

Ethical Considerations In The Use Of Social Media For The Land Use Practitioner And Government Lawyer



Julie Tappendorf

is a partner at Ancel Glink Diamond Bush DiCinni & Krafthefer, P.C. in Chicago. She practices in the areas of local government and land use law and serves as Village Attorney for Gilberts, Lindenhurst, and Wadsworth. She co-authored the book *Social Media and Local Governments: Navigating the New Public Square* (ABA Press, 2013). She also published an article titled *Attorneys and Social Media: An Ethical Minefield or Professional Boon?* in the *Municipal Lawyers Magazine* (IMLA January/February 2013). She is the author of the blogs *Municipal Minute*, where she provides timely updates on cases, laws, and other issues of interest to local government officials and attorneys, and *Strategically Social*, where she posts on social media topics. This article is based on a paper the author prepared for ALI CLE's Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation, Cosponsored by the School of Urban & Regional Planning, Florida Atlantic University, August 14-16, 2013 in San Francisco. The author can be reached at jtappendorf@ancelglink.com.

Julie Tappendorf

The rules of ethics apply to social media, so think carefully about confidentiality and professionalism before using them.

A RECENT STUDY by the American Bar Association estimated that more than half of all attorneys belong to at least one social media site. Am. Bar Ass'n, 2010 *Legal Technology Survey Report*, 4 Web & Comm'n Tech. 23–24 (2010). That number is certain to grow. John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. Times, Sept. 12, 2009. Attorneys are just as likely to use social media in their everyday lives as non-attorneys. They post pictures on Instagram, “check in” on Facebook, and tweet about politics, music, and what they ate for dinner — just like everyone else. But, where a hasty post or comment might lead only to embarrassment for some, a seemingly innocent disclosure by an attorney could lead to serious ethical repercussions.

BENEFITS OF SOCIAL MEDIA • Social media offers users a diverse array of benefits. Government attorneys can “reach out directly to their constituents, take a more active role in shaping their public image, and overcome longstanding institutional barriers.” Stephen Stine & Joshua Poje, *The Good, the Bad and the Ugly of Blogging, Microblogging and Social Networking for Public Attorneys*, 17 Pub. Law. 13, 18 (2009). Social networking also provides attor-

neys with opportunities to network within the legal field, as well as to market their practice to potential clients. Social media provides attorneys a unique advantage in building relationships with others that might otherwise be impossible or impractical because of barriers like distance and time.

How are attorneys taking advantage of these benefits? Attorneys are blogging, tweeting, and posting on a variety of social networking sites, both personally and professionally. Like others, attorneys have set up personal, professional, and even law firm profiles on sites such as Facebook, Twitter, and LinkedIn. Attorneys and law firms are also increasingly establishing legal-oriented blogs where they post summaries of cases and new laws. As new social networking sites are established, it is likely that attorneys will follow online trends and find new ways to establish a presence on social media.

SOCIAL MEDIA AND ETHICS • Attorneys are in a unique position because of their special ethical obligations. Thus, they must be careful in their use of social media to avoid engaging in any unprofessional or unethical conduct. While some might argue that the rules of ethics (designed for print and verbal mediums) do not carry over into emerging technologies, at least one commentator reminds us that:

“Fifteen years ago people were saying the same thing about e-mail. Eighty years ago they were worried about telephones. Any time there’s a new form of communication, there’s fear. Yes, social media are different, but there’s no reason we can’t apply the same rules we’ve used before.”

Helen W. Gunnarsson, *Legal Technology/Ethics: Friending Your Enemies, Tweeting Your Trials: Using Social Media Ethically*, IL Bar Journal, Vol. 99, No. 10, Page 500 (Oct. 2011).

Because each jurisdiction has its own ethical rules in place for attorneys practicing in their state, it is important that attorneys consult their own applicable rules and opinions. This article offers an overview of the more common ways social media use could lead to ethical violations using the ABA Model Rules of Professional Conduct as a general reference.

GIVING LEGAL ADVICE OUTSIDE YOUR JURISDICTION

• Attorneys can only practice law in jurisdictions in which they are licensed, with very few exceptions. Model Rule 5.5 states: “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” Obviously, state lines can become blurred in a social media setting. Accessing a blog written by an attorney in another state (or country for that matter) takes just as much time as accessing one from right down the street. While ease of access and availability of information are arguably the most beneficial aspects of social media, they present particular problems for attorneys.

Facebook “comments,” “Ask a Lawyer” sites, and blogs with reciprocal features are just a few examples of situations where attorneys might find themselves unknowingly yet unethically advising someone who does not live within their licensed jurisdiction. The key is to know when you are providing legal information (which would probably not trigger jurisdictional restrictions), as opposed to providing legal advice (which would). The D.C. Bar Association distinguished between the two as follows: legal information “involves discussion of legal principles, trends, and considerations,” while legal advice involves “offering recommendations tailored to the unique facts of a particular person’s circumstances.” D.C. Bar Legal Ethics Commission Opinion 316 (2002). Thus, an attorney who simply summarizes cases and legislation on a blog is not likely to implicate Model Rule 5.5. However, attor-

neys should be careful not to answer specific legal questions outside their practicing jurisdiction and instead should focus on providing more generalized information.

Physical presence in the non-licensed jurisdiction is not required to trigger a violation. An attorney has committed an ethical violation when he has “established an office or other systematic and continuous presence in this jurisdiction” outside the jurisdiction in which he is licensed. Ongoing electronic communications could certainly be considered a violation.

FORMING ATTORNEY-CLIENT RELATIONSHIPS • Attorneys should also be careful not to inadvertently form attorney-client relationships through online activities. Model Rule 1.18 provides that, “a person who discusses with a lawyer the possibility of forming a attorney-client relationship with respect to a matter is a prospective client.” Moreover, an attorney-client relationship could be inadvertently formed if a client “reasonably relies” on what they believe to be the attorney’s legal advice through social media. Patricia E. Salkin, *Social Networking and Land Use Planning and Regulation: Practical Benefits, Pitfalls, and Ethical Considerations*, 31 Pace L. Rev. 54, 82 (2011). Thus, when using social media, attorneys should not only speak in generalized terms, but also post explicit disclaimers stating that any interaction does not form an attorney-client relationship in order to inform the user and ultimately rebut any reasonable belief that one exists. Michael E. Lackey Jr. & Joseph P. Minta, *Attorneys and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 Touro L. Rev. 149, 164 (2012); Model Rules of Prof’l Conduct R. 1.18 cmt. 2.

Compliance with this rule can be complicated for attorneys who represent government entities. The important thing to remember is that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” This duty also applies to

governments, although the model rules do concede that “[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules.” Government attorneys using social media should take the same measures mentioned above: post a disclaimer and avoid engaging in any kind of advice to non-clients that could produce a reasonable expectation on their part that an attorney-client relationship is formed.

ADVERTISING AND SOLICITATION • Model Rule 7.1 restricts the content of attorney advertisements, prohibiting attorneys from making “false or misleading communication about the lawyer or the lawyer’s services.” The rule defines a false or misleading communication as one containing “a material misrepresentation of fact or law” or one omitting “a fact necessary to make the statement considered as a whole not materially misleading.” Attorneys should understand that truthful information may nevertheless violate this rule if it “omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading” or when there is a “substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.”

Model Rule 7.2 restricts the ways in which an attorney may advertise, prohibiting “in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain,” with limited exceptions for the person contacted being a lawyer or one with a family, close personal, or prior professional relationship with the contacting attorney. The rule goes on to prohibit such contact even for the exceptions previously mentioned “when the target of the solicitation has made known to the lawyer a desire not to be solic-

ited by the lawyer; or the solicitation involves coercion, duress or harassment.”

Whether social media sites are equivalent to “in-person” solicitation is up for debate. The answer varies from state to state, so it is important to research any applicable local opinions. For example, the Philadelphia Bar Association issued an advisory opinion holding that attorney participation in some social media forums where users are discussing legal problems is inappropriate where the attorney invites the users to send a message for further legal advice. However, the bar association found that blogs, emails, and chat rooms are not similarly prohibited. Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2010-6 (June 2010). The bar opinion was based on a state rule similar to the Model Rule 7.1, that forbids in-person, over-the-phone, or real time electronic communication. The bar distinguished between “socially awkward moments” that can arise when a prospective client is in such close proximity through social media as to be the equivalent of an in-person solicitation, from those sites which allow users to ignore any advances and take their time to think and respond — the justification being that those seeking legal advice are often vulnerable and should not be taken advantage of.

Taking a contrary view is the California Bar Association which issued an advisory opinion holding that communications occurring in chat rooms are different than communications occurring in-person or over the phone and would not violate the state rule prohibiting communications that intrude or cause duress. Cal. Bar Comm. on Prof’l Responsibility & Conduct, Formal Op. 2004-166 (2004).

Even if local rules do not restrict a particular online communication, you should check the purpose of the social media forum before using it to advertise services. You should also incorporate any state-specific advertising language into online advertisements and social media sites such as those requiring inclusion of the words “Advertising Material” as well as the name and office address of at

least one lawyer or law firm responsible for the on-line content.

USING SOCIAL MEDIA IN LITIGATION •

Attorneys are charged with being “zealous advocates” of their clients. To fulfill this role, it may be tempting for attorneys to use any avenue possible during litigation, such as “friending” witnesses, parties, and jurors through Facebook to collect personal information. Ethical guidelines might restrict these activities, however. For example, Model Rule 8.4 prohibits attorneys from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation,” sometimes directly conflicting with the charge of advocacy. As such, attorneys must be careful not to engage in unethical behavior even if it would benefit the client.

A number of state bars have issued opinions on attorney use of social media during litigation with regards to deceptive actions. For example, the Philadelphia Bar Association held that it was an ethical violation to “friend” a party or witness without disclosing the attorney’s identification, regardless of whether or not the party or witness would usually accept friend requests without any disclosure. Phila. Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Op. 2009-02 (Mar. 2009). Likewise, the San Diego Bar Association held that “friending” potential witnesses could not be done with the intention to deceive the witness and could be considered an improper ex parte communication. San Diego County Bar Legal Ethics Comm., Op. 2011-2 (May 24, 2011). Similarly, the New York Bar Association held that “friending” an individual under false pretenses to obtain evidence was an unethical deception. N.Y. City Bar Ass’n Comm. on Prof’l & Judicial Ethics, Op. 2010-02 (Sept. 2010).

Ethical considerations might also restrict attorneys from “friending” or otherwise accessing jurors through social media. For instance, the New York Bar Association issued an opinion holding that it is unethical for attorneys or those working on the

attorney's behalf to make friend requests of jurors, extending even to reviewing the juror's comments, pages, or posts when the attorney is aware that the juror would be disclosed to those reviews.

Along the same lines, attorneys run the risk of engaging in improper ex parte communications and conflicts of interest through online relationships with judges. Model Rule 3.5 prohibits attorneys from contributing to a violation of the ABA's Model Code of Judicial Conduct. States vary as to whether or not judges can be "friends" with attorneys on social media sites, so attorneys should consult the bar association opinions in their particular jurisdiction before accepting or soliciting a friend request with a judge.

Attorneys should also be aware of how these "friendships" can affect their client representation. In a recent Florida case, an appellate court disqualified the sitting judge in a criminal case because he was Facebook "friends" with the prosecutor. *Denville v. State*, No. 4D12-556 (Fla. Dist. Ct. App. Sept. 5, 2012). The defendant filed a motion to disqualify the trial judge, which was denied. On appeal, the appellate court looked to a bar association opinion prohibiting judges from "friending" lawyers who appear before the judge on social media sites and from allowing lawyers to add judges as friends. The court found the motion to disqualify well-founded because it raised sufficient facts to "prompt a reasonably prudent person to fear that he could not get a fair and impartial trial."

REVEALING INFORMATION • Model Rule 1.6 prohibits an attorney from revealing "information relating to the representation of a client," with certain exceptions. Posting personal information online often seems innocent enough such as divulging seemingly unimportant details about one's day.

People read what you post, and the seemingly informal forum of a social media site is no shield for ethical violations of improper client disclosures. An Illinois public defender found this out the hard

way, being found to have unethically revealed confidential details about a case when she posted comments such as, "This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch'" and "Huh? You want to go back and tell the judge that you lied to him, you lied to the presentence investigator, you lied to me?" Schwartz, *supra*. She lost her job.

Attorneys must also be careful what they post with regard to their own personal life. For example, a Texas attorney requested and received a continuance because her father had passed away. The judge who granted her continuance was subsequently notified of comments on Facebook chronicling days of drinking and partying. Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, A.B.A. J. (July 31, 2009). Another attorney was summoned to appear before the Florida Bar and fined \$1,200 for calling a judge an "Evil, Unfair Witch" on the attorney's blog. Schwartz, *supra*.

Attorneys should also warn their clients about revealing information through social media during a pending case, as doing so could result in the client unknowingly waiving the attorney-client privilege, and opening up information for discovery. This happened in a 2010 case where the client discussed attorney-client conversations in his e-mails, blogs, and instant messages with family and friends. The court ultimately found that the client had waived his attorney-client privilege, entitling the opposition to discovery of the information disclosed online, including his motivation for pursuing litigation, the litigation strategy, and other facts surrounding the case. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2010).

RESPONSIBILITY FOR EMPLOYEE ACTIVITIES • The Model Rules require attorneys to supervise employees and support staff. For example, Model Rule 5.3 provides that "a lawyer having direct supervisory authority over the non-

lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer," and holds the attorney responsible for any violation of the Rules by the non-lawyer if: "(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." As a result, attorneys cannot claim immunity from ethical rules simply because they personally do not engage in social media because they may be held responsible for their employees' social media activities.

CONCLUSION • Given the growing use of social media, attorneys must learn to weigh the benefits of networking, advertising, socializing, and zealous advocacy against the ethical rules restricting the profession. At stake are attorneys' careers, cli-

ents' interests, and the integrity of the legal process. First, be careful what you post online — this is good advice for everyone, but particularly for attorneys who have special ethical obligations. Second, law firms and other employers (including governments) should consider establishing and adopting a well-crafted social media policy that addresses the legal and ethical issues that arise with their employees' use of social media, and train their employees (and themselves) on the appropriate use of social media.

Finally, government attorneys should be aware of their other role in the social media arena — that of advising their clients on appropriate use of social media. Thus, they must not only be aware of their own ethical obligations, they must also be knowledgeable about all of the ethical and legal issues with government use of social media, including open meetings and records laws, and First Amendment rights, among others. (For a study of the legal and ethical issues with government use of social media, see Patricia Salkin & Julie Tappendorf, *Social Media and Local Governments: Navigating the New Public Square* (ABA Press, 2013).)

**To purchase the online version of this article,
go to www.ali-cle.org and click on "Publications."**