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By Katherine L. Wallman

Social Media and Common Ethical Problems





Social media transverses old barriers such as time and distance, giving attorneys unprecedented opportunities to market their practice to potential clients on a scale never seen before. Although the advantages of social media and the digital age are vast, the ever-changing cyber world raises ethical questions attorneys must address before reaping its benefits.

LINKEDIN, AVVO, FACEBOOK, TWITTER—THESE are just a few of the many social networking websites in today’s digital world providing 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 and make a name for themselves in the blogosphere, as well as market their practice to potential clients. Social media transverses old barriers such as time and distance and allows new relationships to be built and fostered, all through cyberspace.

Although the advantages of social medial and the digital age are seemingly limitless, functioning in that world comes complete with a minefield of hazards for unprepared attorneys. The ever-changing digital world raises ethical questions attorneys must address before reaping its benefits.

For example, how can an attorney make sure her websites and blog posts comply with her state’s advertising requirements? How can an attorney monitor his online presence so he does not disclose privileged client information? How can an attorney avoid the unauthorized practice of law when blog posts are sent across the world? Or, how can an attorney avoid inadvertent attorney-client relationships when she answers postings in online chat groups?

Legal Advertising

The California 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.¹ The opinion states that Facebook and other social media advertising is subject to the same California Bar Rules as traditional advertising and that those rules prohibit both false and misleading advertising.²

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.”³

The State Bar found that a communication is “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.”⁴

It also found that a “communication or solicitation shall not contain any untrue statement; or contain 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; or 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; or fail to indicate clearly, expressly, or by context, that it is a communication or solicitation as the case may be; or be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.”⁵

The Bar went on to examine several hypothetical online postings:

- 1 “Case finally over. Unanimous verdict! Celebrating tonight.”
- 2 “Another great victory in court today! My client is delighted. Who wants to be next?”
- 3 “Won a million dollar verdict! Tell your friends and check out my website.”
- 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.”⁶

In its opinion, the Bar found that examples 1 and 5 were not communications under Rule 1-400(a) because they did not contain a message or offer “concerning the availability for professional employment.”⁷ Therefore, those postings were not advertising and did not have to comply with the standards of Rule 1-400(E).

Examples 2, 3, and 4, however, contained explicit language suggesting the availability for professional employment, with the Bar finding those posts were communications, subject to Rule 1-400’s standards for attorney advertising.⁸

The Bar also found several problems with examples 2, 3 and 4 under California’s rules for attorney advertising. Example 1, it said, violates the restrictions on client testimonials. A California attorney cannot publish “communications” that contain testimonials that attorney



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unless the communication also contains an express disclaimer.⁹

All three examples, it concluded, fail to explicitly state that they are advertisements.¹⁰ Finally, example 2 offers an improper guarantee or prediction of winning.¹¹

California attorneys should be aware of the advertising rules when posting anything online. 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 including in an advertisement any "guarantee or warranty regarding the outcome of a legal matter."¹²

Rule 1-400 of the California Rules of Professional Conduct provides even more detailed requirements. Rule 1-400(D) provides rules that must be followed to ensure that a communication is not false or misleading, or made in a coercive manner.¹³ Rule 1-400 provides a list of "Standards" with examples of communications which are presumed to violate Rule 1-400.¹⁴

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, raises a danger that attorneys might breach that professional duty. Disclosure of confidential client information can occur in variety ways, as websites, blog posts, LinkedIn status updates, Facebook status updates and tweets all allow for the instant publication and dissemination of what could well be privileged information.

The informal setting of a social media website does not excuse an attorney's improper disclosure of confidential information. Further, 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."¹⁵

California's broad duty of confidentiality is found in §6068(e)(1) of the Business and Professions Code, and in California Rule of Professional Conduct 3-100, which requires California attorneys to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."¹⁶ The sole exception is that a California attorney may reveal confidential information relating to the representation of a client to prevent a criminal act likely to result in death or substantial bodily harm.¹⁷

In addition to not intentionally disclosing confidential client information, a lawyer's duty of competence under

California Rule 3-110 requires the attorney to take reasonable precautions to safeguard against unintended disclosure.¹⁸

The Los Angeles County Bar Association (LACBA) Professional and Ethics Committee recently published an opinion discussing the ethical risks in social media.¹⁹

LACBA noted that online communications present particular risks for attorneys and the protection of confidential client information.²⁰ The Bar Association discussed an example of an attorney at a conference with a client,²¹ during which the client revealed facts that were detrimental to the client or the client's case.

After the conference, the attorney disclosed those facts online when discussing a "client" whose name the attorney did not reveal. LACBA noted that although the attorney might believe the facts could not be associated with the particular client, it is possible that an opposing party or third person might be able to infer the client's identity from the context of the disclosure.²² It also found that the disclosure by the attorney would likely not constitute a waiver of the privilege, and that the opposing party would be able to use the underlying facts disclosed during the attorney-client communication to the client's detriment or embarrassment.²³

Attorneys should always 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 that it may be applied even when the facts are already part of the public record.²⁴

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 that responsibility.

Ultimately, using client information in any social media communication is something best done sparingly and with extreme caution.

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 anyone, anywhere with access to the internet can access an attorney blog or website. 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, which in California, is not only a disciplinary violation, it is a misdemeanor.²⁵ Physical presence in the non-licensed jurisdiction is not required to trigger a violation.²⁶

Facebook comments, interactive Tweets, and blogs that offer the opportunity to comment are examples of situations

where attorneys might find themselves interacting with non-lawyers, and thus, inadvertently and unethically providing legal advice to someone who does not live in the state where the attorney is licensed to practice law.

California has recommended its attorneys take the following steps on their websites to avoid any confusion that they are advertising in other jurisdictions: “1) an explanation of where the attorney is licensed to practice law, 2) a description of where the attorney maintains law offices and actually practices law, 3) an explanation of any limitation on the courts in which the attorney is willing to appear, and 4) a statement that the attorney does not seek to represent anyone based solely on a visit to the attorney’s website.”²⁷

When posting online, attorneys should be cautious not to answer specific legal questions and should instead focus on providing more generalized information to the general public.²⁸ Attorneys can also turn off comments on a posting or choose not to respond to a comment. These techniques can help prevent interactive communications that could lead to an attorney-client relationship.

Inadvertent Attorney-Client Relationships

Attorneys should be aware that there is a risk of inadvertently forming attorney-client relationships through online activity.

The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion 2003-161 examined under what circumstances 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, “even if no attorney-client relationship is formed, 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.”²⁹

To avoid creating an inadvertent attorney-client relationship, attorneys must consider whether the information they post on their social media websites would create the reasonable belief by a visitor that they are consulting an attorney in order to obtain legal advice or services. In such a case, 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.³⁰

When using social media, attorneys should speak in generalized terms and also post explicit disclaimers that any interaction does not form an attorney-client relationship.³¹ This is in order to inform the user and ultimately rebut any reasonable belief that one exists.³²

Disclaimers are not bullet-proof, but it is far better to have one than not have one at all.

Be Aware

Attorneys should be aware that they could inadvertently create an attorney-client relationship, and if they provide legal advice in a jurisdiction in which they are not licensed, they could be engaging in the unauthorized practice of law.

The introduction of social media to the practice of law provides attorneys with increased opportunities to market their services and advance their professional personas. However, attorneys must be mindful that technological advances also provide new risks of ethical mishaps. Attorneys must be aware of the existing ethical obligations and apply these obligations to the new situations that may arise from advances in social media. 

¹ Cal. Bar Comm. on Prof’l Responsibility & Conduct, Formal Op. 2012-186 (2012).

² *Id.*; see also Cal. Bus. & Prof. Code §§6157-6159.2; Cal. State Bar Rules of Prof’l Conduct (“Cal. Rules”) R. 1-4100(A).

³ Cal. Bar Comm. on Prof’l Responsibility & Conduct, Formal Op. 2012-186 (2012).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Cal. Rules R. 1-400(E).

¹⁰ Cal. Rules R. 1-400(E), Std. 5.

¹¹ Cal. Bar Comm. on Prof’l Responsibility & Conduct, Formal Op. 2012-186 (2012); Cal. Rules R. 1-400(E), Std. 1.; Cal. Bus. & Prof. Code §6157.2.

¹² Cal. Bus. & Prof. Code, §§6157.1 and 6157.2; see also Cal. Rules R. 1-400, Std. 1.4.

¹³ Cal. Rules R. 1-400, Std. 1.4.

¹⁴ *Id.*

¹⁵ Cal. Bar Comm. on Prof’l Responsibility & Conduct, Formal Op. 2010-179 (2010).

¹⁶ Cal. Bus. & Prof. Code, §6068(e)(1); Cal. Rules R. 3-100.

¹⁷ Cal. Bus. & Prof. Code, §6068(e)(2); Cal. Rules R. 3-100.

¹⁸ 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”).

¹⁹ L. A. County Bar Assoc. Prof’l Responsibility and Ethics Comm., Opinion No. 529 (August 2017).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ 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).

²⁵ Cal. Rules R. 1-300 prohibits the unauthorized practice of law and aiding and abetting the unauthorized practice of law; Cal. Bus. & Prof. Code, §6126.

²⁶ 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).

²⁷ Cal. Bar Comm. on Prof’l Responsibility & Conduct, Formal Op. 2001-155 (2001).

²⁸ Julie Tappendorf, *Attorney Ethics and Social Media*, American Bar Assoc. (2015).

²⁹ Cal. Bar Comm. on Prof’l Responsibility & Conduct, Formal Op. 2003-161 (2003).

³⁰ 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).

³¹ Michael E. Lackey Jr. & Joseph P. Mintz, *Attorneys and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 *TOURO L. REV.* 149, 164.

³² *Id.*



Test No. 109

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 in Legal Ethics. 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. A "communication" within the meaning of Rule 1-400 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
4. A "communication" posted online by an attorney must comply with California's Rules of Professional Conduct for attorney advertising.
 True False
5. A "communication" containing client testimonials does not need to contain a disclaimer
 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

MCLE Answer Sheet No. 109

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
5567 Reseda Boulevard, Suite 200
Tarzana, CA 91356

METHOD OF PAYMENT:

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

Credit Card Number _____ Exp. Date _____

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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) 227-0490, ext. 105.

Name _____

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ANSWERS:

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

1. True False

2. True False

3. True False

4. True False

5. True False

6. True False

7. True False

8. True False

9. True False

10. True False

11. True False

12. True False

13. True False

14. True False

15. True False

16. True False

17. True False

18. True False

19. True False

20. True False