PRACTICAL TIPS AND ETHICAL TRAPS FOR ATTORNEYS USING SOCIAL MEDIA

If you are an attorney in practice today, it is very likely that you are using social media for work or personal use. According to the ABA’s 2014 Legal Technology Survey report, a whopping 77% of attorneys report that they use social media professionally.

Of the various social media platforms out there, LinkedIn and Facebook are by far the most popular platforms in use by attorneys. Among the lawyers that use social networks, a significant majority of them –75% – report using LinkedIn as an online presence. Facebook use among lawyers is also strong, with 26% of lawyers who use social media reporting having a Facebook account. Use of Twitter by attorneys is much less, with 19% of lawyers reporting that their firms used Twitter. Even then, only 8% of individual lawyers reported having interacted on Twitter.

LinkedIn’s popularity is an obvious attraction for any lawyer who wants to maintain a minimal online presence. By subscribing at no cost, and supplying the site with basic information about your firm, your work experience, and the type of legal matters you typically handle, prospective clients and referring attorneys have a way to quickly find important and valuable information about you or your firm using a quick Google search. The same goes for a basic Facebook site used to advertise the firm’s availability to provide legal services.

However, as social media platforms, LinkedIn and Facebook are meant to go beyond what a basic, online advertorial website has to offer. Like all social media platforms, LinkedIn and Facebook are designed in a way to encourage the public to interact with subscribers, applying easy-to-use features that not only give readers access to your detailed firm information, but allows the reader to publicly engage with you by endorsing your services, or as in the case of Facebook, posting information directly on your Facebook home page.

For many attorneys using social media, having happy clients and trusted friends engage with you publicly in an online forum is advertising gold that can’t be matched by any number of pre-paid print ads. In the 2014 ABA survey, 23% of lawyers using social media said ‘yes’ when asked whether their use of social media resulted in getting new clients.

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But if used incorrectly, the same features found on a social media web platform can create an ethical nightmare for an attorney who may not be aware of the implications. For example, if a lawyer invites the public to post legal questions on his or her Facebook site, is a client-attorney relationship formed once a web reader takes the lawyer up on the offer? According to the ABA Ethics Opinion 10-457, such an invitation may trigger the ethical duties owed to prospective clients, and the attorney may be conflicted out of representing other parties related to the prospective client’s matter.

The following is a brief list of some of the ethical concerns that may be triggered through an attorney’s use of social media.

What You Post May be Advertising

Since platforms like LinkedIn and Facebook are primarily attractive to lawyers because of their ability to reach the general public with information about the lawyer’s services, there is no denying that these websites can easily be perceived as advertising vehicles, and therefore, their content should be restricted by local advertising rules. Lawyers using social media platforms should familiarize themselves with rules restricting advertising in their jurisdiction, generally found in ABA Model Rule 7.1 Communications Concerning a Lawyer’s Services, which prohibits lawyers from making false or misleading communications about the lawyer or the lawyer’s services. This can be particularly troublesome when web sites such as LinkedIn or Avvo invite lawyers to identify “specialties” or “expert” in their profile – terms that are highly regulated under most lawyer advertising rules. Rule 7.2 Advertising can change drastically from jurisdiction to jurisdiction and what might be allowed in some jurisdictions – such as client testimonials – may be strictly prohibited in others.

Solicitation Online is Still Solicitation

Rules restricting attorney contact with an unknown person, such as ABA Model Rule 7.3 Solicitation of Clients, can come into play in the unusual world of social media where people who have never met each other have somehow “friended” through online platforms. The rule is straightforward. Unless the solicitation is to a lawyer, family member, or a close personal friend, a lawyer shall not solicit professional employment in-person or through live telephone or real-time electronic contact. So even though someone may be following your posts on Facebook, your communication to the individual for the purpose of pecuniary gain using the tools designed to promote online interaction may be considered solicitation and prohibited under the rules. Again, read your local rules and ethics opinions for guidance on the acceptable use of social media communication.

Don’t Disclose Confidential Information

Of all the advice mentioned here, this one may seem like the biggest no-brainer of them all. But there are numerous cases of lawyers getting in trouble for violating ABA Model Rule 1.6 Confidentiality of Information after they have revealed some information about their activities online. In 2012, a Georgia lawyer was publicly reprimanded for posting online personal and confidential information about a client that the lawyer had obtained in the course of the representation. The post was in response to negative reviews of the lawyer that the client had posted on three “consumer Internet pages.” The lawyer identified the client by name, identified the employer of the client, stated how much the client had paid, identified the county where the client’s divorce had been filed, and stated that the client had a boyfriend. It’s easy to get caught up in the instant online journaling that goes on every day in the world of Facebook. After all, many people who choose to follow you online have done so because they find your life as a lawyer to be interesting. But it’s important not to forget that many of the facts and circumstances that may be interesting to others online are private and should remain confidential.

Avoid Inviting the Entire World to Become Your Client

Attorneys who post information online inviting consumers to contact them with their legal questions may be setting themselves up for inadvertent or unintended client-attorney relationships. Such unintended relationships can become disastrous if the “client” – after using the lawyer’s social media page or attorney website to ask legal questions and divulge private information – is waiting for a response from the attorney that will never come. ABA Ethics Opinion 10-457 Attorney Websites is very useful for helping lawyers understand that invitations like “Tell us about your case…” will trigger additional responsibilities for the lawyer if an individual takes a lawyer up on the offer. Instead of having an open invitation online, it is better to simply include your contact information along with a disclaimer that information provided to you without an initial consultation will not necessarily be kept secret or confidential, and that no attorney-client relationship is entered into until agreed upon by both you and the prospective client.

Social media, like most new online tools, can be a valuable thing for the development of your law practice. And considering the convenience and affordability of such a powerful tool, it may be hard to avoid using it more often for communicating information about your legal services. But keep in mind that the ease-of-use and instantaneous nature of social media often put the lawyer in situations where important decisions about what the public will see are made in haste. Information about the firm that previously – before the days of the Internet – would have taken weeks to carefully parse out, is now quickly publicized by anyone in the firm with a Facebook page. Therefore, lawyers should take the time to examine their social media habits, as well as the information and disclaimers they currently use, and formulate a new policy so that social media will be used in the firm responsibly and ethically.
I MADE A MISTAKE.  NOW WHAT DO I DO?
By Molly Eiden, Claim Attorney

It is every lawyer’s nightmare: a mistake in handling a client matter. Now what?

First, mistakes happen. You are certainly not the first lawyer to make a mistake while representing a client. Nationwide, more than 55,000 claimants initiated claims against lawyers who had legal malpractice insurance in 2008-2011.1

Next, be pro-active in responding to the situation. Consult your firm’s internal procedures for handling these situations as the information below should be considered only advisory guidelines.

A. Notify your malpractice carrier

You will want to make sure that your legal malpractice insurance company is notified as soon as you discover the error. Legal malpractice insurance policies are claims-made policies. Under a claims-made policy, known claims must be reported during the policy period or reporting time period window as defined by the policy. This is a key difference from occurrence policies (i.e., most homeowners insurance policies) where claims may be reported indefinitely into the future if the “occurrence” giving rise to the claim occurred during the policy period. It is an important distinction to keep in mind since untimely reporting to a malpractice insurance company can jeopardize your coverage. Malpractice insurance policies can differ in their notification terms and conditions so it is important to carefully review yours. For example, MLM’s policy defines a “claim” to be: (1) a demand communicated to the insured for damages or professional services; (2) a lawsuit served upon the insured seeking such damages; (3) any notice or threat, whether written or oral, that any person, business entity or organization intends to hold an insured liable for such damages; or (4) any act, error, or omission by any insured which could reasonably support or lead to a demand for such damages. As you can see, the obligation to notify the malpractice insurance carrier under that definition of claim is much broader than simply waiting for a formal demand or suit to be initiated. Moreover, the carrier can give information and guidance on how to proceed and what to tell the client.

B. Notify your client

You have an ethical obligation to notify your client of the error. It is hard to admit mistakes, but it is even worse to be in violation of your state’s Rules of Professional Conduct. The ABA Model Rules of Professional Conduct governing your obligation in this regard are Rule 1.7 and Rule 1.4.

Rule 1.7 Conflict of Interest: Current Clients

ABA Model Rule of Professional Conduct 1.7(a) provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer. ABA Model Rule of Professional Conduct 1.7(b) goes on to state that notwithstanding the existence of a concurrent conflict of interest under 1.7(a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and 4) each affected client gives informed consent, confirmed in writing.

An error by a lawyer during representation may create a conflict of interest for the lawyer. Specifically, the lawyer may now have a personal interest in how the client’s matter is resolved as it may impact the lawyer’s potential liability relating to the error.

Rule 1.4 Communications

ABA Model Rule of Professional Conduct 1.4(a) requires a lawyer to keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information. ABA Model Rule of Professional Conduct 1.4(b) goes on to state that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Ideally, you should meet with your client in person to discuss the situation. An in-person meeting provides the opportunity to fully explain to your client what has happened. You will want to disclose all facts material to the client’s decision on how to proceed. You should advise the client that he or she may wish to retain counsel to review this matter, or, that your client can contact your malpractice insurance company directly (if it is a situation where the client has a potential claim against you). However, it is imperative that you avoid giving legal advice regarding any potential malpractice claim against you.

After you meet and discuss with your client, the best practice is to send follow-up written correspondence confirming the discussion of the meeting. Your malpractice carrier will often assist you in drafting this correspondence. Be sure to save a copy of this correspondence for your file.

At this point, it becomes a “wait and see” situation. Not every error leads to a malpractice lawsuit or demand. After your client has been fully advised of the situation, he or she may choose to: (1) not pursue a claim against you; (2) pursue a claim by initiating suit; or (3) try to resolve the matter by submitting a demand. Again, it is imperative that you notify your malpractice company in accordance with the terms and conditions of the insurance policy. Your malpractice carrier will likely set up a claim file and monitor the situation to see whether anything develops from it.

Questions? Contact MLM at:
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C. Learn from it

While mistakes are a part of life, they often serve as useful mechanisms to reflect on what happened and what can be done to prevent future mistakes. Legal malpractice errors can largely be grouped into three categories: administrative, substantive and client relations. Recognizing these potential errors and maintaining best practices can help you avoid many of these pitfalls.

**Administrative Errors**

Administrative errors include procrastination or failure to follow up; losing a file, document, or evidence; failure to calendar properly; clerical errors; or failure to file appropriate documentation. Often, these types of errors can be prevented by having appropriate office management and organization systems in place. Whether you practice in state or federal courts, it is imperative to have an appropriate calendaring system in place. Whether it is elaborate office management software or basic calendaring, make sure you have some type of system in place that works for you, that provides useful reminders and ensures that these types of potential administrative errors are caught. Employing organized and trained administrative support staff can also ensure that these types of errors are avoided.

**Substantive Errors**

Substantive errors include the failure to know or properly apply the law; inadequate discovery or investigation; error in judgment in handling the case; conflict of interest; or failure to know or ascertain a deadline. When taking on a new case, make sure you have an understanding of the relative complexity and specialized nature of the matter. Specifically, make sure you weigh this against your general experience and training and specialized nature of the matter. Specifically, make sure you weigh this against your general experience and training and specialized nature of the matter. Beware of dabbling in an area of law that you are unfamiliar with, especially if you have only limited time or are not able to give the case the preparation and study necessary. If you are unfamiliar with the area of law or particular issue, you should look at whether you can refer the matter to, or associate with, a lawyer of established competence in the field in question. When you step outside your normal practice area, identify gaps in your own competence and take necessary steps to reach the requisite level of competence. Further, make sure to complete a conflicts check as soon as possible before beginning work on the case.

**Client Relations**

Client relations errors include failure to provide the client with sufficient information; failure to follow client instructions and improper withdrawal. Make sure you consider the client’s expectations for your representation at the outset. Does the client have a reasonable expectation of the value of the case and the time it will take to resolve the matter? Can the client afford your services? Beware of the client who gives you a bad feeling and trust your gut instinct before undertaking the representation. Remember to keep the client fully informed of the case status throughout the representation. Sending written correspondence to a client confirming oral conversations can also be beneficial. Adequate screening of prospective clients can help to avoid many potential claims.

For new lawyers, a mentor can be an invaluable resource. If your firm does not have a formal mentorship program, reach out to local bar or legal organizations as many of them have mentor opportunities available. Seasoned lawyers are often happy to offer their guidance and expertise to newer lawyers.

While no one is perfect, taking appropriate safeguards and precautions can help you minimize the likelihood of making future mistakes. •

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1American Bar Association Standing Committee on Lawyers’ Professional Liability, Profile of Legal Malpractice Claims 2008-2011 (2012).