Vermont Bar Association

Seminar Materials

Solo & Small Firm Conference 2015
The Good, the Bad, & the Ugly of the Web, Social Media, & Advertising

May 14, 2015
Basin Harbor Club
Vergennes, VT

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Vermont Bar Association Solo & Small Firm Conference
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Session Two: Your Risks, Responsibilities and Opportunities
With Social Media, the Web and Advertising

What is Social Media?
... At its core it is still “networking” and “advertising.” Basic Ethical rules apply. The internet has simply provided us with tools to reach beyond our personal space.

Can You Avoid It?
No, you can’t avoid it even if you yourself don’t use it. Your clients will use it. Other attorneys will use it. Your staff will use it. Your family and your clients’ families will use it. In fact, in many practice areas you (or a staff member or contractor) must use it, if only for due diligence.

Client-Lawyer Relationship
ABA Rule 1.1 Competence
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment: Maintaining Competence (added 2012)
[8] 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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

General Issues
Trademark & Copyright
Corporations are diligent in their defense of their trademarks and copyrights, and will pursue perceived misuse or plagiarism. You must be just as diligent in your marketing – and in your due diligence with clients – to avoid any perception of either.

Section 5 of the Federal Trade Commission Act, which is enforced by the Federal Trade Commission (the “FTC”) and declares that unfair or deceptive acts or practices are unlawful. Most states have statutes modeled after the FTC Act, known as “mini-FTC Acts”.

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Complying with the Terms and Conditions of Social Media Outlets

Many social media sites such as LinkedIn prohibit users from disseminating any unsolicited or unauthorized advertising or promotional materials. Twitter prohibits the use of the site to disseminate mass unsolicited messages (i.e., “spamming”).

E-Mail Spamming

Even though you may have a large database of contacts, if you attempt to send a large number of “template” emails to that list (even if those emails are innocuous or even helpful communications) you are in danger of having the internet computer systems which serve as “nodes” for transmission of e-mails identify you as a “spammer” and block you completely from sending or receiving email. Web services such as Constant Contact, MailChimp, Benchmark and others serve as intermediaries authorized to send out large batches of e-mails for you. However, even they are reasonably strict in determining whether a list is a “permission” list – that is, that everyone on it has given their permission to be contacted. Further, these services then monitor the response to any batch e-mail sent, and if it receives too many responses of “undeliverable” “unsubscribe” or “marked as spam,” they also may refuse to send to the list again.

The Risks - General

Defamation, libel and misinterpretation

Social media encourages “blurting” – knee-jerk, poorly considered words that, in an emotional - or legal - light could be judged defamatory or libelous. The worst of these is texting, which often is in rapid reaction to a received text. And social media also shares a risk with e-mail: words alone without the added context of body language, vocal inflection or facial expression, can – and often are – misinterpreted. Sarcasm, innuendo, jokes, tongue-in-cheek comments, all can result in serious misinterpretation. This why “emoticons” were created – in attempt to add the missing non-verbal context to text-only communications.

Out-of-context communications

You or your client may think a picture from a party is cute, but others may interpret it as portraying someone who is rude, drunk, disruptive or even deranged. Just as with bare words, pictures have potential to portray someone in a negative or even damaging light.

Texting

As mentioned above, texting encourages “blurting” – that is, reactive, not carefully thought-out responses. The danger here is that, although texting seems to be ephemeral, disappearing after it is received, just like e-mails, text threads are recorded and accessible to anyone who wishes to do so.

Therefore, it is extremely crucial that texting to and from clients be considered legal communication, and all involved should hew to the rules of professionalism.
Professional Liability Insurance

The general area of social media is so new that liability for such potential malpractice issues as “lack of due diligence” and postings by staff and attorneys which potentially damage a client’s case are still being clarified. Further, coverage for such issues may vary widely, or even be relatively undefined. Contact your insurance carrier for specific information on current or available coverages.

The Risks - Case-Related

**Staff posting confidential information.** Firm members, from attorneys to staff, should be educated and cautioned to never post anything (even when thinly disguised) about a case, client or attorney. *Institute a firm social media policy.* See this useful template from Jaffe, a public relations and marketing firm based in Colorado: [The Law Firm Social Media Policy Template](#)

**Clients sabotaging their own cases** by inappropriate postings or alteration of past social media activity. *Institute a client social media guidelines policy:*

**Helpful Guidelines for New Clients:**

*Excerpted from “Social Networking for the Family Lawyer: What You Need to Know About: Ethics, Evidence & Discovery” -- Ronald W. Nelson Lenexa, Kansas*

1. Generally speaking, it is best to not discuss your case with others via any medium. Emails can be forwarded or printed, postings on Facebook are seen by the public, photos can be taken out of context, and texting on phones all are considered statements released to the public. Friends and family members do not have any obligation to confidentiality like attorneys and their staff do.
2. Refrain from communicating with our staff on any device provided by your employer or shared with someone else.
3. Create your own private email account. It should be protected with a password that is only accessible to you.
4. Create new passwords if your current passwords are accessible or known to others.
5. Refrain from commenting on blogs or public forums regarding details of your case or your feelings towards other persons.
6. Examine the privacy settings on all electronic accounts. Be sure you are aware what content is public and what content is private. Keep in mind, however, that no electronic or written content is truly ever private. 7. Do not access any social media accounts, phones, email accounts, or other electronic devices that do not belong to you. Do not send messages on anyone’s account other than your own pretending to be another person. Doing so could be a Federal crime.
7. Do not solicit friends or family members to “add” adversarial parties solely for the purpose of obtaining additional information.
8. Should you view or receive any concerning electronic communications, document the information and provide a copy to our office.
9. If you have children, note which devices or accounts they may have access to. Do not forget that your accounts may still be accessible if an older device has been given to a child after a parent finished using it.

10. Think before you post. Think before you click “send.”

11. When in doubt, contact our offices before communicating through any other medium.

12. *(Added by Cole)* Please provide me with names and sign-in codes for all social media in which you participate in, or have in the past.

Excerpted From “Social Networking for the Family Lawyer: What You Need to Know About: Ethics, Evidence & Discovery”

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Clients with damaging past posts. In this case, the attorney’s job is due diligence, ongoing vigilance, and preparedness only. Destruction or spoliation can lead to serious penalties, including negative inferences in the evidence, sanctions, additional damages, independent torts actions (in some jurisdictions), and professional disciplinary action against attorneys determined to have been involved in the action – even if unintentionally.)

“Sanctions and disciplinary action against attorneys for their clients actions in deactivating, disabling, removing, or deleting accounts during or in anticipation of litigation in which social media may be important isn’t theoretical.”

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Lack of attorney diligence in researching client past SM activity.

Posts impugning the attorney (most SM sites have tools that allow a user to expunge entries or photos with explicit name identification).

Subterfuge in obtaining SM access or information – i.e., an attorney or staff member “friending” or connecting with an adverse party purely to obtain information.

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Kansas Bar Association Guidelines for Social Networking

In creating content for the web – even informal content like a question posted to a KBA forum – you are representing yourself as a professional, the profession of law and perhaps the KBA. You must use sound judgment at all times – even those times when using unsound judgment would give a much more satisfying response!

*(Ed note: even in your personal communications, always remember that these also reflect directly on your reputation and ethics as a lawyer.)*

**1. Be responsible.** You are responsible for the material(s) you post. Consider the content; what you publish will be widely accessible for some time, and in some cases, indefinitely. All
statements must be true in both content and intent. Do not post private information about
yourself or others without permission.

2. **Be upfront, identify yourself.** Use your real name, and, if relevant, your role or interest in
the topic discussed. When appropriate, make it clear you are speaking for yourself and not on
the KBA’s or KBF’s behalf. No one but the elected president of the KBA or that of the KBF may
speak for the organization.

3. **Be civil and respectful.** It is OK to disagree with others, but do not use defamatory, libelous
or damaging innuendo; abusive, threatening, offensive, obscene, explicit or racist language; or
post illegal material.

4. **Be quick to correct an error.** If you make a mistake, admit it and quickly provide the correct
information. If appropriate, modify an earlier post to make it clear that you have corrected an
error.

5. **Keep it relevant/add value.** Write about what you know. Information can add value if it
contributes to the legal community’s knowledge or skills, improves the legal system or public
understanding of the legal system, or builds a sense of community.

6. **Follow copyright and fair use laws.** Always give people credit for their work. Make sure
you have the right to use material with attribution before publishing. It is good practice to link
others’ work rather than reproducing it on your site. When in doubt as to the proprietary
nature of material, don’t use it. Recognize the potential and legal consequences of any failure
to follow applicable laws governing the use of others’ material.

7. **Protect proprietary and client information.** Do not discuss or misuse proprietary or
confidential information, and follow all professional and ethical rules governing the disclosure
of information shared with you by clients.

8. **Avoid politics.** Political endorsements or advocacy positions should be avoided unless they
reflect official policy. Only the president of the KBA or of the KBF may speak for the
organization.

9. **Comply with Kansas rules governing lawyer conduct.** Comply with all legal restrictions
and obligations governing professional conduct, particularly those regulating communication
and advertising, when posting content to any social network.

10. **Do not violate antitrust laws.** Antitrust laws prohibit postings that encourage or facilitate
agreements between members of different firms concerning the following, as they pertain to
legal services: prices, discounts, or terms or conditions of sale; salaries; profits, profit margins
or cost data; market shares, sales territories or markets; allocation of customers or suppliers; or
any other term or condition related to competition.
11. **Abide by the social network’s rules.** By joining a particular social network, you agree to abide by that community’s terms of use. The KBA/KBF’s networks are no different in this regard.

12. **Avoid blatant marketing.** Blatant marketing or advertising by individuals is inconsistent with the purposes of general dialogue and information exchange and is not permitted.

**Legal Ethics Dos and Don’ts for Professional Social Networking**

1. **DO separate personal and professional postings** into different profiles or limit personal references on a general profile used for professional purposes.

2. **DO NOT reference personally identifiable information about clients or their cases** (with some exceptions for publicly available information, appeal court decisions, and general reference information).

The attorney’s obligation to protect confidences of a client is set forth in Rule 1.6 of the Model Rules of Professional Conduct:

a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

   i) To prevent the client from committing a crime; or
   
   ii) to comply with requirements of law or orders of any tribunal; or
   
   iii) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

3. **DO think before posting anything.** Be aware that others are reading your posts. And remember that what you post reflects back.

4. **DO NOT make claims of expertise or practice specialty not allowed under state ethics rules** or make any other claim about comparative service quality.

Excerpted From “Social Networking for the Family Lawyer: What You Need to Know About: Ethics, Evidence & Discovery” — Ronald W. Nelson, Lenexa, Kansas
Social Media Marketing

Social media has unfortunately become the techno-version of "marketing by wandering around." While it has potential for marketing, without a clear plan or target it can be immensely time-consuming while producing extremely low return. Users spend considerable amounts of time creating visibility, likes and followers, rather than focusing on methods to produce business. In fact, social media without a plan can become an addiction, wasting time and creating dozens of distractions and interruptions every day.

Unfortunately, most of social media for business has moved away from conversations and interactions to bald-faced promotion – in other words, one way conversations. The vast majority of social media has become the equivalent of the highway billboard – a sales message looking for an audience.

The Five Principles of Social Media

Who you should be talking to

The strength and also the weakness of social media is that it can be globe-circling. It is not unusual for a social media user to have followers from around the world on their Twitter, Facebook, LinkedIn, Pinterest and other sites.

First, by and large, you should seek to interact with prospects in your market area. Unless you are a highly skilled and highly niche professional with a rarefied practice area, most if not all of your clients will come from an area reasonably close to your offices. Additionally, unless you practice at the federal level, you are licensed practice only in your home state.

Second, you should seek to engage with individuals who have some identify potential to need your services. For instance, if you are in estate planning lawyer, you may seek – or develop – channels to reach older citizens.

Third, you should seek to interact with professionals and other individuals who have significant potential to refer you clients. Just as in personal referral marketing, one of your major social media targets should be other lawyers.

What your messages should be

It is important to remember that clients come to you because of "synchronicity." In other words, they come to you when there is a conjunction of their need and their awareness of you. So, just as in personal referral marketing, your social media plan should revolve around periodic communications that maintain "top of mind awareness."

Even if you communicate frequently on social media, if your message is all about sales and self-congratulation (as most social media for business seems to be), your audience will disengage, either officially by unsubscribing or blocking, or unofficially by ignoring your
communications. If this happens, you are whistling in the electronic wind. You have become an Internet boor.

Facebook, Pinterest and similar media have promoted the ultimate in narcissism. Too many posts are "all about me." For your audience, it is also "all about me." So, while your family and friends may be interested in your weekend excursion, those who do not know you personally may be less fascinated.

Maintaining the interest of your social media followers means providing information that is of interest or value to them, or by creating or engaging in conversations that are helpful or provide useful information. In other words, your feeds should always seek to be interesting, helpful or valuable. Such information need not always be about your professional skills. It may be about community activities and happenings or problems. It may point to other useful information – for instance, posting a link to an article or a helpful website.

The bottom line is that your message should seek to engage, inform, and support, so that they wish to remain connected – and remember you when their need for your services arises.

**When you should communicate**

The narcissist posts on social media when something happens to them. The savvy individual who uses social media for business purposes posts when something happens in the world, or especially in their community which provides fodder for conversation, and current interest to their audience. For instance, on Veterans Day, a post linking to a thoughtful article or supporting website makes the message topical, poignant and hopefully, makes the posting individual memorable.

**Where you should interact and post**

Your post will be most valuable when they focus on your target audience and market. In other words, you should seek out or create interest groups that best relate to the business you wish to attract. A business attorney would seek forums for business owners, corporate CEOs and counsel, and other professional groups which relate to the same target market.

**How you should post**

Frequently, briefly, and interestingly. Frequently, because all of us are bombarded with literally thousands of messages of all types every day, and occasional posting does not build "top of mind awareness."

Briefly, because the attention span of most individuals has gone from minutes to seconds, and from paragraphs to "sound bites."
And interestingly, because "it's all about me." If your message is not relevant, valuable, interesting or intriguing, you will be forgotten. And if your message continues to be not relevant interesting or intriguing, you will soon be unfriended.

Finally, time spent on social media should be organized and managed, just as work and management. Rather than falling into the “impulse” trap – looking at sites or posting on impulse, the wise attorney schedules out specific time blocks each day and week and has a specific purpose or action plan, and does not allow social media to become an addiction – or an escape.

One simple way to keep social media from becoming an impulse issue is to track the time spent on social media just as you track billable, marketing and administrative time. In this manner the attorney can clearly see how and where they are spending their time.

**On Blogging and social media posting**

“User-Generated Content” is an area of controversy with Bar associations across the country. Some require that any postings be generated by the lawyer personally, and cannot be “ghost written” by others.

Further, the flip side - soliciting reader feedback – can create a host of unintended consequences: lawyer-bashing, client-bashing, random hate postings, or commercial spam postings.

Bloggers should be extremely vigilant by either prohibiting comments or active pre-screening of comments before allowing them to be posted.

**Facebook**

**Advertising – How, Why – and If**

Advertising has proven effective for contingency firms, but in general, few attorneys in other practice areas who carefully track inquiries can attribute any significant new business directly to specific advertising campaigns. And those who continue to advertise do so for the larger purpose of “branding,” rather than an expectation of immediate return.

Especially in the contingency practices, advertising budgets must be large and continuous to be effective. The core issue with advertising is that its effect is relatively ephemeral, meaning that once the advertising stops, awareness by prospects of the attorney or firm begins to drop off.

It is important to remember that your advertising competes for the consumer’s attention not only against the advertising of other lawyers, but also with that of McDonald’s, Target, Macy’s – in effect, all advertising – including the advertising of contingency law firms.
It is a little-known fact that the nation’s largest personal injury law firm, Morgan & Morgan, based in Orlando, Florida with more than 170 lawyers, is actually a nearly full-service law firm, providing everything from divorce to estate planning. The reason is that their advertising, even though specifically focused on personal injury, constantly creates inquiries for virtually every type of legal work, based solely on the firm’s name recognition.

However, when focusing on a target market, advertising again becomes viable – and often even affordable. Target markets often have small but highly effective communications vehicles such as ethnic or native newspapers, radio stations, social organizations, and even websites. In these smaller groups, advertising becomes significantly more effective in helping the attorney establish visibility, reputation and awareness within that target market.

Within a target market, advertising is effective not only for “product” advertising – advertising of attorney services – but also for image-building, or “branding.” Using advertising to honor members of the organization, to congratulate the organization on a milestone or to support an event enhances the attorney’s relationship and visibility within the target community. Again, because of the size of the market, this type of advertising rarely requires high budgets.

Question & Answer Session

For More Information:
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