

# SOCIAL NETWORKING AND LEGAL ETHICS: HOW DO THEY COEXIST?

by Randy Wilson

The new world of social networking brings with it a whole new landscape of ethical questions. Imagine an attorney who writes a blog about how spouses should divide up property upon divorce. In response to his post, a reader sends him an email. In the note, she divulges very personal information about herself, her addiction problems and her recent separation and impending divorce. At the end of the email, she asks the attorney to represent her in the divorce. But after seeing her name, the attorney realizes that he already represented the husband. Obviously, he can't represent her. But the case isn't so black and white. What about the new information the lawyer has about this marriage? Can he use it in his representation of her husband?

Many attorneys find that social networking is an effective and inexpensive way to communicate their message and market their services to a highly targeted audience. The use of blogs, email, Facebook and Twitter has information flowing more freely than ever before. But as exemplified above, when it comes to social networking and legal ethics, we are in uncharted territory. How can — and should — we utilize social networking within the current ethical framework?

## SOCIAL NETWORKING 101

There is a lot of talk about social networking. But what exactly does it encompass? Social networking is the

interaction between people who discuss a common interest or connection on the Internet. I think of social networking as two separate categories: The first is in a communal setting, such as a blog comment, Facebook posting or contacts update through LinkedIn. The second type is one-to-one communication, where a visitor contacts the blogger directly, reaches out through a LinkedIn Inmail, or sends a direct message from Twitter.

Even the most tech-savvy among us can find the sudden rise in social networking an overwhelming topic to tackle. And just when you get the hang of using the most common sites, more seem to pop up. Between this continuous in flux of new sites and millions of blogs, many attorneys find the whole subject so daunting they would rather ignore it and hope social networking turns out to be a passing fad.

Given the ongoing explosive growth of social networking and the increasing ways people are using it both personally and professionally, I believe that social networking is here to stay. And attorneys who think they can ignore social networking do so at their own peril.

## PROTECT YOURSELF

Becoming social networking savvy is about more than just getting new clients: It is about protecting your reputation online. That is because a growing

number of sites include ratings and comments — often anonymous — that could define your reputation, either positively or negatively. A lawyer-specific site called Avvo.com allows clients to comment on how they like their attorney. Unvarnished.com allows an anonymous poster to write about his or her experience doing business with professionals. Although many people think of Yelp.com as a site for rating restaurants, it also includes law offices along with other professional services.

Lawyers without websites, blogs, or LinkedIn profiles risk having other people rightly or wrongly rate them on this growing number of rating websites. One way to combat negative press is to establish profiles on LinkedIn, Twitter, and Facebook. Fresh content will rank higher in search results, pushing down any negative press to a lower ranking. By setting up Google Alerts, you can be the first to know when someone comments on your services. When alerted, it gives you the chance to respond quickly rather than leaving those comments unanswered.

With all the different social networking platforms, figuring out the prevailing ethical guidelines could seem exceedingly complicated to figure out. But it boils down to two kinds of communications — one-way communications (advertising) and two-way communications (social networking).

## **ONE-WAY COMMUNICATIONS**

One-Way communications is just like it sounds: Classic examples are a television advertisement watched passively by a viewer or a billboard seen by someone driving 70 mph down the freeway. The rules governing these forms of advertising are spelled out in the California Business & Professions Code 6157-8 as well as the California Code of Professional Responsibility. For the Business and Professions code, the standard is "false, misleading, or deceptive," while the California Code of Professional Responsibility is an even stricter standard that includes "confusing."

Content that is posted to a website is considered one way communication and clearly constitutes a form of advertising. Whether it is a website, blog or other site, little gray area exists when it comes to text. For example, stating that you always exceed your clients' settlement expectations violates the false, misleading or deceptive standard. If you wrote, "I obtain settlements for my clients," that would probably be okay in and of itself. But what if next to that statement you included a graphic representation of a big bag of money? The money bag would probably violate the legal prohibition against using graphic representations that are deceptive when the page is taken in its totality.

### **THE ISSUE OF SPECIALIZATION**

To avoid charges of making false, misleading or deceptive claims, attorneys also have to be careful when setting up their LinkedIn profiles. Like other State Bar Associations, for instance, the California State Bar certifies attorneys who meet several stringent requirements. They prohibit attorneys without that certification from claiming that they specialize in these certified areas. LinkedIn has a section called "specialties" and it is wise for an attorney not to include areas of practice covered by the State Bar's certification program, if the attorney is not certified in these practice areas.

### **TESTIMONIALS & DISCLAIMERS**

The California Rules of Professional Conduct are very strict about how attorneys utilize testimonials on their

behalf. CRPC Rule 1-400 Standard 2 states that if an attorney publishes a testimonial, it must also provide an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter." What does this mean for LinkedIn recommendations from clients? It is currently unclear. But it is smart to provide recommenders with disclaimer language at the bottom of the recommendation as a precaution against any ethics complaints.

### **HOW TO TREAT BLOGS**

A recent ABA panel recommended that attorneys treat their blogs just as they would their websites: Make sure that your blog does not make false, deceptive, misleading or confusing claims about your legal practice. If you include disclaimers on your website, you might as well include them on your blog. The same applies to any notice about websites constituting attorney advertising, if you might represent clients in states where the attorney ethics rules require such notice.

### **WEBSITES YOU DON'T CONTROL**

If you have the ability to include proprietary text on a website that provides a profile for your law firm such as LinkedIn or Facebook, it makes sense to include the same disclaimer and notice language that you included on your website and blog. And remember, websites, blogs and social networking profiles all need to conform to the rule enshrined in the California code of professional responsibility: attorney communications regarding professional services must not be deceptive, false, misleading or confusing.

## **TWO-WAY COMMUNICATIONS**

The murkier area is two-way communications, where clients or prospective clients can either comment on your blog, ask to connect as a friend to your Facebook or LinkedIn profile, ask a question or engage you to take their case.

### **BLOG COMMENTS**

If you have a blog that allows readers to comment, be careful in respond-

ing. For example, if someone from a jurisdiction where you do not practice law writes a comment to your blog asking for assistance on a legal matter and you respond via the blog, you could be considered having provided unauthorized practice of law.

Another issue is the possible violation of client confidentiality, if you approved the comment. One option is to not approve the post and then to reply directly to the person who commented. Remember, it is not enough to claim that the visitor is not a client. If the visitor who writes a blog post asking for advice is a prospective client, this could be an issue. If you argue that the client was first to make the information public, they could argue they were not aware of the implication of providing this information through a blog, where you as an attorney will be held to higher standard than your prospective client.

### **PUBLICLY CONNECTING TO A CLIENT**

Whether it is Facebook, LinkedIn or any other social networking website, your clients may want to add you to their list of contacts. Depending upon the type of practice, this could be problematic. If your practice is in a sensitive area like bankruptcy or divorce, you may want to fully disclose that the consequence to your client is making such a relationship public. Or you might simply inform your clients that, to protect their confidentiality, you do not make such connections public.

### **PROSPECTIVE CLIENT COMMUNICATION**

Two issues arise when communicating with a prospective client — anyone who queries your website, blog, LinkedIn or Facebook profile seeking your legal representation — and they reveal personal information about their situation. If a prospective client emails you asking for representation, does that constitute engagement? Probably not. But to be safe, you can state that sending an email in no way constitutes the attorney's engagement for services with the client.

A more difficult situation arises where a prospective client divulges potentially confidential information

in an email sent from the website, blog or LinkedIn profile. If the attorney is already representing the other side in the dispute, does the attorney have to treat this information as confidential? What if the attorney states on his website, blog or Facebook profile that no attorney client confidentiality applies to any email sent to him? Is that enough to protect him or her from an overeager prospective client? Not according to the State Bar ethics opinion. They require a plain text statement because prospective clients should not have to understand legalese. The statement needs say something like, "I understand and agree that lawyer will have no duty to keep confidential the information I am now transmitting to the lawyer."

### **DOES "REAL TIME" CHAT QUALIFY AS DIRECT COMMUNICATIONS?**

California is proposing to adopt much of the ABA Model Rules of Professional Responsibility. In particular, the State Bar wants to eliminate the distinction between solicitation and communication. Under the old rules, online chat or "real time" electronic communications was not considered solicitation. But that has changed in the new rules, which cover such communication. In the ABA model, they are looking to adopt restrictions to various forms of direct communications. This raises more questions. What is real time electronic communication? Does Twitter qualify? What about a chat between people who connected through an online group but have never met face to face — does that qualify as direct communications? To be safe, it is probably best not to initiate communications with prospective clients on such sites.

### **BEST SOCIAL NETWORKING PRACTICE: DISCLAIMERS**

Disclaimers are not invincible shields against all litigation. But it is better to have good ones than bad ones — or nothing at all. Here are some suggestions based on both California State Bar and ABA ethics opinions addressing websites and disclaimers:

- **Be clear.** Make it clear to your website visitors that visiting your site or

emailing you does not establish a client relationship.

- **Make your disclaimer prominent.** If you have a Contact page, have the disclaimer(s) on the same page. I have seen law firm websites that have a separate page for the disclaimer. However, this does not address the essential issue: making sure that the prospective client is aware of any limitations or provisions about the attorney's legal representation at the point of contact.

- **Separate out the disclaimer regarding engagement in legal services from confidentiality.** Attorneys often collapse these issues into one disclaimer. But they are very different. Only those who are looking to actually engage the attorney or law firm need to understand what constitutes legal engagement. Confidentiality relates to the information provided by anyone writing to the attorney in an email, blog comment or through a social networking inquiry. Typically, attorneys do not guarantee to keep this information confidential, but this should be clearly stated.

- **Email disclaimers**

Social networking websites typically require that users provide them with email addresses. When a person has received a posting or message on his or her social networking profile, he or she is often notified through this address. To make sure that anyone who sends a message through one of these sites understands the terms of engagement and confidentiality, you can use an auto-response email that includes a clear disclaimer either in the body of the email or the footer. This prevents you from having to individually monitor or craft a response for every email sent to you from every one of your social network websites.

### **AN ETHICAL QUESTION ANSWERED**

So what does the law say about the hypothetical woman who emailed her husband's attorney? According to a 2005 California State Bar Ethics Opinion and the ABA ethics opinion mentioned above, the woman is considered a prospective client for purposes of confidentiality. The next question is whether the attorney has to treat the information the woman provided him

as confidential. Both opinions concluded that a legalistic disclaimer alone will not protect the attorney. The lawyer's disclaimer must be extremely clear, making sure that the person who sent the email understood that the lawyer had no duty to keep the information transmitted confidential. Remember that a cautious, educated approach to social networking clearly benefits attorneys both in marketing their practices and adding value for their clientele.

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- *Randy Wilson is an attorney who assists other attorneys with their business development and marketing needs including website development, social networking strategy and ethics. Randy has a B.A. from UC Berkeley and J.D. from the University of Santa Clara School of Law. He is an active member of the California Bar and a co-chair of the Alameda County Bar Association's Business Law Section Executive Committee.*

# MCLE SELF-STUDY

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## SOCIAL NETWORKING AND LEGAL ETHICS: HOW DO THEY CO-EXIST? MCLE SELF-STUDY

- 1 If you do not engage in social networking, you do not have to worry about your online reputation.  True  False
- 2 Blogs are not considered websites for purposes of advertising rules.  True  False
- 3 If you do not have a state bar sponsored legal certification, it is probably best not to include practice area expertise in the Specialty section of your LinkedIn profile.  True  False
- 4 If your secretary asks for a recommendation on LinkedIn, go ahead and give it to her.  True  False
- 5 You cannot go wrong if you make sure your online content is not false, misleading or deceptive.  True  False
- 6 Be careful how you respond to comments that are made to your blog because you do not know where the reader is located.  True  False
- 7 The best approach is to never let a client link to you on a social networking platform.  True  False
- 8 As an attorney you may owe a duty to people who communicate with you on your website even if they are not clients.  True  False
- 9 The ABA suggests that your online disclaimer should be clear to people who are not lawyers.  True  False
- 10 As long as you have a disclaimer on your website, it does not matter where you place it.  True  False
- 11 Social networking is the interaction between people who discuss a common interest or connection on the Internet.  True  False
- 12 Actively engaging in social networking is a good way to minimize negative online criticism.  True  False
- 13 As long as you are careful what you say, it is okay to use graphics however you like.  True  False
- 14 You cannot rely on a disclaimer stating that no attorney client relationship is established in order to prevent any information a prospective client sends you from being considered confidential.  True  False
- 15 It is best to use your business email address when you set up social networking profiles for your legal practice.  True  False

### HOW TO RECEIVE ONE HOUR OF MCLE CREDIT

Answer the test questions above, choosing the one best answer to each question. Mail this page and your payment for \$20 to CCCBA at the address below.

Name	State Bar #
Firm Name	
Address	
City, State, Zip	
Phone	Email
<input type="checkbox"/> Visa <input type="checkbox"/> MasterCard <input type="checkbox"/> Amex <input type="checkbox"/> Check (payable to CCCBA)	
Cardholder Name	
Card Number	
Expiration Date	
Signature	

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