

USING SOCIAL MEDIA TO COMMUNICATE WITH CLIENTS, ADVERTISE YOUR PRACTICE AND RESEARCH JURORS

BY RYAN ELLIS, ESQ.

Social media provides the unique ability to reach clients and prospective clients in new and innovative ways. Aside from serving as an alternative to email, social media can further client communication by serving as a virtual meeting space and as a forum for advertising. That said, the Nevada Rules of Professional Conduct may be functionally antiquated when viewed in the context of the internet.

Very little innovation has occurred within the structure of the rules themselves, and the rules do not textually account for the rapid growth of social media. This creates unique issues in the areas of client communication, confidentiality and attorney advertising.

Using Social Media to Communicate with Clients

While the use of social media to communicate with clients raises many ethical concerns, it can be a boon to attorneys seeking simpler ways to communicate with clients informally.

Certainly, the advent of email communication and texting has dramatically simplified client communication. Social media is the next step in that process.

This technology may help attorneys comply with Nevada rules for informing clients about updates in cases, promptly comply with requests for information and consult with clients on case strategy.

Attorneys using social media have an ethical duty to keep a client's personal information in confidence unless the client gives informed consent, or the disclosure is impliedly authorized to carry out the representation. That duty of confidentiality extends to spoken and written communications with both current and former clients.

Like email, private messages sent over social media are first given to a third-party server for storage, which does not break confidentiality rules provided the attorney makes reasonable efforts to prevent the disclosure of, or unauthorized access to, the confidential information. The same rule likely applies to other private forms of

communication through social media;



however, it would almost certainly not apply to public postings, such as tweets.

The storage of a client's confidential information in electronic format raises concerns. Nevada rules allow storage of client information in electronic format without the consent of the client—as long as the lawyer acts competently and reasonably to safeguard the information from inadvertent disclosure.

Even a post that purports to hide the identity of a client, but still reveals confidential information, could run afoul of the rule.

For example, in 2010, an Illinois public defender was suspended for posting confidential information about her clients on a personal blog open to the public. The public defender in question was caught using poorly disguised pseudonyms and first names when venting on her blog about frustrating clients.

Clients should also be cautioned against making public Facebook posts and tweets. Similarly, pictures of evidence should be kept off of Facebook and Instagram. Clients should be similarly cautioned about discussing anything related to the litigation in a group-chat setting.

Social Media and Attorney/ Firm Advertising

An attorney's use of social media to advertise his or her law firm or services also raises ethical concerns relating to communication with both prospective and former clients.

Many law firms link their law firm websites to Facebook and Twitter accounts, and "share" content back and forth to gain a wider viewership.

Such promotion is normally permitted under the Nevada rules, which state that attorneys may not misrepresent their services to prospective clients. The rules also ban direct solicitation of prospective clients, but permit written advertising.

Generally, law firms should do their best to ensure that all public social media platforms and postings conform to those rules. Strict compliance with these rules, however, may be next to impossible in some instances.

For example:

- Twitter's 280-character limit for tweets would make posting the required disclaimers impossible. In cases like these, law firms should utilize their best judgment in attempting to conform to advertising rules.
- An attorney's public Facebook page describing his or her law firm and services likely constitutes an advertisement. However, an attorney's private Facebook page limiting access to acquaintances, friends and family likely does not constitute an advertisement.
- An attorney's LinkedIn page raises more interesting concerns, as LinkedIn is designed for personal résumé advertisements. It is conceivable that a more public draft of a LinkedIn page could be considered an advertisement, if it was designed to solicit clients.

Communications with prospective clients via social media are a closely-related concern, as direct communication may constitute impermissible advertising. Facebook's platform provides the ideal example. A clear-cut violation occurs when an attorney uses a law firm's public Facebook page to "friend" or direct-message a potential client for soliciting business.

Other interactions on Facebook create murkier circumstances with uncertain consequences. For example, does an attorney "liking" a personal injury victim's status about her injury constitute a solicitation of business?

Similarly, does a law firm hosting public Facebook live streams about its services constitute an advertisement in the vein of a television commercial? What are the rules about a prospective client direct-messaging or posting on the wall of a law firm's Facebook page?

One final consideration is the use of former client confidences in the advertising of a law firm on social media. Nevada rules require attorneys to keep the confidences of their former clients.

Conversely, if an attorney realizes that a client has inadvertently revealed information about a prior case that the attorney believes should remain privileged, the attorney should ask his or her former client to remove the post.

Using Social Media to Research Jurors

Social media can also be a powerful tool for researching prospective jurors prior to voir dire. When used properly, social media can provide insight into prospective juror's biases, likes and dislikes, and could hypothetically be used to construct a rudimentary psychological profile of each juror.

Social media might tell a lawyer what a juror's favorite movie is—leading the attorney to quote lines from that movie in closing arguments. Jurors' social media activity can also inform attorneys about their political opinions and views on current events, information that could influence the presentation of trial testimony in high-profile cases. The potential uses are endless and are limited only by the size of each juror's social media footprint.

In general, light-touch social media usage to conduct research into prospective jurors should be permissible under the Nevada rules.

The use of social media to research jurors may become problematic, however, when attorneys skirt the lines of direct contact. Nevada rules state that a lawyer shall neither seek to influence a juror nor communicate ex parte with a juror or prospective juror.

Certainly, most attorneys should know not to contact prospective jurors via Facebook direct-message, but other uses of social media would likely run afoul of the rule.

The same rule bars "any direct or indirect communication with a prospective juror, a member of the

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juror's family, an employer, or any other person that may lead to direct or indirect communication with a prospective juror.”

For example, a Kentucky Supreme Court, analyzing its similar rule, concluded that friending jurors on Facebook and subscribing to their Twitter accounts was impermissible, because those actions functionally constitute contact with jurors.

The same could be considered true regarding the LinkedIn pages of jurors, as LinkedIn profiles normally alert the users of those profiles to “viewers” of their pages.

Conclusion

Tools such as Facebook, Twitter, Instagram and other social media platforms can be powerful tools for attorneys and law firms.

It is almost impossible to ignore the potential of social media as an important force as the legal profession moves into the 21st century.

Even though there are still some questions regarding how attorneys utilize social media, there is little doubt that the use of social media will become increasingly important in legal communication and marketing activities.

Attorneys in Nevada should feel encouraged to use social media as a tool to assist in the practice of law, as long as they do so with caution and respect for the existing letter and spirit of the current rules of professional conduct. **NL**

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