mislead the public; omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, nor misleading to the public; fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be, that is in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct."⁹

The State Bar has considered several hypothetical online postings. For example:

- ❶ "Case finally over. Unanimous verdict! Celebrating tonight."
- ❷ "Another great victory in court today! My client is delighted. Who wants to be next?"
- ❸ "Won a million-dollar verdict. Tell your friends and check out my website."



Kate Wallman is a corporate and franchise attorney at Lewitt Hackman in Encino. She can be reached at kwallman@lewitthackman.com.

- ④ “Won another personal injury case. Call me for a free consultation.”
- ⑤ “Just published an article on wage and hour breaks. Let me know if you would like a copy.”¹⁰

In an opinion, the Bar found that examples one and five were not communications under Rule 1-400(a) because they did not contain a message or offer “concerning the availability for professional employment.”¹¹

Therefore, those postings were not advertising and did not have to comply with the standards of Rule 1-400(E).

Examples two, three, and four however, contained explicit language suggesting the availability for professional employment. As a result, those posts are seen as communications, subject to Rule 1-400’s standards for attorney advertising.¹²

The Bar found several problems with examples two, three, and four under California’s rules for attorney advertising.

Example two violates the restrictions on client testimonials. A California attorney cannot publish communications that contain testimonials for that attorney unless the communication also contains an express disclaimer, while all three examples fail to explicitly state that they are advertisements.^{13 14}

Finally, example two offers an improper guarantee or prediction of winning.¹⁵

Formal Opinion 2019-199

In 2019, the State Bar Standing Committee on Professional Responsibility and Conduct issued Formal Opinion 2019-199, which details an attorney’s obligations concerning third-party website profiles advertising on the attorney’s behalf and concludes that the rules governing attorney advertising apply to an individual who adopts any such profile.^{16 17}

All media attorneys use to promote their professional legal services are regulated by Rules 7.1 and 7.2 of the California Rules of Professional Conduct (RPC) and are subject to the limitations laid out in the Business and Professions Code, Sections 6157.2 through 6258.3.¹⁸

Attorneys licensed to practice in California should be aware of the advertising rules when posting anything online—simply, if an attorney’s post meets the definition of a communication, the attorney must comply with California’s rules regarding advertising.

For example, Business and Professions Code section 6157.1 prohibits any false, misleading or deceptive statement in an advertisement, while section 6157.2 prohibits the

inclusion of any “guarantee or warranty regarding the outcome of a legal matter.”¹⁹

New Rules 7.1 through 7.5 of the RPC lay out even more detailed requirements. Rule 7 explains that even statements which are true, but misleading, may violate an attorney’s ethical obligations.²⁰

Comment 3 to new Rule 7.1 notes that a truthful statement may be misleading if it “omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading,” or if it creates a “substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.”²¹

Similarly, Comment 4 to new Rule 7.1 explains that even a truthful statement regarding the lawyer’s achievements on behalf of clients or former clients, or a testimonial or

endorsement, may be misleading and thus a violation, if “presented so as to lead a reasonable person to form an unjustified expectation” that they could obtain the same results.²²

Most attorney advertisements in California must identify at least one attorney, by name, who is responsible for placing the advertisement even if a firm is identified.

Under Rule 7.2(c), both the name and address of at least one responsible attorney must be identified.²³



Though the advantages of social media and the digital age are seemingly limitless, this new world also comes with a minefield of hazards for unprepared attorneys.”

Confidential Information

One of an attorney’s most sacrosanct duties to a client is confidentiality. The ease of sharing information through social media, and the inherent informality of social media websites, however, increases the danger of breaching that trust.

Disclosure of confidential client information can occur in a variety of ways.

Though websites, blog posts, LinkedIn and Facebook status updates, and Tweets all allow instant publication and dissemination of information, the informal setting of a social media website does not excuse an attorney’s improper disclosure of confidential information.

Furthermore, understanding how these websites work to assess their security is critical for monitoring ethical compliance. The State Bar has stated that if an attorney “lacks the necessary competence to assess the security of the technology, he or she must seek additional information or consulted with someone who possesses the necessary knowledge.”²⁴

California’s broad duty of confidentiality is found in § 6068(e)(1) of the Business and Professions Code, and in the California Rules of Professional Conduct, Rule 1.6, which requires attorneys practicing in the state to “maintain inviolate

the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”²⁵

The sole exception permits revealing confidential information relating to the representation of a client to prevent a criminal act likely to result in death or substantial bodily harm.²⁶

In addition to not intentionally disclosing confidential client information, a lawyer’s duty of competence under California Rule 1.6 requires that reasonable precautions be taken to safeguard against unintended disclosure.²⁷

Ethical Risks

The Los Angeles County Bar Association’s Professional and Ethics Committee published an opinion on the ethical risks in social media. It noted that online communications present particular risks for attorneys and for protection of confidential client information.^{28 29}

The Association discussed an example of an attorney at a conference with a client during which the client revealed facts that were detrimental to the client or the client’s case.³⁰

After the conference, the attorney disclosed those facts online when discussing a client whose name the attorney did not reveal.

The Bar Association noted that although the attorney might believe the facts could not be associated with the particular client, an opposing party or third person might be able to infer the client’s identity from the context of the disclosure.³¹

The Bar also found that the disclosure by the attorney would likely not constitute waiver of the privilege, but that the opposing party could use the underlying facts that were disclosed during the attorney-client communication to the client’s detriment or embarrassment.³²

Attorneys must protect client information diligently and carefully. Posting seemingly casual information about an attorney’s day or meeting with a client may have greater consequences than an attorney can imagine.

Further, attorneys should be aware that the duty of confidentiality does not end with termination of a professional relationship and even may apply even when the facts are already part of the public record.³³

In addition, an attorney must always comply with the duties regarding confidential client information and an attorney’s online postings or other activities do nothing to negate this responsibility.

Ultimately, using client information in social media is best done very sparingly with extreme caution, or, perhaps even better, not at all.

Unauthorized Practice of Law

A basic tenet of legal practice is that attorneys can practice law only in jurisdictions where they are licensed, with a few exceptions. Social media, however, knows no geographic boundaries as people can access an attorney blog or website from anywhere in the world.

While this ease of access is one of the most powerful benefits of the internet and social media, it poses ethical problems regarding the unauthorized practice of law.

In California, unauthorized practice is more than a disciplinary violation; it is also a misdemeanor, while a physical presence in the non-licensed jurisdiction is not required to trigger a violation.^{34 35}

Facebook comments, interactive Tweets, and blogs with comment features are examples of situations where attorneys might find themselves interacting with non-lawyers, inadvertently and unethically providing legal advice to someone who does not live in the state where they are licensed to practice.

The State Bar has recommended its attorneys add the following content to their websites to avoid any confusion that they are advertising in other jurisdictions:

- An explanation of where the attorney is licensed to practice law,
- A description of where the attorney maintains law offices and actually practices law,
- An explanation of any limitation on the courts in which the attorney is willing to appear; and,

- A statement that the attorney does not seek to represent anyone based solely on a visit to the attorney's website.³⁶

Also, when posting online, attorneys should avoid answering specific legal questions and should instead focus on providing generalized information.³⁷

Attorneys can also turn off comments on a posting or not respond to a comment—two simple, but effective, techniques that can help prevent interactive communications that could lead to an unintended attorney/client relationship.

Inadvertent Attorney/Client Relationships

There is a serious risk of inadvertently forming attorney-client relationships through online actions.

The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion 2003-161 examined such a circumstance—a communication made in a non-office setting by a person seeking legal advice may be entitled to protection as a confidential communication when the attorney makes no agreement of confidentiality and does not accept the case.

The Bar concluded that the communication may be entitled to protection under two circumstances—first, if an attorney-client relationship is created by the contact or, second, the attorney's words or actions induce in the speaker a reasonable belief that the speaker is consulting the attorney, in confidence, in his professional capacity to retain the attorney or to obtain legal services or advice, even if no attorney-client relationship is formed.³⁸

To avoid creating an inadvertent attorney/client relationship, attorneys must consider whether information they post on a social media website would create the reasonable belief by a website visitor that they are consulting an attorney to obtain legal advice or services.

It is an attorney's responsibility to make clear to the website visitor that an attorney/client relationship either has or has not been created.³⁹

When using social media, attorneys should always speak in generalized terms and post explicit disclaimers stating that any interaction does not automatically form an attorney/client relationship.⁴⁰

This is in order to inform the user and ultimately rebut any reasonable belief that one exists.⁴¹


Disclaimers are, of course, not bullet-proof, but it is better to have one than not have one at all. Compounding the risk that attorneys could inadvertently create an attorney/client relationship—if they provide legal advice in a jurisdiction where they are not licensed—they could be considered as engaging in the unauthorized practice of law.

Conclusion

The introduction of social media to the practice of law

provides attorneys with increased opportunities to market services and advance their professional personas.

But it is critical to remember that technologically advanced online communication also creates the possible risk of ethical mishaps.

Attorneys must be aware of their existing ethical obligations and apply those obligations to new situations that may arise from utilizing the latest advances in social media. 

¹ Cal. State Bar Rules of Prof'l Conduct ("Cal. Rules").

² *Id.* at R. 7.1 to 7.5.

³ *Id.*

⁴ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-186 (2012).

⁵ *Id.*; see also Cal. Bus. & Prof. Code §§ 6157-6159.2; Cal. Rules R. 1-4100(A).

⁶ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-186 (2012).

⁷ Cal. Rules R. 7.1.

⁸ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-186 (2012).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Standard 2 in former Rule 1-400 notes that a communication which contains a testimonial or endorsement of the lawyer must contain an express disclaimer that such communication is not a guarantee or prediction of results, otherwise it is a presumed violation. Comment 4 to new Rule 7.1 explains that even a truthful statement regarding the lawyer's achievements on behalf of clients or former clients may be misleading and therefore a violation, if "presented so as to lead a reasonable person to form an unjustified expectation" that they could obtain the same results. Although the comments to new 7.2 do not require including a disclaimer, the comments note that a disclaimer "often avoids creating unjustified expectations." Cal. Rules R. 7.2.

¹⁴ Cal. Rules R. 1-400(E), Std. 5; Cal. Rules R. 7.3(c).

¹⁵ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-186 (2012); Cal. Rules R. 1-400(E), Std. 1.; Cal. Rules R. 7.1, Comment 2; Cal. Bus. & Prof. Code § 6157.2.

¹⁶ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2019-199 (2019).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Cal. Bus. & Prof. Code, §§ 6157.1 and 6157.2; see also Cal. Rules R. 1-400, Std. 1.4.

²⁰ Cal. Rules R. 7.1.

²¹ *Id.* at Comment 3.

²² *Id.* at Comment 4.

²³ Cal. Rules R. 7.2(a).

²⁴ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2010-179 (2010).

²⁵ Cal. Bus. & Prof. Code, § 6068(e)(1); Cal. Rules R. 1.6.

²⁶ Cal. Bus. & Prof. Code, § 6068(e)(2); Cal. Rules R. 1.6.

²⁷ See Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2010-179 (2010) ("An attorney's duties of confidentiality and competence require the attorney to take appropriate steps to ensure that his or her use of technology in conjunction with a client's representation does not subject confidential client information to an undue risk of unauthorized disclosure").

²⁸ L.A. County Bar Assoc. Prof'l Responsibility and Ethics Comm., Opinion No. 529 (August 2017).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See *Dixon v. State Bar* 32 Cal.3d 728 (1982) (suspending attorney from practice of law for five years for violating client confidentiality, among other violations, when attorney disclosed confidential information about a former client); *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811 (2011) (after termination of representation, "a lawyer must: ... (d) take no unfair advantage of a former client by abusing knowledge or trust acquired by means of the representation." See *In re Johnson*, 4 Cal. State Bar Ct. Rptr. 179 (2000) (finding an attorney's revelation in confidence that his client had served time for a felony conviction violated the duty of confidentiality because, even though the conviction was public record, it was not easily discovered).

³⁴ Cal. Rules R. 5.5 prohibits the unauthorized practice of law and aiding and abetting the unauthorized practice of law; Cal. Bus. & Prof. Code, § 6126.

³⁵ See *In The Matter of Lenard*, 5 Cal. State Bar Ct. Rptr. 250 (2013) (physical presence is not the litmus test for identifying or establishing that a lawyer has committed unauthorized practice of law).

³⁶ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2001-155 (2001).

³⁷ Julie Tappendorf, *Attorney Ethics and Social Media*, American Bar Assoc. (2015).

³⁸ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2003-161 (2003).

³⁹ Jessica Weltge and Myra McKenzie Harris, *The Minefield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology*, American Bar Assoc. (March 24, 2017).

⁴⁰ Michael E. Lackey Jr. & Joseph P. Minta, *Attorneys and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 *TOURO L. REV.* 149, 164.

⁴¹ *Id.*



Social Media and Common Ethical Problems

Test No. 146

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. The California State Bar is silent on guidelines for California attorneys using social media.
☐ True ☐ False
2. Online attorney advertising is governed by the same California Bar Rules as traditional advertising.
☐ True ☐ False
3. The California Rules of Professional Conduct regarding rules for attorney websites and advertisements were last revised in November 2017.
☐ True ☐ False
4. A communication within the meaning of the Rules of Professional Conduct of the State Bar of California contains a message or offer concerning the availability of professional employment.
☐ True ☐ False
5. A communication posted online by an attorney must comply with California's Rules of Professional Conduct for attorney advertising.
☐ True ☐ False
6. A communication can contain a guarantee or prediction of winning.
☐ True ☐ False
7. A communication cannot contain false and misleading information.
☐ True ☐ False
8. An attorney who posts "Another great victory in court today! My client is delighted. Who wants to be next?" to her blog is not in violation of the California Rules of Professional Conduct.
☐ True ☐ False
9. There are four exceptions to California's duty of confidentiality under the California Business and Professions Code and in California's Rules of Professional Conduct.
☐ True ☐ False
10. A California attorney has a duty to take reasonable precautions to safeguard confidential client information against unintended disclosure.
☐ True ☐ False
11. Ignorance of technology is an excuse for the disclosure of confidential information.
☐ True ☐ False
12. An attorney's online post about their work day with information about a client but not the client's name can never breach the attorney's duty of confidentiality.
☐ True ☐ False
13. The duty of confidentiality can be applied to facts that are already in the public record.
☐ True ☐ False
14. The duty of confidentiality ends at the termination of the professional relationship with the client.
☐ True ☐ False
15. An attorney must be physically present in the unlicensed jurisdiction to trigger a violation of the rule against unauthorized practice of law.
☐ True ☐ False
16. In California, the unauthorized practice of law is an ethical violation and a felony.
☐ True ☐ False
17. California recommends attorneys put disclaimers on their websites to avoid confusion that the attorney is advertising or practice law in another jurisdiction.
☐ True ☐ False
18. An attorney-client relationship can be created by an attorney's online interaction with a person.
☐ True ☐ False
19. Disclaimers are useful for attorneys to post in their online activities stating that any interaction does not form an attorney-client relationship.
☐ True ☐ False
20. It is the attorney's responsibility to make clear to the website visitor that an attorney-client relationship has or has not been created.
☐ True ☐ False

Social Media and Common Ethical Problems

MCLE Answer Sheet No. 146

INSTRUCTIONS:

1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the \$20 testing fee for SFVBA members (or \$30 for non-SFVBA members) to:

San Fernando Valley Bar Association
20750 Ventura Blvd., Suite 140
Woodland Hills, CA 91364

METHOD OF PAYMENT:

- ☐ Check or money order payable to "SFVBA"
☐ Please charge my credit card for \$ _____.

Credit Card Number _____

CVV code _____

Exp. Date _____

Authorized Signature _____

5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0495.

Name _____

Law Firm/Organization _____

Address _____

City _____

State/Zip _____

Email _____

Phone _____

State Bar No. _____

ANSWERS:

Mark your answers by checking the appropriate box. Each question only has one answer.

- | | | |
|-----|-------------------------------|--------------------------------|
| 1. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 2. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 3. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 4. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 5. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 6. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 7. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 8. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 9. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 10. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 11. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 12. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 13. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 14. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 15. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 16. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 17. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 18. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 19. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 20. | <input type="checkbox"/> True | <input type="checkbox"/> False |