

The Profession

Professional Ethics and Social Media

by Steven W. Kasten

Lawyers are embracing social and business networking media — [Facebook](#), [Twitter](#), [LinkedIn](#) and the like — as an essential part of their law practices and marketing efforts. Social media offers unprecedented opportunities for professional networking, profile enhancement and thought leadership. And incorporating one's professional life into the milieu of social networking is easy and natural.

Nevertheless, professional ethics rules apply to the use of social media, just as they do to other on-line activities by attorneys. As has been widely reported in the press, lawyers have been subject to disciplinary review for improperly publicizing cases, criticizing judges, and divulging confidential client information, all through social media. In one instance, a Texas attorney and judge “friended” each other, which led to the judge learning through Facebook postings that the attorney had lied about her reasons for requesting a continuance.

It appears that many of these lawyers simply failed to use common sense, so the lessons to be drawn from these anecdotes are limited. But there are a range of interesting social media-related professional responsibility issues discussed with increasing frequency among bar associations and regulatory bodies. The American Bar Association Ethics 20/20 Commission is now in the process of examining whether to provide formal guidance and/or to recommend changes to the ABA Model Rules of Professional Conduct to address lawyers' use of social media as client development



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tools. Its [September 2010 “call for comments”](#) has elicited thoughtful and conflicting commentary from law bloggers, the law firm marketing industry, and law-related enterprises offering various commercial opportunities to lawyers through social media. As this discussion plays out, it is worthwhile considering how the Massachusetts Rules of Professional Conduct relate to the use of social media for the marketing of legal services.

Social Network Profiles and Recommendations Must Comply With Rule 7.1

There are now more than 17,500 registered LinkedIn users whose profiles identify them as an attorney in Greater Boston. Each profile can include basic information, such as educational background, degrees, honors and awards, a law firm name, prior employment and practice descriptions.

Lawyers posting such profiles are communicating about their services, and must comply with [Rule 7.1](#), which provides that “[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 omits a fact necessary to make the statement considered as a whole not materially misleading.” Statements comparing a lawyer’s services with another lawyer’s services, and statements creating unjustified expectations about the results a lawyer can achieve, are especially suspect. Lawyers should also be mindful to comply with [Rule 7.4](#), restricting claims of specialization.

Many networking sites allow clients and colleagues to “recommend” a lawyer, and encourage subscribers to request such recommendations, which then appear on the lawyer’s profile page. While the Massachusetts Rules do not prohibit a lawyer from requesting a recommendation or publishing testimonials, the lawyer [cannot pay anything of value for the recommendation](#) and, as the [South Carolina Bar Association recently concurred](#), is responsible for ensuring that the content of the recommendation comports with [Rule 7.1](#). Lawyers therefore should be especially careful to review the content of recommendations on social media sites, and decline or delete them as appropriate, especially where the profile pages provide no effective way to add fair context and/or disclaimers to reduce any potentially misleading aspect of the testimonials.

Social Network Profiles as Advertising

Until there is authority to the contrary, lawyers should consider information disseminated through social media, such as a LinkedIn profile, as “advertising” governed by [Rule 7.2](#). One could certainly articulate an argument that lawyers participate in social media for reasons unrelated to marketing, and therefore that such information should not be considered advertising. But it is difficult to see how an on-line professional profile maintained by a lawyer can be distinguished by the public from a lawyer’s web-site or home page which, according to Comment 3A to Rule 7.2, “would generally be considered advertising subject to [MRPC 7.2] ... ” In [Ethics Opinion 98-2](#), the MBA Ethics Committee, addressing whether an internet-based bar directory was a lawyer referral service, assumed that the content on member home pages that were linked to the directory was advertising, and as such the content must be retained for at least two years under Rule 7.2(b). Bar association ethics committees in Arizona, Alabama, and Illinois have agreed, and in 2010, the [Texas Bar Association’s Advertising Committee issued an interpretive comment](#) that “[l]anding pages such as those on Facebook, Twitter, LinkedIn, etc. where the landing page is generally available to the public are advertisements” which must be filed with the bar unless “access is limited to existing clients and personal friends.”

Accordingly, Massachusetts lawyers should keep a record of the content of and changes to their professional profiles, and of promotional communications distributed through social media.

Blogging, Tweeting, and Chat Rooms

Social media such as Twitter, blogs and chat rooms provide opportunities for lawyers to communicate about legal issues with each other, and with non-lawyers. They also pose professional ethics risks, albeit ones which appear to be manageable.

Solicitation. [Rule 7.3](#) requires that written solicitations of prospective clients (which include e-mail) be retained for two years, and that solicitations “in person or by personal communication,” including by “electronic device,” are altogether prohibited. Comments to Rules 7.2 and 7.3 suggest that posting to chatrooms, newsgroups or electronic bulletin boards might constitute a permissible written solicitation

or even a prohibited “in person” solicitation. A recent [Ethics Opinion of the Philadelphia Bar Association](#), however, opined that chat room solicitation should never be considered “in person” because participants understand that they may disengage.

A lawyer who simply posts general commentary about a legal issue on-line, and who invites prospective clients to access the discussion, should not be viewed to be soliciting, as long as his or her comments are not accompanied by any recommendation or invitation to retain the lawyer. Such activity is analogous to giving a legal education seminar, motivated in part by the hope of business generation, which the [MBA Ethics Committee has opined](#) does not constitute “solicitation” governed by Rule 7.3.

Unwanted Clients and Conflicts. Commentators have also warned that social media interactions may place lawyers at risk of being disqualified from a case based on contact with unintended “prospective clients.” The [MBA has opined](#) that in the absence of an effective disclaimer, a lawyer who receives confidential information in an unsolicited e-mail transmitted through his firm’s website is subject to a duty of confidentiality that may disqualify the firm from representing clients with adverse interests.

In the context of law firm web sites and e-mail, well-placed warnings and disclaimers to control the flow of information can substantially reduce or eliminate those risks. However, since social media may not permit the same level of functional control, the risk of unintended conflicts may be greater. Where the social medium is of a public nature (e.g., an open chat room), it is unlikely to create any reasonable expectation of privacy that would give rise to a serious claim of confidentiality. Nevertheless, as a precaution, lawyers should consider utilizing whatever automated reply features are offered by social media sites, such as LinkedIn’s “Contact Settings” which permit a user to send a standard message to those who are sending “InMail,” to make the appropriate disclaimer.

Actually *answering* legal questions through social media raises different issues, and may well give rise to attorney-client relationships as well as unauthorized practice of law issues depending on the location of the requester and the legal problem being described. As the [D.C. Bar Ethics Commission has suggested](#),

lawyers who are not intentionally seeking to form an attorney-client relationship, should avoid giving legal advice, as distinguished from more general information about the law, on blogs and other on-line legal forums.

The Responsibility of Lawyers and Law Firm Management

Lawyers must keep in mind that the professional information they post or claim on social and professional media sites must be truthful and fair, and in many cases will likely be subject to regulation as advertising. Because [Rule 5.1](#) requires partners in law firms to “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,” law firms should be developing policies regarding the use of social media, including but not limited to the issues discussed herein. While the proper extent and formality of such policies will depend on the size of the firm and its particular circumstances, the topics of such policies may include:

- Conforming social media profiles to practice descriptions on firm web-sites;
- Providing Standard disclaimers for use on specific social media sites;
- Policies for requesting and retaining social media profile recommendations and “specialty” information;
- Recommended privacy settings for Facebook and other social media;
- Conforming blog and Twitter use to Rule 7.1;
- Ethical use of social media to gather case information;
- Whether it is appropriate for attorneys to “friend” or link to the profiles of judges before whom they practice, a question about which states such as Florida, New York and Kentucky have come to different conclusions;
- Cautions against posting on any social media information regarding clients, including information subject to [Rule 1.6](#). ■