

SOCIAL MEDIA AND ETHICS

1. DEFINITION OF SOCIAL MEDIA
 - a. Webster's dictionary definition;
 - b. Oxford dictionary definition;
 - c. Business dictionary definition;
2. WHY DO WE AS LAWYERS WANT TO USE SOCIAL MEDIA
 - a. First, Revenue;
 - b. Brand development;
 - c. Attracting customers;
 - d. Research;
 - e. Networking;
 - f. Search-engine discoverability;
3. WHAT ARE THE MOST COMMON FORUMS AND HOW DO YOU INTERACT ON THEM –
 - a. FACEBOOK;
 - b. TWITTER;
 - c. INSTAGRAM;
 - d. YOUTUBE;
 - e. LINKEDIN;
 - f. YELP;
 - g. AVVO;
 - h. YOUR BUSINESS WEBSITES;
4. WHO ARE THE USERS OF SOCIAL MEDIA – nowadays, all of us.
 - a. TWEENS;
 - b. The VAST MAJORITY IN THE US; uses social media. –
 - a. COMPANIES THAT WE HIRE for
 - i. web design and development;
 - ii. making website interactive;
 - iii. search engine optimization;
 - iv. social media marketing;
 - v. email marketing;
 - vi. text message marketing;
5. WHY IS ETHICS THIS IMPORTANT
 - a. PROTECT THE PUBLIC IN GENERAL
 - b. TO PROTECT YOURSELF FROM BEING SUED
6. WHAT RULES APPLY TO SOCIAL MEDIA?
 - a. WEBSITES RULES APPLY TO SOCIAL MEDIA
7. WHAT ARE THE RULES THAT APPLY TO WEBISTES AND HENCE SOCIAL MEDIA ACCOUNTS?
 - a. RULES: California Rules of Professional Conduct ,and Business and professions codes apply in this setting - According to the State Bar of California's Standing Committee on Professional Responsibility and Conduct Formal Opinion number 2001-155, "the aspects of professional responsibility and conduct that an attorney

must consider when providing an internet website with information for the public about his or her availability for professional employment include the rules governing attorney advertising in Cal Rules of Professional Conduct 1-400 and Business and Professional Conduct paragraph 6157-6158.3.

1. According to this opinion, an attorney's website that provides information to the public about the attorney's availability for professional employment (and the mere fact of having a website meets that test) is both a 'communication' under California rules of professional conduct 1-400A and an advertisement under business and professional code paragraph 6157-6158.3

8. COMMUNICATION AND ADVERTISEMENT WE DO

- a. COMMUNICATION – Rules of professional conduct 1-400a defines communication as

- i. Any message or offer made by or on behalf of a member concerning the availability for professional employment directed to any former, present, or perspective client including but not limiting the following
 1. Any brochure or other comparable written material describing such member, law firm, or lawyers,
 2. Any advertisement regardless of medium of such member or law firm directed to the general public or any substantial portion thereof

- b. ADVERTISEMENT – Business code paragraph 6157 c defines advertisement as

- i. Any communication disseminated by television or radio, by any print medium, or by means of mailing directed generally to members of the public not to a specific person, that solicits employment of legal services

9. ANALYSING WHETHER A STATEMENT IS ETHICAL? DOES THIS REQUIRE A DISCLAIMER? OR COULD IT EVEN BE UNETHICAL OR MISLEADING?

- a. Examples: Formal Opinion 2012-186 lists examples and short statements along with an analysis to help you understand whether or not they are ethical:

- i. "Case finally over. Unanimous verdict! Celebrating tonight." In the Committee's opinion, this statement, standing alone, is not a communication under rule 1-400(a) because it is not a message or offer "concerning the availability for professional employment," whatever subjective motive status postings that simply announce recent victories without an accompanying offer about the availability for professional employment generally will not qualify as a communication.

- ii. “Another great victory in court today! My client is delighted. Who wants to be next?” Similarly, the statement “Another great victory in court today!” standing alone is not a communication under rule 1-400(a) because it is not a message or offer “concerning the availability for professional employment.” However, the addition of the text, “[w]ho wants to be next?” meets the definition of a “communication” because it suggests availability for professional employment. Thus, it is subject to rule 1-400(D) and rule 1-400’s Standards. Similarly, the post may be presumed to violate rule 1-400 because it includes “guarantees, warranties, or predictions regarding the result of the representation.” See Rules Prof. Conduct, rule 1-400(E), Std. 1. The post expressly relates to a “victory,” and could be interpreted as asking who wants to be the next victorious client.
- iii. “Won a million dollar verdict. Tell your friends to check out my website.” In the Committee’s opinion, this language also qualifies as a “communication” because the words “tell your friends to check out my website,” in this context, convey a message or offer “concerning the availability for professional employment.” It appears that Attorney is asking the reader to tell others to look at her website so that they may consider hiring her. This language therefore is subject to the adverse presumption in rule 1-400(E), Standard 5 (e.g., it must contain the word “Advertisement” or a similar word) and the preservation requirement in rule 1-400(F).

10. WHAT IF IT QUALIFIES AS A COMMUNICATION OR ADVERTISEMENT?

a. THEN MAKE SURE YOU FOLLOW RULES ON ADVERTISEMENT AND COMMUNICATION

i. Rules

1. Rule 1-400 Advertising and Solicitation WRITE THAT ONE DOWN
2. Rule 1-400 defines both “communication” and “solicitation.”
3. A communication for purposes of the rule refers to “any message or offer made by or on behalf of a member,” regarding employment, that is directed to a prior, current or potential client. Communications include the use of the attorney’s name or firm name, letterhead or business cards, advertisements directed to the general public and unsolicited correspondence (Rule 1-400(A)).

4. A solicitation is defined as any communication regarding legal employment where “a significant motive is pecuniary gain,” which is either delivered in person or by telephone, or directed towards someone known by the sender to be represented by counsel in the matter (Rule 1-400(B)). Rule 1-400(C) prohibits making solicitations to prospective clients with whom an attorney has no prior professional or family relationship unless the solicitation is constitutionally protected.
5. Both communications and solicitations are subject to a list of restrictions, enumerated in Rule 1-400(D), as well as potentially the rules of other states in which you market your services.
6. Formal Opinion 2001-155 concludes that attorney website information relating to employment availability qualifies as a communication under California Rule 1-400(A), but not as a solicitation under Rule 1-400(B). This is the case even if the website offers an electronic mail option facilitating direct correspondence with the attorney. As a communication, the website information must comply with the restrictions governing permissible content of communications. The applicable regulations govern not only the words on the website, but also the sounds and images.
7. SO again, check the rules that apply to websites and adhere to those
8. ONE MORE THING OT THINK ABOUT
9. If your law office has a multi-state practice, your website is subject to regulations by other jurisdictions where the rules of advertising and solicitation may be more strict.
10. Multijurisdictional practice is increasingly common, and legal websites are accessible via a broad range of search engines. Links and “Contact Us” buttons on your home page may expose you to potential clients located in remote jurisdictions. Ethics opinions have begun to address this phenomenon and the problems encountered in attempting to regulate interstate legal business. State Bar Formal Ethics Opinion 2001-155, for example, although its main focus is online advertising, recognizes that an attorney’s website may have to comply with the regulations of other jurisdictions and might be construed as the

unauthorized practice of law. California Rule of Professional Conduct 1-300(B) states that a lawyer shall not practice law in any jurisdiction where such practice would violate the regulations of legal practice in that jurisdiction.

11. WHAT IF MY STATEMENT IS FALSE OR MISLEADING?

- a. FALSE OR MISLEADING STATEMENTS ARE OBVIOUSLY PROHIBITED
- b. 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.” Bus. & Prof. Code, §§ 6157.1 and 6157.2; see also rule 1-400, Std.
- c. Definition – according to Opinion 2001-155 an attorneys website must conform to the requirements that the communication not be false or misleading in accordance with California rules of professional conduct 1-400D 1-3 and not fail to indicate clearly expressly or by context that this is a communication . under rule 10400D a communication or solicitation shall not
 1. Contain any untrue statement or
 2. Contain any matter, or present or arrange any matter in a manner of format which is false, deceptive, or which tends to confuse, deceive, or mislead the public, or
 3. Omit to state any fact necessary to make the statements made in the light of the circumstances under which they are made, not misleading the public, or
 4. Fail to indicate clearly, expressly, or by context that it is a communication or solicitation

12. OTHER IMPORTANT THINGS WE DO WITH SOCIAL MEDIA

- a. WEBSITE TIPS
 - i. The savvy lawyer also will have a disclaimer on his or her site in order to guard against false expectations of creating an attorney-client relationship.
 - ii. Regarding website disclaimers, California Formal Op. no. 2005-168 opined that a lawyer who provides his or her website visitors with a means by which they can communicate with the lawyer on the site *may* effectively disclaim owing a duty of confidentiality “only if the disclaimer is in sufficiently plain terms to defeat the visitors’ reasonable belief that the lawyer is consulting confidentially with the visitor.”

- iii. The opinion goes on to specify that “[s]imply having a visitor agree that an ‘attorney-client relationship’ or ‘confidential relationship’ is not formed” would not defeat a visitor’s reasonable belief that the information transmitted to the lawyer on his or her site will be kept confidential.
- iv. So be sure to have disclaimers that are plain and obvious and communicate what you mean

b. THE USE OF CLIENT TESTIMONIALS

- i. First, Why use it? Because it is a wonderful tool for self-promotion and hence growing your business.
- ii. Rules: Be aware that under Cal Rules of Professional Conduct 1-400 Standard (2) which states that a testimonial or endorsement is presumptively misleading if it does not include a disclaimer.
- iii. RULE: An attorney cannot disseminate communications that contain testimonials or endorsements unless the communication also includes an express disclaimer.
- iv. An example is “this testimonial or endorsement does not constitute a guarantee, warranty of prediction regarding the outcome of your legal matter.”

c. 2 YEAR RETENTION REQUIREMENT

- i. If you happen to update the content of your websites frequently be sure that you don’t toss the content of your old ones!
- ii. Rules: According to California Rules of Professional Conduct 1-400(F), “an attorney must retain for two years copies or recordings of any communication by written or electronic media and that these copies must be made available to the State Bar if requested. These requirements apply to each page of every version and revision of your website.