



2nd Annual Venable Advertising Law Symposium

**The Early Bird Gets Ethics CLE
plus check-in and breakfast**

Alexandra Megaris, Venable LLP



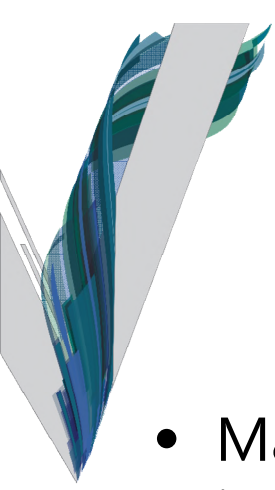
Social Media and Ethics

- Social media has become ubiquitous
- However, more than ever it blurs the line between our personal and business lives
- Also creates numerous ways to connect to people that never existed before
- Bar has been busy playing “catch-up” on how existing ethical obligations apply in this area
- Need to be aware of inconsistency between jurisdictions



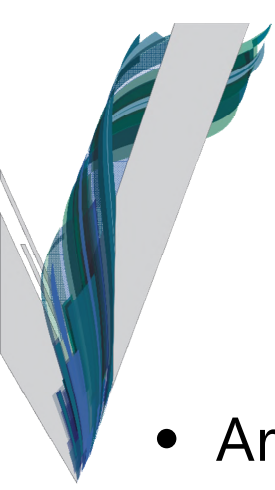
Social Media and Ethics

- Social media has no geographic boundaries
- Conduct that may be okay in your own jurisdiction can land you in trouble elsewhere
 - Blogs, etc.
 - Client solicitation



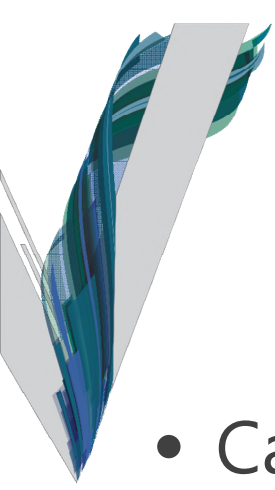
Personal or Professional Use of Social Media: Are you Advertising?

- Marketers we advise sometimes wrestle with whether something is an “advertisement”
- Same issue arises with respect to lawyers’ use of social media
 - Important threshold question as to whether ethical requirements relating to lawyer advertising apply
- Different states may have different rules but principles to consider



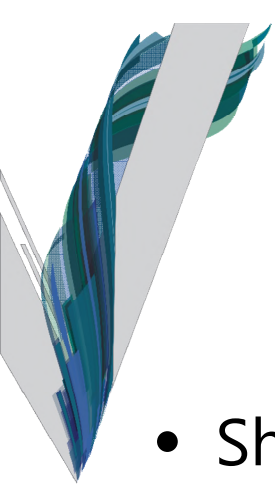
Personal or Professional Use of Social Media: Are you Advertising?

- Are you communicating with just “friends” or the general public?
- Are you simply reporting a result?
- Are you soliciting prospective clients?
- Are you promoting an event or article?
- What if your site is “mixed use?”
- Social Media Ethics Guidelines of Commercial and Federal Litigation Section of NYSBA (Mar. 18, 2014) state that attorney advertising and solicitation rules do not apply to a lawyer’s social media platform that is used only for personal purposes (Guideline No. 1.A)



Personal or Professional Use of Social Media: Are you Advertising?

- California Ethics Op. 2012-186 – Several Hypos
 - Operative language is any message “concerning the availability for professional employment”
 - (1) Case finally over. Unanimous Verdict! Celebrating
 - (2) Another great victory in court today. My client is delighted. Who wants to be next?
 - (3) Won a million dollar verdict. Tell your friends to check out my website
 - (4) Just published an article on wage and hour breaks. Let me know if you want a copy



Personal or Professional Use

- Should it matter who you are communicating with?
 - Some states recognize exemptions for communications to other lawyers, family members, close friends, prior clients, etc.
- What about sending “friend request” or LinkedIn invitation?
 - California ethics op declined to address
 - Your daughter’s piano teacher?
 - Does it depend on how you use the site and your connection to the individual you’re seeking to “friend”?



Is a Blog Advertising/Commercial Speech?

- Hunter v. Virginia State Bar
 - Criminal Defense Lawyer maintained blog
 - Most posts described cases where he obtained favorable result; interspersed with commentary about the justice system
 - In a 5-2 decision, Virginia Supreme Court said that blog was commercial speech subject to advertising requirements
 - Majority found that motivation was at least in part economic
 - Dissent focused on speech relating to justice system



Complying with Advertising Requirements

- If you are engaging in advertising, then various restrictions apply, depending upon state
- Things like firm websites, blogs must be labeled as “advertisements” (Hunter case)
- Note that this differs from FTC guidance – Company website does not have to label itself as an “advertisement”
- NY Social Media Ethics Guidelines allow you to abbreviate required disclosures for sites such as Twitter



Avoid False or Misleading Statements

- Rules in this regard apply in full force to social media
- If you post about winning a case or verdict, make sure you comply with state rules governing “typicality”
 - Cal. Hypo – “Another great victory. My client is delighted.” or “Won a million dollar verdict.”
- Beware of social media sites (LinkedIn, Avvo) that may allow you to claim a “specialty” (NY Ethics Opinion 972)
- NYBA Social Media Ethics Guidelines specifically prohibit advertising areas of practice under headings in social media platforms that include terms like “specialist,” unless lawyer is certified by appropriate accrediting body (Guideline No. 1.B)

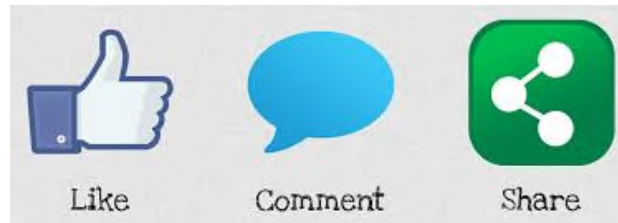


Social Media – Testimonials and Endorsements

- Using client testimonials on social media – same rules apply to testimonials generally
 - Beware of retweeting, etc.
 - Consider typicality rules
- Endorsements can also trigger material connections requirements
 - Clients
 - Relatives
 - Colleagues

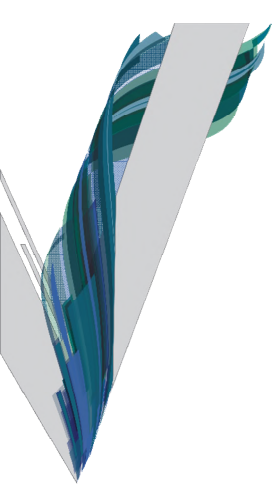


Hypothetical #1



Happy Client My lawyer is fantastic and just won my case. She'll win yours too. Give her a call.

- What you should you do if this gets posted on your social media site?



Hypothetical #1

- NY Social Media Guidelines provide the answer??
- While a lawyer is not responsible for a post made by a person who is not an agent of the lawyer, a lawyer's obligation not to . . . participate in the dissemination of advertisements containing misleading, false or deceptive statements includes a duty to remove information from the lawyer's social media profile where that information does not comply with applicable ethics rules.

Hypothetical #2 – Preserving Client Confidences



A screenshot of a Facebook status post interface. At the top is the Facebook logo. Below it are four tabs: Status, Photo, Ask Question, and Milestone. The Status tab is selected. The text of the status is: "Why do clients insist on making my job harder by telling me these things.... There are some things your defense attorney would rather not know...". At the bottom right, there is a lock icon, the word "Public", a dropdown arrow, and a "Post" button.

facebook

Status Photo Ask Question Milestone

Why do clients insist on making my job harder by telling me these things.... There are some things your defense attorney would rather not know...

Public Post



A screenshot of a Facebook status post interface, similar to the one above. The text of the status is: "Should've paid more attention in mergers and acquisitions @ Dunder Mifflin, Inc.". The bottom right shows the same "Public" setting and "Post" button.

facebook

Status Photo Ask Question Milestone

Should've paid more attention in mergers and acquisitions
@ Dunder Mifflin, Inc.

Public Post



Social Media and Disclosing Privileged or Confidential Information

- Privilege Considerations
 - Avoid making casual comments about client
 - Implying guilt, breaking law, etc.
 - What about posts that might disclose work for a particular client
 - Posting pictures (town or client building)
 - Geolocation or otherwise disclosing where you are
 - Should common sense prevail? (saying you're in NYC versus Smithfield, Virginia)



Social Media and Disclosing Privileged or Confidential Information

- Confidential Information
 - Even if information is not privileged there may be restrictions on disclosing information about clients (and some clients may also include that in their retainer agreements)
 - ABA Formal Op 10-457 (client consent before posting info about clients on websites)
 - However, Virginia Supreme Court held that 1st Am. Allows lawyers to post about events that actually took place in the courtroom (Hunter v. Va. State Bar)
 - Cautionary tale re confidential settlements
 - Settlement voided when family member posted about it



Social Media and Connections

- Friending Judges
 - ABA – Judges may engage in social networking
 - Evaluate on case-by-case basis
 - Some states – don't friend/connect with lawyers who appear before you
 - Suggests they are in special position to influence judge
 - Are Facebook friends really "friends"?
 - What about regular social interaction with judges?
 - Is the problem that social media memorializes it?



Monitoring Jurors on Social Media

- ABA Formal Opinion 466 (April 24, 2014): Lawyer Reviewing Jurors' Internet Presence
 - Lawyer can review a juror or potential juror's public internet presence, BUT no direct communication
 - Indeed, there has been a suggestion that lawyers have a duty to investigate juror backgrounds in this manner
 - Lawyer cannot either personally or through another send an access request (communication)
 - The fact that a juror may become aware that a lawyer is viewing his or her profile does not constitute a communication
 - If a lawyer discovers evidence of jury misconduct that is criminal or fraudulent, lawyer **MUST** take reasonable remedial measures



Monitoring Jurors on Social Media

- Some state and local jurisdictions may take a different view on monitoring social media sites that let the user know they've been visited
- Claiming to be unaware that this was how the social media site worked may not necessarily be a defense



Hypothetical #3



- Jack McCoy is a prosecutor in NY and wants to check the LinkedIn page of potential jurors for a capital case to see if any of them have a background in science or psychology.
- Mr. McCoy is new to LinkedIn and doesn't know much about the default/basic account settings.
- Ethical violation?



Social Media and Competence

Comment 8 to Rule 1.1 of the ABA Model Rules of Professional Conduct was recently amended to say:

*To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology....**

* If you are going to use social media you have to know the technology well enough to avoid ethical violations. (Keep up with your kids or grandkids!)



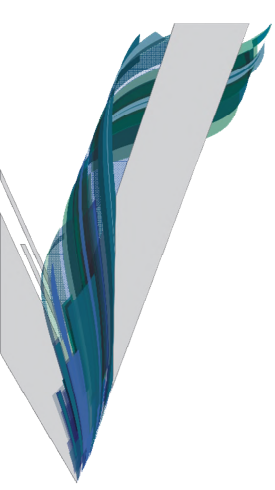
Communicating with Represented Parties

- Avoid attempting to connect with opposing parties represented by counsel
- For companies, San Diego Bar says this includes high-ranking employees
 - Primary concern is preventing access to private social media
- What about pre-existing connections – do you have to “unfriend”?
- Ok to access publicly available social media



Communicating with Unrepresented Parties

- Arises most commonly with 3rd party witnesses
- Attempt to gain access to private social media
 - Some jurisdictions can't use false pretenses
 - Other jurisdictions affirmatively disclose reason for connection request
- Publicly available social media is fair game
 - Perhaps encourage clients to make their social media private



Hypothetical # 4 – Viewing Your Own Client’s Social Media



You are a lawyer representing the plaintiff in a personal injury suit where you argued in your complaint and want to argue at trial that your client has a debilitating back injury. The day before the trial you see the following picture posted to your client’s Instagram with the hashtags:



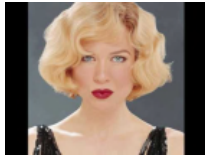
#aren'tIawesomeatclimbing #climbingselfie #bestweekendever



Viewing Your Own Client's Social Media

- NY Guideline No. 4.A: A lawyer can advise a client as to what social media content to leave up or take down but must be wary of duty to preserve.
- NY Guideline No. 4.C: A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertion of material false factual statement or evidence supports such a conclusion.

Hypothetical # 5 – Creating an A/C Relationship?



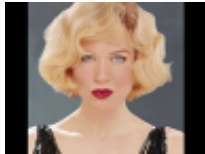
Roxy Hart @JazzGirl20

Just got arrested for killing that no good, lying...I mean Fred. #Ididn'tdoit #butifIdoneit #needalawyer



Atticus Finch @TheRealAtticusFinch

@JazzGirl20 As an attorney, I would advise you to remain silent, act innocent, and talk to a lawyer. #5thAmendment



Roxy Hart @ JazzGirl20

@TheRealAtticusFinch Innocent is for the birds. Can't I just lie about it. #webothreachedforthegun



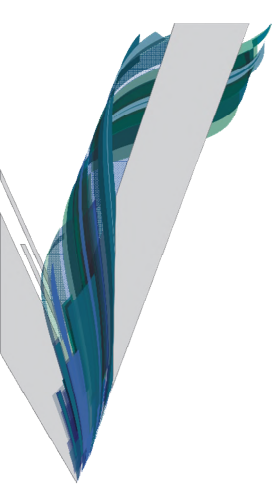
Atticus Finch @TheRealAtticusFinch

@JazzGirl20 I would advise against lying, but if that happened you could argue self-defense.



Inadvertently Creating an Attorney-Client Relationship

- Responding to tweets, blog post comments, etc.
- Might give rise to attorney-client relationship
- Many legal blogs disable comments
- Also disclaimers re not forming A/C relationship
- Disclosures, though, must be clear and prominent
- Many jurisdictions allow you to answer general questions regarding the law – South Carolina Advisory Opinion 12-03



Questions?