LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com

FRIDAY, MAY 28, 2021

PERSPECTIVE

Social media use can be a Catch-22 for attorneys

By Arash Homampour

Social media has rapidly become the medium of choice for marketing and communications. Whether for personal interactions or for political and commercial purposes, everyone these days seems to be on Facebook, Twitter or Instagram, and the pandemic-driven bump in social media use shows no signs of waning as we enter a post-pandemic existence. More and more people are finding that a random, sometimes thoughtless, comment can become fodder for viral messaging.

The legal profession is no outlier in this regard. Every lawyer's website includes social media handles, and lawyers regularly use the internet to post blogs, comment on news stories and promote themselves to an increasingly media- savvy prospective clientele. Why shouldn't lawyers avail themselves of the same opportunities as other businesses? What possible downside could there be?

As it turns out, there is quite a bit of downside for legal professionals who don't use social media appropriately.

Judges

At the end of April, the state's Supreme Court Committee on Judicial Ethics Opinions issued Expedited Opinion 2021-042 on the use of social media by judges. The opinion, although advisory only, highlights the reach and risks of using social media — specifically for judges but with implications for all attorneys:

(1) [T]he same standards for judicial communications that apply in face-to-face settings apply with equal force to online statements and social media posts; (2) due to lack of control over the dissemination and permanence of online statements, judges must exercise caution and restraint and should assume the widest possible audience; (3) while statements concerning the law, the legal system, or the administration of justice are generally permissible, judges may not engage in prohibited social or political commentary on social media; and (4) judges must carefully evaluate what they intend to post and continually monitor their social media communications and posts to ensure public confidence in the integrity, independence, and impartiality of the judiciary.

The CJEO acknowledged the balancing act that social media use entails. "[W]hile they are subject to restrictions and limitations on extrajudicial activities, judges are not required to give up their personal lives or individual opinions ... That said, judges must be mindful of how the public may perceive social media activity and refrain from any online statements or communications that call into question the impartiality of the judiciary."

Attorneys are fundamentally advocates, not bound by judicial rules of impartiality. Nevertheless, they are bound by strict confidentiality rules and other constraints on public communications. Attorneys who use social media platforms such as Facebook, Twitter, Instagram, and LinkedIn may believe they have control over with whom they're communicating, but the reality is that no control mechanisms are absolute and attorneys must be conscious of the potential for prohibited communications.

Friending

Something as seemingly benign as sending a friend request to a represented party may cross ethical lines. By becoming "friends," the attorney might have access to private information not typically shared by an adverse party in a legal action and that could be relevant to the legal matter at issue.

Attorneys are fundamentally advocates, not bound by judicial rules of impartiality. Nevertheless, they are bound by strict confidentiality rules and other constraints on public communications.

Rule 2.1 of the California Rules of Professional Conduct states, "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." These same precautions must extend to others acting on the attorney's behalf such as paralegals, private investigators, secretaries, and interns.

According to an opinion of the San Diego County Bar Legal Ethics Committee, an attorney's ex parte communication to a person known to be represented by another lawyer is impermissible when intended to elicit information about the subject matter of the representation, and the attorney's duty not to deceive prohibits him or her from "making a friend request even of unrepresented witnesses without disclosing the purpose of the request … [N]o one — represented or not, party or non-party — should be misled into accepting such a friendship."

Advertising

Although attorneys are allowed to buy advertising on social media platforms, they are generally prohibited from targeting the ads to specific individuals. Social media marketing campaigns must therefore be aimed at the general public. Even if a lawyer has both personal and professional acquaintances through Facebook or Twitter, once the content concerns "availability of professional employment," that lawyer is subject to the same advertising rules as apply to any media.

In 2014, State Bar's Standing Committee on Professional Responsibility and Conduct issued Formal Opinion No. 2012-186, regarding the circumstances under which an attorney's social

Arash Homampour *of the Homampour Law Firm, is a trial attorney who represents individuals in catastrophic injury/wrongful death, employment and insurance bad faith matters throughout California.*

media postings are subject to professional responsibility rules and standards governing attorney advertising. Prompting the inquiry was a California lawyer who regularly posted comments about her personal life and career on a social media profile page viewable by about 500 people, including personal and professional contacts and people the lawyer didn't know. Among her postings were these: "Another great victory in court today! My client is delighted. Who wants to be next?" "Won a million dollar verdict. Tell your friends and check out my website." "Won another personal injury case. Call me for a free consultation."

The ethics committee ruled that these posts violated Rule 1-400 of the Rules of Professional Conduct. Ads subject to RPC requirements include "any message or offer made by or on behalf of a member concerning the availability for professional employment of a member of a law firm directed to any former, present, or prospective client." The key question is if a communication concerns the availability for professional employment of an attorney.

The attorney's social media postings included general legal information such as article recommendations, as well as information about her legal practice including filed complaints and court victories. The first type of information did not constitute information about availability for employment, said the committee, but postings about her legal practice could touch on availability for employment and be subject to rule 1-400.

The current version of rule 1-400, Rule 7.3. Solicitation of Clients, has been updated in a way that now may permit these posts. Subsection (a), regarding solicitation, states as follows: "A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain, unless the person[1] contacted."

Comment [1] goes on to clarify that "A lawyer's communication does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches."

Blogs and other posts

Lawyers who blog should never discuss current or former clients, or disclose their confidential information, without client permission. Even hypotheticals can identify a client to those familiar with a case or its facts. When a lawyer makes his or her presence known on the Internet, whether through a firm website, a "chat room," or a blog, there is a risk that the lawyer will create an attorney-client relationship. This can happen without the attorney realizing he has done so and possibly without his knowing the identity of the client.

Some websites allow prospective clients to engage lawyers without any intake processing. Others permit those reading the blog to email the lawyer — also without preliminary screening. These activities could be enough to create an attorney- client relationship before conflicts checks have been completed; it is sufficient for the "client" to have a reasonable belief that such a relationship was formed.

Lawyers who actively post blogs can minimize this risk by placing a conspicuous disclaimer on each page of the blog and any corresponding websites stating that an attorney/client relationship exists only if expressly agreed to in writing. The disclaimer should also make clear to anyone wishing to post a response that the information will not be treated as confidential or entitled to attorney-client privilege.

Contamination

What should an attorney do when representing a client whose case is similar to prior cases, mentioned in her blog or on her website, in which she has been involved? Must she erase all references to these past cases and clients in order to prevent juror contamination?

In *Steiner v Superior Court*, 220 Cal. App. 4th 1479, 1489–92 (2013), the Court of Appeal ruled that a trial judge improperly ordered a plaintiffs' attorney to remove for the duration of the trial two pages from her website discussing her success in other similar cases. The order, said the court, was overbroad and thus an unlawful prior restraint on the attorney's free speech rights. The judge's admonitions to the jurors not to research the parties or their attorneys was sufficient, in the court's opinion, to prevent potential jury misconduct.

Conclusion

Social media and the internet are powerful tools. They allow attorneys to educate and inform the public on issues of importance. They provide a vehicle for connecting with prospective clients and raising one's professional profile. But with their broad reach and instantaneous impact, they can become weapons that backfire, causing irreparable damage to reputations and livelihoods.

As lawyers embrace and master these tools, they must remain both vigilant and informed about the ethics rules governing their use. ■