

10 Tips for Avoiding Ethical Lapses When Using Social Media

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You may be among the thousands of legal professionals flocking to social media sites like LinkedIn, Facebook, Twitter, or Google+ to expand your professional presence in the emerging digital frontier. If so, have you paused to consider how the ethics rules apply to your online activities? You should. Some of the ethical constraints that apply to your social media usage as a legal professional may surprise you. Moreover, legal ethics regulators across the country are beginning to pay close attention to what legal professionals are doing with social media, how they are doing it, and why they are doing it. The result is a patchwork quilt of ethics opinions and rule changes intended to clarify how the rules of professional conduct apply to social media activities.

This article provides 10 tips for avoiding ethical lapses while using social media as a legal professional. The authors cite primarily to the ABA Model Rules of Professional Conduct (RPC) and select ethics opinions from various states. In addition to considering the general information in this article, you should carefully review the ethics rules and ethics opinions adopted by the specific jurisdiction(s) in which you are licensed and in which your law firm maintains an office.

1. Social Media Profiles and Posts May Constitute Legal Advertising

Many lawyers – including judges and in-house counsel – may not think of their social media profiles and posts as constituting legal advertisements. After all, legal advertising is limited to glossy brochures, highway billboards, bus benches, late-night television commercials, and the back of the phonebook, right? Wrong. In many jurisdictions, lawyer and law firm websites are deemed to be advertisements. Because social media profiles (including blogs, Facebook pages, and LinkedIn profiles) are by their nature websites, they too may constitute advertisements.

For example, the Florida Supreme Court recently overhauled that state's advertising rules to make clear that lawyer and law firm websites (including social networking and video sharing sites) are subject to many of the restrictions applicable to other traditional forms of lawyer advertising. Similarly, California Ethics Opinion 2012-186 concluded that the lawyer advertising rules in that state applied to social media posts, depending on the nature of the posted statement or content.

2. Avoid Making False or Misleading Statements

The ethical prohibition against making false or misleading statements pervades many of the ABA Model Rules, including RPC 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), 4.4 (Respect for Rights of Third Persons), 7.1 (Communication Concerning a Lawyer's Services), 7.4 (Communication of Fields of Practice and Specialization), and 8.4 (Misconduct), as well as the analogous state ethics rules. ABA Formal Opinion 10-457 concluded that lawyer websites must comply with the ABA Model Rules that prohibit false or misleading statements. The same obligation extends to social media websites.

South Carolina Ethics Opinion 12-03, for example, concluded that lawyers may not participate in websites designed to allow non-lawyer users to post legal questions where the website describes the attorneys answering those questions as “experts.” Similarly, New York State Ethics Opinion 972 concluded that a lawyer may not list his or her practice areas under the heading “specialties” on a social media site unless the lawyer is appropriately certified as a specialist – and law firms may not do so at all.

Although most legal professionals are already appropriately sensitive to these restrictions, some social media activities may nevertheless give rise to unanticipated ethical lapses. A common example occurs when a lawyer creates a social media account and completes a profile without realizing that the social media platform will brand the lawyer to the public as an “expert” or a “specialist” or as having legal “expertise” or “specialties.” Under RPC 7.4 and equivalent state ethics rules, lawyers are generally prohibited from claiming to be a “specialist” in the law. The ethics rules in many states extend this restriction to use of terms like “expert” or “expertise.” Nevertheless, many professional social networking platforms (e.g., LinkedIn and Avvo) may invite lawyers to identify “specialties” or “expertise” in their profiles, or the sites may by default identify and actively promote a lawyer to other users as an “expert” or “specialist” in the law. This is problematic because the lawyer completing his or her profile cannot always remove or avoid these labels.

3. Avoid Making Prohibited Solicitations

Solicitations by a lawyer or a law firm offering to provide legal services and motivated by pecuniary gain are restricted under RPC 7.3 and equivalent state ethics rules. Some, but not all, state analogues recognize limited exceptions for communications to other lawyers, family members, close personal friends, persons with whom the lawyer has a prior professional relationship, and/or persons who have specifically requested information from the lawyer.

By its very design, social media allows users to communicate with each other or the public at-large through one or more means. The rules prohibiting solicitations force legal professionals to evaluate – before sending any public or private social media communication to any other user – *whom* the intended recipient is and *why* the lawyer or law firm is communicating with that particular person. For example, a Facebook “friend request” or LinkedIn “invitation” that offers to provide legal services to a non-lawyer with whom the sending lawyer does not have an existing relationship may very well rise to the level of a prohibited solicitation.

Legal professionals may also unintentionally send prohibited solicitations merely by using certain automatic features of some social media sites that are designed to facilitate convenient connections between users. For instance, LinkedIn provides an option to import e-mail address books to LinkedIn for purposes of sending automatic or batch invitations. This may seem like an efficient option to minimize the time required to locate and connect with everyone you know on LinkedIn. However, sending automatic or batch invitations to everyone identified in your e-mail address book could result in networking invitations being sent to persons who are not lawyers, family members, close personal friends, current or former clients, or others with whom a lawyer may ethically communicate. Moreover, if these recipients do not accept the initial networking invitation, LinkedIn will automatically send two follow up reminders unless the initial invitation is affirmatively withdrawn. Each such reminder would conceivably constitute a separate violation of the rules prohibiting solicitations.

4. Do Not Disclose Privileged or Confidential Information

Social media also creates a potential risk of disclosing (inadvertently or otherwise) privileged or confidential information, including the identities of current or former clients. The duty to protect privileged and confidential client information extends to current clients (RPC 1.6), former clients (RPC 1.9), and prospective clients (RPC 1.18). Consistent with these rules, ABA Formal Opinion 10-457 provides that lawyers must obtain client consent before posting information about clients on websites. In a content-driven environment like social media where users are accustomed to casually commenting on day-to-day activities, including work-related activities, lawyers must be especially careful to avoid posting *any* information that could conceivably violate confidentiality obligations. This includes the casual use of geo-tagging in social media posts or photos that may inadvertently reveal your geographic location when traveling on confidential client business.

There are a few examples of lawyers who found themselves in ethical crosshairs after posting client information online. For example, in *In re Skinner*, 740 S.E.2d 171 (Ga. 2013), the Georgia Supreme Court rejected a petition for voluntary reprimand (the mildest form of public discipline permitted under that state's rules) where a lawyer admitted to disclosing information online about a former client in response to negative reviews on consumer websites. In a more extreme example, the Illinois Supreme Court in *In re Peshek*, M.R. 23794 (Ill. May 18, 2010) suspended an assistant public defender from practice for 60 days for, among other things, blogging about clients and implying in at least one such post that a client may have committed perjury. The Wisconsin Supreme Court imposed reciprocal discipline on the same attorney for the same misconduct. *In re Disciplinary Proceedings Against Peshek*, 798 N.W.2d 879 (Wis. 2011).

Interestingly, the Virginia Supreme Court held in *Hunter v. Virginia State Bar*, 744 S.E.2d 611 (Va. 2013), that confidentiality obligations have limits when weighed against a lawyer's First Amendment protections. Specifically, the court held that although a lawyer's blog posts were commercial speech, the Virginia State Bar could not prohibit the lawyer from posting non-privileged information about clients and former clients without the clients' consent where (1) the information related to closed cases and (2) the information was publicly available from court records and, therefore, the lawyer was free, like any other citizen, to disclose what actually transpired in the courtroom.

5. Do Not Assume You Can "Friend" Judges

In the offline world, it is inevitable that lawyers and judges will meet, network, and sometimes even become personal friends. These real-world professional and personal relationships are, of course, subject to ethical constraints. So, too, are online interactions between lawyers and judges through social media (e.g., becoming Facebook "friends" or LinkedIn connections) subject to ethical constraints.

Different jurisdictions have adopted different standards for judges to follow. ABA Formal Opinion 462 recently concluded that a judge may participate in online social networking, but in doing so must comply with the Code of Judicial Conduct and consider his or her ethical obligations on a case-by-case (and connection-by-connection) basis. Several states have adopted similar views, including Connecticut (Op. 2013-06), Kentucky (Op. JE-119), Maryland (Op.

2012-07), New York (Op. 13-39, 08-176), Ohio (Op. 2010-7), South Carolina (Op. 17-2009), and Tennessee (Op. 12-01).

In contrast, states like California (Op. 66), Florida, Massachusetts (Op. 2011-6), and Oklahoma (Op. 2011-3) have adopted a more restrictive view. Florida Ethics Opinion 2009-20, for example, concluded that a judge cannot friend lawyers on Facebook who may appear before the judge because doing so suggests that the lawyer is in a special position to influence the judge. Florida Ethics Opinion 2012-12 subsequently extended the same rationale to judges using LinkedIn and the more recent Opinion 2013-14 further cautioned judges about the risks of using Twitter. Consistent with these ethics opinions, a Florida court held that a trial judge presiding over a criminal case was required to recuse himself because the judge was Facebook friends with the prosecutor. *See Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012).

6. Avoid Communications with Represented Parties

Under RPC 4.2 and equivalent state ethics rules, a lawyer is forbidden from communicating with a person whom the lawyer knows to be represented by counsel without first obtaining consent from the represented person's lawyer. Under RPC 8.4(a) and similar state rules, this prohibition extends to any agents (secretaries, paralegals, private investigators, etc.) who may act on the lawyer's behalf.

These bright-line restrictions effectively prohibit lawyers and their agents from engaging in social media communications with persons whom the lawyer knows to be represented by counsel. This means that a lawyer may not send Facebook friend requests or LinkedIn invitations to opposing parties known to be represented by counsel in order to gain access to those parties' private social media content. In the corporate context, San Diego County Bar Association Opinion 2011-2 concluded that high-ranking employees of a corporation should be treated as represented parties and, therefore, a lawyer could not send a Facebook friend request to those employees to gain access to their Facebook content.

On the other hand, viewing publicly accessible social media content that does not precipitate communication with a represented party (e.g., viewing public blog posts or Tweets) is generally considered fair game. That was the conclusion reached by Oregon Ethics Opinions 2013-189 and 2005-164, which analogized viewing public social media content to reading a magazine article or a published book.

7. Be Cautious When Communicating with Unrepresented Third Parties

Underlying RPC 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), 4.4 (Respect for Rights of Third Persons), and 8.4 (Misconduct), and similar state ethics rules is concern for protecting third parties against abusive lawyer conduct. In a social media context, these rules require lawyers to be cautious in online interactions with unrepresented third parties. Issues commonly arise when lawyers use social media to obtain information from third-party witnesses that may be useful in a litigation matter. As with represented parties, publicly viewable social media content is generally fair game. If, however, the information sought is safely nestled behind the third party's privacy settings, ethical constraints may limit the lawyer's options for obtaining it.

Of the jurisdictions that have addressed this issue, the consensus appears to be that a lawyer may not attempt to gain access to non-public social media content by using subterfuge, trickery, dishonesty, deception, pretext, false pretenses, or an alias. For example, ethics opinions in Oregon (Op. 2013-189), Kentucky (Op. KBA E-434), New York State (Op. 843), and New York City (Op. 2010-2) concluded that lawyers are not permitted (either themselves or through agents) to engage in false or deceptive tactics to circumvent social media users' privacy settings to reach non-public information. Ethics opinions by other bar associations, including the Philadelphia Bar Association (Op. 2009-02) and the San Diego County Bar Association (Op. 2011-2), have gone one step further and concluded that lawyers must affirmatively disclose their reasons for communicating with the third party.

8. Beware of Inadvertently Creating Attorney-Client Relationships

An attorney-client relationship may be formed through electronic communications, including social media communications. ABA Formal Opinion 10-457 recognized that by enabling communications between prospective clients and lawyers, websites may give rise to inadvertent lawyer-client relationships and trigger ethical obligations to prospective clients under RPC 1.18. The interactive nature of social media (e.g., inviting and responding to comments to a blog post, engaging in Twitter conversations, or responding to legal questions posted by users on a message board or a law firm's Facebook page) creates a real risk of inadvertently forming attorney-client relationships with non-lawyers, especially when the objective purpose of the communication from the consumer's perspective is to consult with the lawyer about the possibility of forming a lawyer-client relationship regarding a specific matter or legal need. Of course, if an attorney-client relationship attaches, so, too, do the attendant obligations to maintain the confidentiality of client information and to avoid conflicts of interest.

Depending upon the ethics rules in the jurisdiction(s) where the communication takes place, use of appropriate disclaimers in a lawyer's or a law firm's social media profile or in connection with specific posts may help avoid inadvertently creating attorney-client relationships, so long as the lawyer's or law firm's online conduct is consistent with the disclaimer. In that respect, South Carolina Ethics Opinion 12-03 concluded that "[a]ttempting to disclaim (through buried language) an attorney-client relationship in advance of providing specific legal advice in a specific matter, and using similarly buried language to advise against reliance on the advice is patently unfair and misleading to laypersons."

9. Beware of Potential Unauthorized Practice Violations

A public social media post (like a public Tweet) knows no geographic boundaries. Public social media content is accessible to everyone on the planet who has an Internet connection. If legal professionals elect to interact with non-lawyer social media users, then they must be mindful that their activities may be subject not only to the ethics rules of the jurisdictions in which they are licensed, but also potentially the ethics rules in any jurisdiction where the recipient(s) of any communication is(are) located. Under RPC 5.5 and similar state ethics rules, lawyers are not permitted to practice law in jurisdictions where they are not admitted to practice. Moreover, under RPC 8.5 and analogous state rules, a lawyer may be disciplined in any jurisdiction where he or she is admitted to practice (irrespective of where the conduct at issue takes place) or in any jurisdiction where he or she provides or offers to provide legal services. It is prudent, therefore,

for lawyers to avoid online activities that could be construed as the unauthorized practice of law in any jurisdiction(s) where the lawyer is not admitted to practice.

10. Tread Cautiously with Testimonials, Endorsements, and Ratings

Many social media platforms like LinkedIn and Avvo heavily promote the use of testimonials, endorsements, and ratings (either by peers or consumers). These features are typically designed by social media companies with one-size-fits-all functionality and little or no attention given to variations in state ethics rules. Some jurisdictions prohibit or severely restrict lawyers' use of testimonials and endorsements. They may also require testimonials and endorsements to be accompanied by specific disclaimers. South Carolina Ethics Opinion 09-10, for example, provides that (1) lawyers cannot solicit or allow publication of testimonials on websites and (2) lawyers cannot solicit or allow publication of endorsements unless presented in a way that would not be misleading or likely to create unjustified expectations. The opinion also concluded that lawyers who claim their profiles on social media sites like LinkedIn and Avvo (which include functions for endorsements, testimonials, and ratings) are responsible for conforming all of the information on their profiles to the ethics rules.

Lawyers must, therefore, pay careful attention to whether their use of any endorsement, testimonial, or rating features of a social networking site is capable of complying with the ethics rules that apply in the state(s) where they are licensed. If not, then the lawyer may have no choice but to remove that content from his or her profile.

Conclusion

Despite the risks associated with using social media as a legal professional, the unprecedented opportunities this revolutionary technology brings to the legal profession to, among other things, promote greater competency, foster community, and educate the public about the law and the availability of legal services justify the effort necessary to learn how to use the technology in an ethical manner. E-mail technology likely had its early detractors and, yet, virtually all lawyers are now highly dependent on e-mail in their daily law practice. Ten years from now, we may similarly view social media as an essential tool for the practice of law.