NAVIGATING THE SOCIAL NETWORK: APPLYING ETHICS RULES TO BLOGS, FACEBOOK, TWITTER, AND OTHER SOCIAL MEDIA

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This article provides an overview of legal ethics issues for immigration attorneys using new social media. It starts with a discussion of advertising and legal advice issues, and proceeds with privacy concerns and potential areas for conflicts of interest. After highlighting specific issues of concern, the article concludes with some practical guidance for lawyers and law firms through a discussion of resources for creating their own social media policies to anticipate and avoid ethical violations.

BLOGS, WEBSITES, AND SOCIAL MEDIA PROFILES: ADVERTISING AND LEGAL ADVICE ISSUES

Could a Client's LinkedIn Recommendation of an Attorney Result in Ethical Charges?

Although every state (except California) follows the ABA Model Rules of Professional Conduct, many states customized their rules and comments. This can result in some striking differences. For example, South Carolina customized ABA Rule 7.1, Communications Concerning a Lawyer's Services. The Florida Bar's Standing Committee on Advertising, on the other hand, created separate guidelines for social media sites.[1]

ABA Rule 7.1 states:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

The comment to ABA Rule 7.1 states:

> Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. *The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client* (emphasis added).

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[1] The Florida Bar Standing Committee on Advertising, Guidelines for Networking Sites (Feb. 9, 2010) *available at* *www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/a502e8b302def7a5852576e3004fc685!OpenDocument*.

In contrast, South Carolina's Rule 7.1[2] added more sections and more comments, making its rule more restrictive than the ABA's Rule 7.1. South Carolina added (d) to Rule 7.1, which states:

> A lawyer shall not make false, misleading, deceptive, or unfair communications about the lawyer or the lawyer's services. A communication violates this rule if it:
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> (d) *contains a testimonial* (*emphasis added*); or…
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> In addition, Comments to South Carolina's Rule 7.1 do not include the ABA disclaimer language.
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> In a LinkedIn recommendation on an attorney's profile, a client stated, "Our employees greatly appreciate us using X immigration firm because it shows them we care enough to use the very best. He took the time to carefully answer all questions, and even used Instant Messaging chat as a communication tool." While these words were not written by the attorney, the attorney does have control over posting this recommendation. Thus, the part of the posting that labels the firm "the very best" might violate ABA Rule 7.1 if it is considered misleading under the comment to Rule 7.1:
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> > [A]n unsubstantiated comparison of the lawyer's services…with the services …of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated."

On the other hand, if "the very best" is not considered specific enough, perhaps it wouldn't be misleading under ABA Rule 7.1. But is "carefully answer all questions, and even used Instant Messaging chat" specific? Does this imply other immigration attorneys don't "carefully answer all questions, and even used Instant Messaging chat?" Can this be substantiated? According to Virginia State Bar Lawyer Advertising Opinion A-0113, a client's statements about an attorney that says the attorney is, "the best," is a comparison that cannot be factually substantiated.[3]

Instead of playing the above guessing game, it might be best to use the disclaimer suggested in ABA Rule 7.1's comment noted earlier to "preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client."

In contrast, if this recommendation is considered a testimonial, it would most likely be unethical under the South Carolina Rules even with a disclaimer, according to the South Carolina Bar Ethics Advisory Committee, Ethics Advisory Opinion 09–10 and the entire profile might even have to be taken down if the attorney cannot take down just one piece of the profile:

> Information on business advertising and networking websites are both communications and advertisements; therefore, they are governed by Rules 7.1 and 7.2. While mere participation in these websites is not unethical, all content in a claimed listing must conform to the detailed requirements of Rule 7.2(b)–(i) and must not be false, misleading, deceptive, or unfair...Client comments may violate Rule 7.1 depending on their content. 7.1(d) prohibits testimonials, and 7.1(d) and (b) ordinarily also prohibit client endorsements. See Cmt. 1. In the Committee's view, a testimonial is a statement by a client or former client about an experience with the lawyer, whereas an endorsement is a more general recommendation or statement of approval of the lawyer. A lawyer should not solicit, nor allow publication of, testimonials. A lawyer should also not solicit, nor allow publication of, endorsements unless they are presented in a way that is not misleading nor likely to create unjustified expectations. "The inclusion of an appropriate disclaimer or qualifying language *may* preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client." Cmt. 3 (*emphasis added*). Lawyers soliciting client comments on web-based business listings are also cautioned to adhere to Rule 8.4(a), which prohibits lawyers from violating the Rules of Professional Conduct through the acts of another. Even absent a specific prohibition against testimonials, several states have concluded that client comments contained in lawyer advertising violate the prohibition against misleading communications if the comments include comparative language such as "the best" or statements about results obtained. *See, e.g.*,

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[2] S.C. Rules of Prof'l Conduct R. 7.1, *available at* www.law.cornell.edu/ethics/sc/code/SC_CODE.HTM#Rule_7.1.

[3] Virginia State Bar Lawyer Advertising Op. A-0113 (2000), *available at* www.vsb.org/site/regulation/lawyer-advertising-opinion-a-011.3

> Virginia State Bar Lawyer Advertising Opinion A-0113 (2000). Rule 7.1(c) prohibits comparative language in all communications, Rule 7.1(b) prohibits statements that are likely to create unjust expectations about results, and Rule 7.2(f) prohibits self-laudatory language in advertisements. Therefore, a lawyer should monitor a "claimed" listing to keep all comments in conformity with the Rules. If any part of the listing cannot be conformed to the Rules (*e.g.*, if an improper comment cannot be removed), the lawyer should remove his or her entire listing and discontinue participation in the service.[4]

Because South Carolina's Rule 7.1 includes an explicit prohibition against testimonials, there seems to be no room for an ABA suggested disclaimer that could "preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client." South Carolina's ethics opinion also notes that Rule 8.4(a), which prohibits lawyers from violating the Rules of Professional Conduct through the acts of another, requires attorneys to monitor their claimed listings to insure that client's comments don't violate the Rules. Check your state bar rules to see if they conform to ABA Model Rule 7.1 or mimic (or lean more towards) South Carolina's Rule 7.1 before you accept a client's recommendation on LinkedIn or similar sites.

The Florida Bar Standing Committee on Advertising's Guidelines for Networking Sites[5] states that:

> Although lawyers are responsible for all content that the lawyers post on their own pages, a lawyer is not responsible for information posted on the lawyer's page by a third party, unless the lawyer prompts the third party to post the information or the lawyer uses the third party to circumvent the lawyer advertising rules. If a third party posts information on the lawyer's page about the lawyer's services that does not comply with the lawyer advertising rules, the lawyer must remove the information from the lawyer's page. If the lawyer becomes aware that a third party has posted information about the lawyer's services on a page not controlled by the lawyer that does not comply with the lawyer advertising rules, the lawyer should ask the third party to remove the non-complying information. In such a situation, however, the lawyer is not responsible if the third party does not comply with the lawyer's request.

This guidance is somewhat confusing. If an attorney did not "prompt the third party to post the information or the lawyer uses the third party to circumvent the lawyer advertising rules," it is unclear whether the lawyer is responsible for the information and whether the lawyer must remove the information that does not comply with the lawyer advertising rules.

Can Attorneys State Their Fields of Practice and Specialization in Their LinkedIn Profile Without Violating Any Rules of Ethics?

LinkedIn provides a "Specialties" section on the profile page. Although this is LinkedIn's label for the section, some may argue that when an attorney describes his or her practice beneath the "Specialties" label, they are implying they are certified as a specialist in the described practice area. For example, if you describe your practice area beneath the "Specialties" label as "Immigration Law," are you claiming to be a specialist (which could imply "certified") in this area or merely communicating the fact that you practice in this particular field?

ABA rule 7.4: Communication of Fields of Practice and Specialization provides in pertinent part:

> lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law… and (d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless…".[6]

The comment to this rule states,

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[4] S.C. Bar Ethics Advisory Comm., Advisory Op. 09-10 (2009), *available at* www.scbar.org/member_resources/ethics_advisory_opinions/&id=678.

[5] The Florida Bar Standing Comm. on Advertising, Guidelines for Networking Sites (Feb. 9, 2010), *available at* www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/a502e8b302def7a5852576e3004fc685!OpenDocument.

[6] Model Rules of Prof'l Conduct R. 7.4.

> A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.[7]

Thus, it can be argued that because you are not using the word "certified" you would not be violating Rule 7.4 merely by stating your practice areas beneath a "Specialties" label supplied by LinkedIn (which can't be deleted or changed). This argument is bolstered by the comment to ABA Rule 7.2, which specifically states that you can use variations of the words "specialist" such as "specialty." However, if your state rules are more restrictive, you might need to practice "safe social networking" by adding a disclaimer that you are not certified as a specialist in these areas of law (or that there is no certification for this area of law in your state, if that is the case). In Florida, Rule 4-7.2(c)(3)[8] states that unless a lawyer is certified by the Florida Bar (or an organization accredited by the Bar or another state bar) and displays the name of the certifying organization, "A lawyer shall not state or imply that the lawyer is… a "specialist." Thus, it may be inappropriate for non-certified Florida attorneys to add their areas of practice into the section labeled "Specialties" in their LinkedIn profile.

Would Answering a Legal Question Posted to a Social Media Site Ever Create a Client-Lawyer Relationship?

With the advent of the Internet and the ensuing web sites, blogs, chat rooms, and now social media sites, the public has found new ways to ask lawyers for answers to their legal questions. Lawyers must be careful not to create a client-lawyer relationship inadvertently when they use social networking sites (and similar types of sites) because they may just find themselves embroiled in a malpractice lawsuit if the so-called client relies on the lawyer's advice to the client's detriment and then is able to prove a client-lawyer relationship existed. The relevant ABA Rule is 1.18, Duties to Prospective Client, which states that "(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client and..."[9]

In a lawyer social networking site, a lay person posed the following question: "I am divorcing my husband. Is my car accident settlement community property in California?" The attorney referred the individual to a relevant California case and said, "Give it to your family law lawyer, I mostly practice immigration law." The lawyer would most likely argue that he was not creating a client-lawyer relationship but was simply educating the lay person by supplying a relevant case and by specifically telling her to give it to *her* lawyer and saying he mostly practices immigration law, he was saying, "I am *not* your lawyer." On the other hand, if the woman was representing herself pro se and relied upon the case to her detriment (*e.g.* it had been overruled or reversed, unknown to her), she might claim that the lawyer created a client-lawyer relationship. She might argue that by giving her a case, she assumed it was the most current case about her issue and that he intended her to use it. She might also argue that by saying, "Give it to your family law attorney," he was actually being coy and hoping she considered him to be her lawyer (even though he mostly practices immigration law).

You may be able to avoid creating a client-lawyer relationship if you answer legal questions at social media sites (or on blogs) by giving very general information and not giving answers to specific legal questions, not supplying cases or statutes, and not giving legal advice. In addition, you should use the same types of disclaimers on your social media profile that you use on your firm's website to avoid inadvertently creating client-lawyer relationships. ABA Formal Opinion 10-457[10] has disclaimer information for lawyer web sites. Even though it does not focus on lawyer social media profiles, the two often involve analogous issues, so you might find it useful for your social networking profile disclaimer. In that opinion, you are advised that your disclaimers must be written "[s]o as to avoid a misunderstanding by the website visitor that

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[7] *Id.*

[8] Florida Rules of Prof'l Conduct R. 4-7.2, *available at* www.law.cornell.edu/ethics/fl/code/FL_CODE.HTM#Rule_4-7.4.

[9] Model Rules of Prof'l Conduct R. 1.18.

[10] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-457 (2010), *available at* www.abanet.org/cpr/pdfs/10-457.pdf.

(1) a client-lawyer relationship has been created; (2) the visitor's information will be kept confidential; (3) legal advice has been given; or (4) the lawyer will be prevented from representing an adverse party."[11]

FACEBOOK, LINKEDIN, AND OTHER SUCH SITES—PRIVACY ISSUES

There are at least three privacy issues that can arise when lawyers are dealing with social media: whether a third party's private profile is subject to discovery, how attorneys should set their own privacy settings, and how attorneys can pierce a third party's private profile without using traditional discovery methods. The focus of this discussion will be on the last issue and how it impacts an attorney's ethical obligations.

Social media profiles contain all kinds of personal information that attorneys can often use to attack a third party's credibility, which is why attorneys are particularly interested in viewing them. If the profile is private, however, this poses a block to retrieving the information. There are three ethical opinions about a third party's social media profile and two of them focus on whether it is ethical for attorneys to pierce these private profiles (the other focuses on using information found in public profiles).

Private Profiles and Ethics

Is it Ethical for an Attorney to Ask a Non-Lawyer Assistant to "Friend" the Ex-Wife of a Beneficiary if the Non-Lawyer Uses Her Real Name But Fails to Disclose the Reasons for Making the Request?

Scenario: A U.S. citizen wife thinks that the husband she is sponsoring for permanent residence has been unfaithful and that he might be still seeing his ex-wife from his home country. The ex-wife also remarried and is pursuing permanent residence based on her new marriage to a U.S. citizen. The U.S. citizen wife wants to talk to an immigration lawyer confidentially about the impact of a separation on her husband's case, but she wants to be sure she has her facts straight, so she asks the immigration lawyer to do some investigating for her, such as trying to find the husband's ex-wife's Facebook profile (the husband does not have a Facebook profile). The lawyer is considering asking the firm's part-time legal assistant, using her real name, to attempt to friend the ex-wife, but without disclosing the reason for the friending. Is this ethical?

The Philadelphia Bar Association's Professional Guidance Committee Opinion Says "Friending" an Unrepresented Witness Violates Several Ethical Rules, Even if You Use Your Real Name

The Philadelphia Bar Association's Professional Guidance Committee Opinion 2009-02 (March 2009)[12] addresses a similar question from a lawyer who wished to gain access to an unrepresented witness's private profile to use the profile information against the witness during litigation. In that instance, the inquiring attorney asked if he would be in breach of professional conduct rules if he asked a non-lawyer assistant to "friend" the witness, without the assistant explaining the reason for the request or disclosing that the assistant worked for the attorney. The opinion authors explained that even though the attorney is not making the actual "friend" request, the attorney is responsible for his nonlawyer's conduct because of Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants). Therefore, if the nonlawyer's conduct is "violative conduct" under any of the Rules of Professional Conduct, then the attorney would be in breach of the Rules. The opinion authors found that:

- The "proposed course of conduct contemplated by the inquirer [the lawyer] would violate Rule 8.4(c) because the planned communication by the third party [the assistant] with the witness is deceptive. It omits a highly material fact—namely that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness."[13]

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[11] *Id.* at 5–6.

[12] Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009), *available at* http://tinyurl.com/cgwgwr.

[13] *Id.* at 3.

- The proposed conduct also violates Rule 4.1 because it "constitutes the making of a false statement of material fact to the witness."[14]
- Because "the violative conduct would be done through the acts of another third party, this would also be a violation of Rule 8.4(a)."[15]

Because it is highly unlikely that an unrepresented witness would "friend" your part-time legal assistant once she provided her real name *and* real reason for friending (to use information in the witness's private profile against the husband), you would need an order to compel the ex-wife to turn over her private profile (assuming you can convince the judge there is relevant information). It is difficult to predict whether a judge would issue such an order.

Interestingly, in *Barnes v. CUS Nashville*,[16] instead of compelling witnesses to turn over their private profiles, the magistrate found that because the issue of who took pictures of the plaintiff and her friends dancing on a bar was highly relevant to the plaintiff's personal injury case, he would create a Facebook account and ask the witnesses to "friend" him "for the sole purpose of reviewing photographs and related comments *in camera* … and review and disseminate any relevant information to the parties." The magistrate's friending was his attempt at expediting discovery "regarding the photographs, their captions, and comments."

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Says "Friending" Is Ethical if You Use Your Real Name

For a completely different take on a similar question, see the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Opinion 2010-2 (Sept. 2010),[17] where the committee concluded that there would be no violation of the rules of professional conduct if an attorney or her agent used her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website *without also disclosing the reasons for making the request*. However, the committee noted that a "lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent."[18] The committee said:

> Rather than engage in "trickery," lawyers can—and should—seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful "friending" of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line.
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> Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.[19]

If the ex-wife in this scenario accepts the part-time legal assistant as a friend, even though she doesn't know your assistant is connected to you and her ex-husband's immigration matter, as long as your assistant used her real name, this would not be considered "trickery" according to the New York City Bar. Thus, if you are a New York attorney who wants to send a "friend" request to an unrepresented person, you will have an easier time meeting your ethical obligations than a Pennsylvania attorney because you are only obliged to use your real name and need not disclose your reason for making the request

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[14] *Id.* at 4.

[15] *Id.*

[16] *Barnes* v. *CUS Nashville*, No. 3:09-cv-00764, 2010 U.S. Dist. LEXIS 52263 (M.D. Tenn. June 3, 2010), *available at* http://tinyurl.com/cusnashville.

[17] Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2010-2 (2010), *available at* http://www.abcny.org/Ethics/eth2010.htm.

[18] *Id.*

[19] *Id.*

Could a Lawyer Representing a Client in Pending Litigation Access the Public Pages of Another Party's Social Networking Website for the Purpose of Obtaining Possible Impeachment Material for Use in the Litigation?

Would any of the above ethical dilemmas arise if an attorney was trying to access a public profile to use the information contained in the profile as evidence? We've always said "probably not" when this question has been posed to us. After all, if the profile is open to the public, there would be no need to "pierce" the profile by a "friend" request, so there would be no deceit or false statements involved.

A recent New York State Bar Association Committee on Professional Ethics validated our above supposition in Opinion 843 (September 10, 2010).[20] There, the committee said, "A lawyer representing a client in pending litigation may access the *public* (*emphasis added)* pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation."[21] Further, the committee explained:

> New York's Rule 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so.[22]

It hardly seems that the New York State Bar Association Committee on Professional Ethics needed to write this opinion because viewing public pages of another party's social networking website, in and of itself, is not deceptive. The opinion is, however, a good reminder that attorneys should not use "deception in any other way" which is defined as, "including, for example, employing deception to become a member of the network."

New York attorneys looking for guidance about what would be considered "deception in any other way" could look to the New York City Bar's definition of "deception," which they explained would be the failure to use your real name in a "friend" attempt. This sets a lower bar than the Philadelphia Bar Association's Professional Guidance Committee set for Pennsylvania attorneys, which would be the failure to use your real name in a "friend" attempt, and failure to include the reason for the friending. The real problem is, what should an attorney who practices in both states do? We'd recommend following the stricter guidelines if you want to practice "safe friending."

PERSONAL SITES, CLIENT SITES—CONFLICTS OF INTEREST

The impact of a Hennepin County prosecutor's derogatory Facebook posting about Somalis provides just one example of conflicts created by what an attorney posts to her own social networking profile. The prosecutor posted her comments during a Somali man's trial for attempted murder. Her professional work in court led to his conviction, but her private posting online served as the basis for his new trial motion.[23] The prosecutor likely now appreciates what we should all understand, that attorney misconduct is amplified online. Private conversations are now being relayed to a much broader audience, while leaving a digital trail for ethics investigations.

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[20] N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010).

[21] *Id.* at 1 (emphasis added).

[22] *Id.* at 2–3.

[23] "Hennepin County Prosecutor Accused of Anti-Somali Posting on Facebook," by R. Olson, *Minneapolis Star Tribune*, Feb. 17, 2010.

Using social media sites may be a recent development, but resolving conflicts of interests has long been a standard part of law practice. The preamble to the ABA Model Rules of Professional Conduct emphasizes that all difficult ethical problems arise from conflicts between a lawyer's responsibility to clients, to the legal system, and to the lawyer's own interests.[24] Lawyers increasingly use social networking sites to promote their practice, to research and gather evidence, and to communicate with clients, and these different purposes inevitably lead to conflicts of interest. The ABA's Commission on Ethics 20/20 identified the challenge of maintaining personal and professional boundaries for lawyers using Internet-based client development. "Because lawyers frequently use these websites and services for both personal and professional reasons, the legal ethics issues in this context are more complicated than they have been for more traditional client development tools."[25] Immigration lawyers handling a case involving dual representation need to pay even greater attention to possible conflicts of interest online.

Considerations Before Connecting with Clients

A lawyer's decision to friend a client may be less consequential than a judge's decision to friend a lawyer, but both require some degree of caution. The decision may be easier for judges. Florida's Judicial Ethics Advisory Committee actually recommended against judges becoming friends with lawyers on social networking sites. According to the Florida Committee, listing lawyers as "friends" creates the appearance of a conflict of interest because it reasonably conveys the impression that the lawyer "friends" are in a special position to influence the judge.[26] A minority of the committee disagreed: "Social networking sites have become so ubiquitous that the term "friend" on these pages does not convey the same meaning that it did in the pre-internet age."[27] Judicial ethics authorities in other states have followed the minority's more nuanced position that online friendships do not, by themselves, imply that the attorney is in any special position to influence the judge.[28] According to these authorities, the online friendship is simply one factor among others to consider in deciding whether there is a close social relationship for a judicial conflict of interest.

Not surprisingly, the public nature of social media relationships creates problems for both judges and attorneys alike. Attorneys and judges who use social networking sites for strictly personal reasons may have trouble separating personal from professional contacts. Unlike judges, attorneys have other compelling reasons to use social media, including for marketing. While personal recommendations are still the most trusted form of advertising, online recommendations have strong and growing levels of credibility. According to a recent Nielson study, 70 percent of consumers trust online recommendations. Using social media levels the playing field for attorneys in small firms by making it easier to market on a smaller budget.[29]

ABA Model Rule of Professional Conduct 1.6(a) on confidentiality of information provides that: "A lawyer shall not reveal information related to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."

Comment to Rule 1.6

> [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer may not reveal information relating to the representation…This contributes to the trust that is the hallmark of the client-lawyer relationship.
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> [4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.

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[24] Preamble and Scope, ABA Model Rules of Professional Conduct.

[25] "Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools," ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies, Sept. 20, 2010.

[26] Florida Supreme Court, Judicial Ethics Advisory Committee, Opinion Number 2009-20, Nov. 17, 2009.

[27] *Id.*

[28] *See*, Ethics Committee of the Kentucky Judiciary, *Judicial Ethics Opinion* JE-119 (Jan. 2010).

[29] "Nielson: Consumers Trust Online Opinions," *Adweek*, by D. Gianatasio, July 9, 2009.

As an initial matter, attorneys need to be careful about simply contacting clients with "friend" requests. The attorney-client relationship is not for the attorney to disclose. Attorneys may have good reasons to want to connect with past, present, or potential clients, and to maintain ongoing relationships with clients. This makes particular sense in immigration practice, since clients keep coming back as they go through the process of adjusting status, removing conditions on permanent residence, naturalizing as citizens, and petitioning for family members. Some attorneys adopt a practice of waiting for clients to contact them with friend requests, and even then, they would be prudent to advise clients who make the request that merely listing them as friends on their social media sites might give away information that would otherwise be confidential.[30]

Use Caution in Posting About Clients

Beyond making the initial online connection with clients, attorneys need to comply with Rule 1.6 regarding the content of their sites. "Website disclosure of client identifying information is not normally impliedly authorized because the disclosure is not being made to carry out the representation of a client, but to promote the lawyer or the law firm."[31] Although this may seem clear enough, information that is even tangentially about a client may cause problems. An assistant public defender in Illinois who wrote a blog about her cases carefully hid clients' names. Still, she not only lost her job, but she also faced disciplinary charges for revealing confidential client information. In a hypothetical situation, an immigration attorney may innocently write an online post for marketing or educational purposes about defending a corporate client in an I-9 inspection, naming the industry, but not the client. The post is now out for the world to see. The attorney wrote with enough specificity to disclose potentially damaging confidential client information following publication the next day of a newspaper article, prepared from an employee source, naming the company in connection with a worksite enforcement investigation.

Additional Concerns with Dual Representation

Immigration lawyers routinely represent two parties in the same matter. They represent both corporations and foreign nationals in employment-based applications and both citizen and foreign national spouses in family-based applications. Because the objectives of both parties usually remain the same throughout the process, retaining separate counsel is likely to be considered too expensive or impractical because of difficulties in communication and overlap in services. Still, this type of dual representation already carries greater risk of conflict. Much has been written about different approaches to dual representation, the importance of clarifying at the outset the implications of common representation, and how attorneys can represent two clients with interests that may diverge.[32] Attorneys in dual representation must continually assess whether it is possible to represent both clients and to maintain their duty of loyalty and confidentiality to each client.

Dual representation is permitted unless there is a present conflict of interest. Rule 1.7(a) provides that "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer."

Rule 1.7(b) states that: "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

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[30] See "Why Can't We Be Friends," *ABA Journal*, by L. A. Gordon, Jan. 1, 2010.

[31] ABA Committee on Ethics and Professional Responsibility, Formal Opinion 10-457 (Lawyer Websites).

[32] See B. Hake, "Dual Representation in Immigration Practice," *Ethics in a Brave New World*, 28 (AILA 2004 Ed.); C. D. Mehta, "Finding the 'Golden Mean' in Dual Representation," 06-08, *Immigration Briefings* 1, (Aug. 2006).

Comments to Rule 1.7

[29] In considering whether to represent multiple clients in the same matter, the lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment, and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.

Attorneys try to minimize conflicts by explaining to co-clients at the beginning that the case involves dual representation and identifying where conflicts may arise. Still, some conflicts are unavoidable.

The widespread use of social media sites is likely only to increase conflicts between jointly represented clients. These sites have become such a valuable research tool for attorneys in contested matters because they reveal important and often embarrassing information about the other side. The previously discussed Philadelphia Bar and New York City Bar opinions on ethical traps for lawyers accessing private profiles implicitly highlight the value of information available from another party's social networking site.[33] The scenario from section three could easily apply to immigration lawyers representing two clients in a marriage-based petition. In a variation of this scenario, the petitioning spouse and her husband are represented by the same immigration attorney. The spouse not only discovers her husband's infidelity by accessing his Facebook profile, but she also finds out on her own that he is still seeing his ex-wife from his home country who also is married to a U.S. citizen. The jointly represented clients are now in direct conflict under circumstances that raise concerns about possible marriage fraud, which may trigger a duty of candor to the tribunal under Rule 3.3. The attorney would not be able to protect confidential information between jointly represented clients. Moreover, the attorney's duty of confidentiality to the husband would be qualified by the duty of candor to the tribunal.

EDUCATING AND RESTRAINING YOUR STAFF REGARDING THE APPROPRIATE USE OF SOCIAL MEDIA

Hardly a week goes by without a news report of someone dealing with the consequences of a post they made on a social media site. Whether it's a waitress fired for posting derogatory remarks about a customer on Facebook, a job offer that's rescinded because of an errant Twitter post, or a college professor denied tenure over the sex-related Web site she ran (not on school time), these incidents are no longer novel. Their prevalence illustrates why having a social media policy for employees is important.

Law firms are no different than any other business in their need for an employee policy to define what is and is not acceptable behavior for employees to engage in online as it relates to the firms' reputation and commercial interests. For law firms though, it goes far beyond just "protecting their brand" or keeping customers satisfied. Law firms have the added concerns of running afoul of the rules of professional conduct that guide the profession … and can mean the difference between remaining in good standing and being disciplined or even disbarred. Law firms must also contend with the potential for the revelation of client confidences, the inadvertent creation of an attorney-client relationship, violation of the rules governing attorney advertising, or the appearance of the unauthorized practice of law.

Creating a Social Media Policy for Your Firm

ABA Model Rules of Professional Conduct 5.1 and 5.3 lay out the responsibilities of lawyers with supervisory responsibilities. These rules make a good argument for a law firm's need to implement a social media policy.

Section 5.1(a) states that, "A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." (*available at* www.americanbar.org/groups/professional_responsibility/publicat

[33] Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2010-2 (2010); Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009).

ions/model_rules_of_professional_conduct/rule_5_1_responsibilities_of_a_partner_or_supervisory_lawyer.html).

Rule 5.3 lays out similar responsibilities over the firm's nonlawyer employees and the comments to Rule 5.3 (and Rule 5.1) make it clear that the firm should have internal policies in place so nonlawyers and lawyers in the firm conform to the Rules of Professional Conduct (*available at* www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant.html).

Comments to Rule 5.3

> [1] A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.
>
> [2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct.

As with any policies, the social media policy should be written and distributed, employees should acknowledge receipt, and the policy should be updated. It should also include disciplinary and/or corrective actions for violations.

What to Include in the Policy

Without trying to sound contradictory, the policy should be both specific and broad. It should specifically address the types of information and/or actions that can and can't be engaged in. It might also spell out activity allowed only with the prior consent of the managing partner (or some other management designate). However, the policy should be broad enough to anticipate further developments in social media (*e.g.*, new forms of online communications and/or sharing).

Some "must-cover" items would include:

- Computers and technology are firm property
  - With the appropriate employee expectation of privacy
  - Many policies govern an employee's private computer use outside work
- Complete prohibition of unlawful use of computers/Internet
  - Policy should be tied to the harassment prevention policy
- Cover as wide a range of online activities as possible, including social networking sites (*e.g.,* Facebook, Twitter), blogs, and comments left on the sites of others
- Client confidentiality is sacrosanct
- Personal social media activity must be kept separate and distinct from professional social media
- Employees cannot maintain social media sites dedicated to legal issues or law firm practice without prior firm authorization
- Employees must get permission before using firm's logo or speaking on behalf of firm
- Employees should always be transparent and honest about their affiliations; they should never be false or misleading (This may, in fact, be covered by the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR Part 255 (2009), *available at* www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf.)
- Permitted posts should be factual, correct, and verified

Getting Started with a Social Media Policy

In some ways, a social media policy is just an extension of your firm's existing communications policies. If you already have established communications policies in place, social media might be handled with the addition of language such as:

> Substantive legal and professional materials intended for a social media site, blog, or other electronic media site must conform to the same review standards as any printed or otherwise distributed material from the firm.

If you are creating a new social media communication strategy from scratch, issues of client confidences might be handled by language such as:

> Firm matters, including firm business matters and matters involving firm clients, may never be posted, discussed, transmitted, or alluded to on any social media site (personal or private) without specific authorization.
>
> Client confidences and secrets may never be posted, discussed, transmitted or alluded to on any social media site (personal or private).

A Resource for Completed Sample Policies

Although this list of "must-covers" can seem daunting, luckily you don't have to start from scratch. Chris Boudreaux, an executive with business consulting firm Converseon, has created a collection of links to nearly 175 policies covering social media, e-mail, and other types of electronic communication (*http://socialmediagovernance.com/policies.php*). The list includes law-related entities, such as Baker and Daniels and Harvard Law School, as well as dozens of large and small companies in an array of industries.

A Form-Based Policy Generator

If you're looking for another head start to help you build a social media policy for your firm, the Policy Tool for Social Media (*http://socialmedia.policytool.net*) offers a free tool that includes a series of fill-in-the-blank forms to create a personalized policy for your firm. By its own description, the site is a "policy generator that simplifies the process of creating guidelines that respect the rights of your employees while protecting your brand online."

As with any form, the policy that this site generates should not be relied on without careful review and (in most cases) further customization to fit your precise needs. It's also extremely important to note that the form policy was created by a Canadian IT firm in collaboration with Canadian technology lawyer David Canton—so be certain to look for inconsistencies in the law and policy languages that come with this kind of cross-border adaptation. Additionally, the site presents a lengthy disclaimer that reads in part: "This tool is intended to provide assistance to create a social media policy—it does not provide legal advice. We do not warrant the completeness, timeliness or accuracy of the output of the tool, which is provided 'as is.' The user is encouraged to seek legal advice to ensure that the document produced by this tool is appropriate for the user's circumstances and jurisdiction."

While every law firm has different requirements, dictated by their individual circumstances, this advisory gives you a series of starting points to craft a social media usage policy that fits your firm's individual circumstances.

CONCLUSION

Attorneys who want to avoid having their own profiles ensnare them in a potential ethical trap should temper their social media use by reviewing the attorney codes of ethics and ethics opinions in states where they practice. Also, attorneys should configure their profile privacy settings to the social media site's most restrictive privacy settings. This assumes that the attorney is using a social media profile for personal reasons only. If an attorney is using a social media profile for professional or marketing purposes, using the most restrictive settings would run counter to that purpose, so attorney s must choose their words (and their friends) carefully. Attorneys using social networking sites need to learn from the mistakes of others, understand potential ethics traps, and adjust their use based on an understanding that everything online is potentially accessible.