



CAUTION SIGNS AHEAD

For attorneys, social networking presents an ethical obstacle path

BY PAMELA WILSON

LinkedIn, Twitter, Facebook—social networking tools proliferate faster than spam clogs an inbox. These rapidly spreading platforms pose challenges for lawyers as highly regulated professionals. Unlike most business owners, lawyers must follow complex ethical rules regarding advertising, solicitation of business, formation of attorney-client relationships and confiden-

tial communications. Yet promoters of social media seem blissfully unaware their prescriptions for electronic marketing are mostly inapplicable to attorneys.

Marketers are sometimes oblivious to the stringent rules governing communications with clients, prospective clients and the public. Many such gurus overlook the ethical rules lawyers must follow, which renders most advice on using social media of little value to attorneys—even dangerous to apply.

Some advocates suggest the conundrum is not as daunting as it appears: Lawyers need only identify key Rules of Professional Responsibility and apply them to social media. Former San Diego consumer fraud attorney Tracy Thrower Conyers is passionate about the value of Internet marketing for lawyers. “You have to understand your relevant professional responsibility rules,” she advises. “It’s the same rules with new tools. You just have to use common sense.”

John Nevius, a professional engineer and attorney at Anderson Kill & Olick, studied social networking because he enjoys pursuing cutting-edge strategies to reach potential clients. “At first, I was a little taken aback when I got these form requests to join someone’s circle,” he recalls of the first invitations he received for LinkedIn. “But you can’t help someone if they don’t know who you are.”

For years Nevius published articles in legal and trade journals to demonstrate his expertise to prospective clients. More

recently, he has embraced social media to promote his law practice. “Even though we are dealing with new technology, it’s not like we need a new set of rules,” he says. “If you think about what you are doing, the old rules still apply.”

Nevius and social media professional Kris Ruby jointly presented a San Diego County Bar Association webinar titled “Establish Your Personal Brand by Utilizing

Deputy Public Defender Mary Jo Barr finds Twitter a rich source of information crucial to case investigations. “You can get to people’s information without actually having to say ‘Be my friend.’ Just follow the breadcrumbs.”

Social Media.” The two have spoken on new marketing methods to many lawyers’ groups. Ruby, of Ruby Media Group, contends it is crucial for attorneys to post a professional profile on LinkedIn.

“There is more trust built with LinkedIn than with a firm bio,” claims Ruby. The site encourages client testimonials and allows viewers to read profiles of other professionals to whom a lawyer is connected. “You get a more well-rounded perspective of who someone is,” says Ruby. “And typically LinkedIn is more concise and readable” than a law firm’s website—but makes it easy to jump to the firm site for more detailed information.

California Rule 1-400 and California Business and Professions Code section 6157 et seq. address advertising and solicitation. Rule 1-400 states, “A ‘communication’ means any message or offer made by or on behalf of a member [of the bar] concerning the availability for professional employment of a member or a law firm directed to any former, present or prospective client.”

The State Bar Board of Governors’ Standards for 1-400 provide in part that a “communication” that contains testimonials about a lawyer must include an express disclaimer that the endorsement does not constitute a guarantee or prediction of the outcome of the reader’s legal matter. This requirement can be unwieldy to implement on social media sites. To comply with 1-400, an attorney who asks a contact to write a recommendation must advise the endorser to include a disclaimer, such as

“This testimonial or endorsement does not constitute a guarantee, warranty or prediction regarding the outcome of your legal matter.” The recipient of a recommendation cannot edit an endorsement; the disclaimer must be included by the person giving the reference. Any advertisement directed to the general public, regardless of the medium, is subject to 1-400. A quick review of dozens of lawyers’ LinkedIn pro-

files demonstrates few are aware of this disclaimer rule.

Social media advisors encourage lawyers to send a request to “link” to all of the attorney’s e-mail contacts. Boilerplate requests to “link” or “friend” on Facebook don’t disclose whether the message constitutes legal advertising. Current social networking platforms simply are not designed to satisfy ethical rules applicable to lawyers, who must take extra steps to ensure conformance with these mandates.

LinkedIn’s profile format is also ill-suited to California’s ethical guideline prohibiting attorneys from claiming to be a certified specialist in an area of law unless they have earned one of the State Bar’s approved specialization certificates (Rule 1-400(D)(6)). Conyers notes, “LinkedIn encourages people to list their ‘specialties.’ LinkedIn has one way they intend users to use their [specialties] section, but it may not be in sync with professional responsibility rules.” Conyers says LinkedIn wants profilers to post key words so people searching the site can easily find professionals by the type of work they do. “But because it’s called a ‘Specialties’ section, lawyers could be in conflict with the rules” if they list legal topics among their “specialties.”

Professor Tim Casey teaches professional responsibility to prospective lawyers at California Western School of Law in the STEPPS Program (Skills Training for Ethical and Preventive Practice and Career Satisfaction). Social media is “a real pitfall for new lawyers,” he says, “and even for law-



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yers who have been around a long time, for different reasons.”

New lawyers, Casey finds, “don’t think about professional responsibility, because a lot of law students have never had a professional life.” He helps aspiring lawyers recognize that “Your professional life is different from your personal life.”

Cal Western students identify key ethical rules that must be applied to social networking, such as the duty of confidentiality. Says Casey, “There are new challenges . . . You are required to take ‘reasonable’ steps to ensure confidentiality. But what was reasonable in 2001 might not be reasonable in 2011.”

The California State Bar has not issued advisory opinions specifically applying

Rules of Professional Conduct to social networking. At Cal Western, students review opinion letters from states that have issued relevant guidance. The State Bar of Texas requires preapproval, Casey says, for any advertising other than “tombstone” information limited to a law firm’s contact specifics. “If you updated your Facebook with ‘I just had a jury verdict,’ that could be considered an advertisement about a past success and subject to prerule.”

Another crucially important ethics requirement is Rule 1-400’s admonition that communications from lawyers may not contain any untrue statement or any matter that is false, deceptive or which tends to confuse, deceive or mislead the

public. It is clear that any content an attorney posts electronically must be scrupulously accurate. Less obvious is the fact this rule also applies to what lawyers may and may not do when conducting informal discovery on the Internet.

Bar associations disagree whether lawyers can hide their identity or motives when attempting to gain information by “friending” strangers on social media sites. New York University School of Law Professor Stephen Gillers, writing in a recent edition of the *ABA Journal*, cites a 2009 opinion by the Philadelphia Bar Association’s ethics committee that concluded attorneys and their agents must fully disclose motives for making a “friend” request. In contrast, Gillers adds, the New York City

Bar concluded in a 2010 opinion that an attorney or agent who uses his or her real name and profile to send a “friend request” to an unrepresented person need not disclose the reason for the request.



Professor Timothy Casey

The San Diego County Bar Association recently issued an ethics opinion siding with Philadelphia. SDCBA Opinion 2011-2

says a plaintiff attorney may not send an innocuous “friend” request to high-ranking executives of a represented corporate defendant to gather information critical of the company. Doing so violates the rule against lawyers directly or indirectly contacting parties an attorney knows are represented by counsel (Rule 2-100). The hypothetical assumes the high-ranking executives qualify as part of the represented corporation due to their roles at the company. The lawyer’s case-related motive for seeking access to executives’

restricted web pages qualifies the request as a communication “about” the plaintiff’s case. Even though the lawyer makes the “friend” request in his/her true name, non-disclosure of his/her motive arguably violates a lawyer’s duty not to deceive (Cal. Bus. & Prof. Code §6068(d)). Although some cases have construed this duty as limited to misrepresentations to judges, Opinion 2011-2 concludes a lawyer’s duty not to deceive should be broadly construed and applies even to unrepresented witnesses in a matter.

Given the multitude of Internet applications, this issue may be moot. San Diego Deputy Public Defender Mary Jo Barr finds Twitter a rich source of information crucial to case investigations. Lawyers mine this



Mary Jo Barr

data extensively to advance their cases. “If someone tweets about a case, it can pop up in a search . . . You can get to people’s information without actu-

ally having to say ‘Be my friend.’ Just follow the breadcrumbs.”

Does participation in social media get business? Many lawyers doubt it, but Pluggedinlawyer.com blogger Conyers believes social networking is effective. “Consumers are definitely turning to the search engines, if not to find their service providers then definitely to do their due diligence,” she says. “The more active you are on social media, the higher your digital profile.”

While the business argument may still be in debate, it’s uncontested that lawyers who venture into social media to promote their practices can’t leave the Rules of Professional Responsibility behind. The requirements still apply, even if many nonlawyer social media professionals don’t know it. ↵

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