

Current Legal Ethics Challenges: What You Need to Know



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New Legal Ethics Risks and Developments

In 2016 the ABA adopted Model Rule 8.4(g) which added a new category for what can be considered professional misconduct. The Rule aims to prohibit attorneys from engaging “in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.” The Rule has not been widely adopted, as many in the legal community are fearful that the Rule is too overbroad and may limit their First Amendment freedoms.¹ Dennis Rendleman, Ethics Counsel in the ABA’s Center for Professional Responsibility, wrote a blog post responding to those opposed to the Rule, arguing that those in opposition to the Rule were using the First Amendment argument as an excuse to continue discriminatory behavior.² Regardless of your opinion on the issue, it is important to keep track of whether or not your State has adopted the model rule. Arizona and Idaho have become the latest states to reject the Model Rule joining four other states in formerly rejecting the rule. So far only California and Vermont have adopted rules which would fall under the conduct specified in Model Rule 8.4(g).³

Another important development in the world of legal ethics occurred in November of last year when the California Supreme Court approved a complete overhaul of the state’s Rules of Professional Responsibility.⁴ The overhaul means that California’s

¹ <https://www.washingtonexaminer.com/the-american-bar-associations-chilling-efforts-to-suppress-free-speech> (“The bottom line is that lawyers don’t sign away their free speech rights by virtue of their profession. Opposing harassment is not synonymous with regulating private speech. And when it comes to respecting free speech, this proposed rule simply crosses the line.”)

² Rendleman. (2018). The Crusade Against Model Rule 8.4(g). Retrieved from <https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/>

³ Hudson Jr., D. (2017). States split on new ABA Model Rule limiting harassing or discriminatory conduct. Retrieved from http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct/

⁴ The State Bar of California. (2018). New Rules of Professional Conduct Effective November 1. Retrieved from <http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/new-rules-of-professional-conduct-effective-november-1>

Rules now are more in line with the Model Rules. The most obvious of these changes is a new numbering system that aligns with the numbering system employed by the Model Rules, making it easier for lawyers in other jurisdictions to reference. Even though California's Rules do conform in many ways to the Model Rules, there are several areas where California's new rules substantively depart from the Model Rules.

By far the most fluid ethical challenges are stemming from the continued growth of the internet, social media, electronic discovery, and technology. One area where questions have arisen recently stems from online reviews and liability. While libel and slander laws apply to clients or others that may post an unfavorable or even malicious review, the service reviews the website provides are generally immune from liability under federal law, specifically 47 U.S.C. §230. If someone posts a defamatory post on a Google posting for you or your law firm, what recourse do you have? Generally speaking, I have been advising clients to send a timely retraction demand to the person making the post, with a separate letter to Google or the service provider making the same demand, but in a nicer way. Google also has a specific procedure to follow to challenge an unwanted post. The multi-pronged attack has worked to remove the post, which should be the most important step. You can then decide to take action against the person who made the post.

If Google will not remove the post or the author will not remove the post, you likely will be unable to bring a successful action against Google. Similarly, if a Facebook user posts a defamatory statement on his or her wall, is Facebook liable for "publishing" the post, at the time it is posted, after Facebook gains knowledge of it, or after Facebook is informed it is defamatory? The answer is generally known under the Communications Decency Act) 47 U.S.C. §230 that limits liability for providers for content provided by others and precludes any civil liability of a provider for — **(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or **(B)** any

action taken to enable or make available to information content providers or others the technical means to restrict access to certain material. The take away from this is that even where a provider has been given notice of injurious content, the provider will be immunized for liability and damages caused by the content. While there is more here, and while details of 18 U.S.C. §230(e)(2) remain in flux, the basic requirement of registering and having appropriate policies in place is a simple step that every business with an online presence can take to minimize potential liability from the actions of third parties who can post content to a website.

Data Privacy, Security and Confidentiality Hurdles

“Breach,” the word which may make one think of Target, Experian, Sony and other corporations that have experienced major data breaches exposing thousands of customer’s data to criminals, has become one of the scariest words for firms nationwide in the last few years. The negative publicity produced by these stories have led many companies to implement more policies and procedures in an effort to protect customer’s data. Many companies are now requiring that customer passwords be longer and use different combinations of symbols or numbers. Companies have also started to employ two-factor authentication which requires customers to enter in a separate special code that is either emailed or texted to the user. Law firms are not immune to these risks, and actually have been targeted due to the highly sensitive information law firms are often tasked with holding. In 2016, two of the largest firms in the United States were hacked, in a cyber-attack that was potentially motivated by gaining investment trading secrets.

Given these risks the ABA has issued a number of opinions regarding a law firm’s responsibilities regarding customer data. The most recent of these opinions, Formal Opinion 483, was published in October of last year.⁵ The opinion goes into detail to

⁵ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 483 (2018) (“Lawyers’ Obligations After an Electronic or Data Breach or Cyberattack”).

describe how a lawyer’s duties of professional responsibility should guide what they do in the event that their firm is the victim of a cyberattack or data breach. Model Rule 1.4 requires lawyers to keep clients “reasonably informed” about any such breach so as to explain the implications to their clients and allow the client to make an informed decision regarding representation. Whenever breach occurs, or where there is even a substantial likelihood of a breach, involving the material client information, there is a duty to notify the clients and take reasonable steps to attempt to rectify the situation.⁶ The discussion, however, does not end there. The ABA is clear in Opinion 483 that there may be other laws impacted in the event of a breach relating to privacy of data, most notably the recent developments in data security law from the European Union and jurisdictions within the United States that have attempted to mirror those protections.

In 2018, the European Union put countless businesses on edge across the United States when it implemented the General Data Protection Regulation (“GDPR”). Under the requirements of the GDPR, American companies, individuals, corporations, and various other entities that offer goods or services to EU citizens are now subject to the EU new strict data privacy law.⁷ Penalties are substantial and can be as large as four percent of annual global turnover and have been considered to impact corporate giants such as Google and Facebook to the tune of \$24 million dollars.⁸

While this only impacts entities that target a data subject in an EU country, American jurisdictions have taken notice of their new protection policy. States such as California, Colorado and New York have already begun to follow in the EU’s footsteps of broadening the scope of defining what “personal information” has traditionally meant while expanding the range of consumer-related data that companies collect or maintain.

⁶ Id.

⁷ <https://www.forbes.com/sites/forbestechcouncil/2017/12/04/yes-the-gdpr-will-affect-your-u-s-based-business/#7454aa426ff2>

⁸ <https://www.recode.net/2018/5/16/17360944/gdpr-us-business-eu-european-union-data-protection-privacy>

California recently signed into law the California Consumer Privacy Act (“CCPA”), which becomes effective on January 1st, 2020.⁹ The CCPA applies to businesses which are defined as any for-profit legal entity doing business in California that collects personal information regarding California residents, even if that business is not physically located in the United States. Any business with either over \$25 million in annual revenue or that retains personal data of more than 50,000 consumers is considered to be subject to the CCPA requirements. The CCPA extends a consumer’s rights in association with their personal data, affording the consumer the right to know and request whether their personal information is being collected, what information is being collected, the right to say no to the sale of such information, and the right to delete that information.¹⁰ Additionally, in the event someone chooses to request their data be deleted, businesses are required to respond to such requests and deliver the required information to the client free of charge within 45 days of the receipt of the request.¹¹

Colorado has a policy that mirrors the CCPA, and was made effective in September of last year.¹² Colorado’s notice requirements under the Data Privacy Act of 2018 dictate any covered entity that experiences a breach that involves Colorado resident’s PII must provide notice to those affected individuals within 30 days. Secondly, if that breach involves the PII of more than 500 Colorado residents, that covered entity must also provide notice to the Colorado Attorney General within 30 days. These breach disclosures are required to have specific details such as the date of breach, the entity’s contact information, information on how to contact credit reporting agencies, information on how to receive alerts regarding fraud or freezing credit, and a statement directing individuals to change their name and password if that entity believes that resident’s specific information was compromised in the breach.

⁹ Cal. Civ. Code §§ 1798.100.

¹⁰ Cal. Civ. Code § 1798.100-105.

¹¹ Cal. Civ. Code § 1798.130.

¹² 2018 Colo. HB. 1128.

It is clear the impact of the GDPR on American jurisdictions has only begun, and it should be expected that more and more states will be adopting new data privacy laws in the coming years.

While many lawyers, myself included, are not tech savvy, lawyers need to be aware of their obligations to maintain the security of their client data and attorney-client privileged information. Lawyers need to be cognizant of information security because file cabinets are no longer the standard. Most client information is now stored on servers or in the cloud. As I write this article, I am accessing my desktop and client files from another Country, something unheard of not very long ago. Lawyers should retain and consult with appropriate IT and data security professions to implement measures to best ensure that sensitive information, attorney-client privileged information, and client confidences are protected. An informative and straightforward guide to basic security goals can be taken from the National Institute of Standards and Technology (NIST) Special Publication (SP) 800-66 (Information Security):

Information Security: Protecting information and information systems from unauthorized access, use, disclosure, disruption, modification, or destruction in order to provide— 1) integrity, which means guarding against improper information modification or destruction, and includes ensuring information nonrepudiation and authenticity; 2) confidentiality, which means preserving authorized restrictions on access and disclosure, including means for protecting personal privacy and proprietary information; and 3) availability, which means ensuring timely and reliable access to and use of information.

Conflicts of Interest: The Latest Problems

California's overhaul of their Rules of Professional Responsibility also made substantive changes, some which depart from the Model Rules, in identifying and avoiding conflicts of interest. The new Rule 1.7 on conflicts of interest, which went into effect in November 1, 2018, moved away from the state's former "checklist" approach and shifted towards the current Model Rules test. The Model Rules test asks "whether there is a direct adversity to another current client in the same or separate matter, or whether there is a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationship with another client, a former client or a third person, or by the lawyer's own interests."¹³ While the new rule retains California's informed written consent standard, the new change recognizes advance waivers under certain circumstances and factors such as the knowledge, experience, and sophistication of the client are to be weighed when determining whether the client has truly given fully informed consent.¹⁴

A notable addition within the new Rule 1.7 regarding written disclosure is that even if there is no significant risk that an attorney's representation will be materially limited by that attorney's responsibilities or their relationship with another client, that attorney must now absolutely submit a written disclosure to the client in two instances: the first is if that attorney has or knows that another attorney within the same firm has any sort of relationship or responsibility to a party or witness in the same matter; the second is if the attorney knows or reasonably should know another party's lawyer is intertwined as a relative of some sort or in some form of a personal or intimate relationship with either the client's attorney or with another attorney within that same firm.¹⁵

One of the most notable cases in 2018 in regards to conflicts of interest came from the California Supreme Court who, in wake of the recent rules changes in

¹³ <https://www.hinshawlaw.com/newsroom-updates-california-adopts-new-rules-of-professional-conduct.html>

¹⁴ CA ST RPC Rule 1.7, Cmt. 9.

¹⁵ CA ST RPC Rule 1.7(c)(1-2).

California, was able to address issues pertaining to advanced waivers of conflict and establishing informed consent. In *Sheppard, Mullin, Richter & Hampton v. J-M Manufacturing Co.*, the Court was asked to determine the requirements for obtaining waivers of existing conflicts, whether drafting an effective and enforceable advance waiver of potential conflicts is even possible, and the adequacy of the disclosure necessary to obtain a client's informed consent.¹⁶ The firm Sheppard, Mullin, Richter & Hampton (Sheppard Mullin) took on J-M Manufacturing (J-M) as a client in a qui tam action in 2010. Sheppard Mullin later discovered that one of the many plaintiffs against J-M, South Tahoe Public Utility District (South Tahoe), was represented by Sheppard Mullin at a different office for employment matters as recent as 2009.

Sheppard Mullin had provided South Tahoe an advanced conflict waiver and because of that waiver, ultimately decided that taking on J-M as a client did not create a true conflict. Sheppard Mullin never disclosed to J-M about its relationship with South Tahoe. Over the next year, Sheppard Mullin would bill South Tahoe for only 12 hours of work, but when South Tahoe discovered that Sheppard Mullin was also representing J-M, they moved to disqualify Sheppard Mullin in the qui tam action. A suit ensued in which Sheppard Mullin brought action against J-M for over \$1 million in outstanding fees, while J-M filed a cross-complaint for breach of contract, fraudulent inducement, and breach of fiduciary duty. Ultimately, after the trial court confirmed an award granted to Sheppard Mullin via arbitration, the Court of Appeals reversed holding that because Sheppard Mullin never disclosed the conflict, they had violated the California Rules of Professional Conduct and rendered J-M's engagement agreement unenforceable.

The California Supreme Court held the failure by Sheppard Mullin to disclose their relationship with South Tahoe rendered J-M's engagement agreement unenforceable due to a conflict of interest. However, the Court also determined the conflict did not prevent Sheppard Mullin from recovering value for its services via the doctrine of

¹⁶ 6 Cal. 5th 59 (2018).

quantum meruit. Notably, the Court found the small amount of billed hours (12) by Sheppard Mullin for South Tahoe after J-M had become a client was irrelevant, but focused on the extent that J-M was made aware of all relevant conflicts in order to provide consent in the conflict waiver provision of their engagement agreement. The Court found although both clients had provided written consent of advance conflict waivers, J-M did not have adequately informed consent when Sheppard Mullin failed to disclose a current client. Also, while the Court did not outright reject the use of advance waivers, they noted that advance waivers cannot ever be used as a way to establish informed consent where a conflict exists but not ever disclosed specifically. The takeaway is to provide as full and specific disclosure as possible, inform the prospective client to consult with independent counsel, and obtain informed consent in writing.

Engagement Agreements: Lessons from Recent Cases

Model Rule 1.8(h)(1) prevents an attorney from making an agreement that limits “the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.” This Rule should not surprise many attorneys, but some lawyers may be surprised by limitations in a retainer agreement recently allowed by the Utah Ethics Advisory Committee. The Utah committee’s opinion argued that it would be permissible to include a provision requiring the client to indemnify the lawyer against claims from third parties, since that provision is not explicitly prohibited by the Rule. Other states have allowed similar provisions for use when a lawyer is attempting to protect from potential claims brought by third-party recipients of opinion letters drafted by an attorney on behalf of the client. If your practice involves writing opinion letters that may be relied on by third parties you may want to consider adding a similar provision after consulting with the State Bar of your state for guidance on whether such a provision is deemed to be ethical.

It has also been recently determined that fee-sharing agreements between attorneys of different firms without a client’s consent in writing are deemed

unenforceable. In *Dickens v. Webster*, a dispute arose between a Kansas attorney and a Texas attorney over an alleged oral agreement to evenly split a contingency fee resulting from a wrongful death action.¹⁷ Although the action originated in Kansas, the Kansas attorney filed the claim in Texas to avoid the damage caps in Kansas and sought a Texas attorney to conduct the matter. Upon settlement, the settlement funds were disbursed to the Texas attorney, and after the Kansas attorney attempted to obtain a lien against those funds, the client terminated the Kansas attorney for interfering with the settlement. The Kansas attorney argued there was an oral agreement to split the proceeds and when the Texas attorney cited to the Texas Disciplinary Rules of Professional Conduct requiring fee-sharing agreements to be in writing, the Court of Appeals for the Fifth District of Texas found for the Texas attorney.¹⁸ The Court found that although the Kansas Rules of Professional Conduct did not require a fee sharing agreement to be in writing, Texas law was to be applied where a fee was generated by litigation in Texas. The Court held oral fee-sharing agreements, which a client was not aware of and did not consent to, violated public policy and were deemed unenforceable.

Dickens v. Webster demonstrates that it always best practice, even in jurisdictions that do not require it, to make sure that any fee sharing agreement is not only in writing between co-counsel, but also that the client's consent to the agreement is in writing as well. This will reduce exposure to risk in the future over fee disputes and will avoid headaches in instances in which counsel seeks help from another attorney in another jurisdiction. Some states also require that the fee split be reasonable and either be in proportion to services provided by each lawyer or that each lawyer agree to be jointly responsible for the entire litigation. Some states such as Arizona prohibit referral fees, so a lawyer needs to be actively involved or agree to responsibility for the case in order to earn any fee.

Old Case Files: Disposal Issues and Former Clients' Access to Documents

¹⁷ *Dickens v. Jason C. Webster, P.C.*, 2018 WL 6839568 (Tex. App. Dec. 31, 2018).

¹⁸ *Id.* at *14.

Client document retention can be at times considered a “burdensome insurance policy” that toes the line, so to speak, of Rules of Professional Conduct but it does play an important part in allowing attorneys to safeguard themselves against the threat of potential malpractice claims. While the baseline established by Model Rule 1.15(a) is five years for document retention, that length is changing among the several states and appears to be increasing the required years.

Massachusetts recently amended their Rules of Professional Conduct to require, as a baseline, attorneys to hold client files for six years from either the date of matter’s completion or termination of the engagement has occurred.¹⁹ This number changes depending on the type of file and the type of underlying matter. Criminal and delinquency cases can require retention ranging from 10 years to the length of the client’s life.²⁰

As more threats of data and security breaches arise, the answer of how long a particular client file needs to be retained is becoming increasingly complicated. This notion is particularly relevant to the issues implicated by GDPR and the data of international clients discussed earlier, when considering that a particular state’s jurisdiction may not be the final word.

When representation of a client ends, attorneys have a duty to take precautions that reasonably protect the former client’s interests.²¹ As for the former client file’s documents and work product, former clients have a right to access those documents but that right is not unlimited. In 2015, the ABA issued a formal opinion addressing the ethical considerations surrounding a former client’s entitled access to documents related to the former representation.²² As a baseline, an attorney is required to allow a former client access to any document related to the former representation, but there are grounds

¹⁹ Rule 1.15A of the Massachusetts Rules of Professional Conduct

²⁰ <https://bbopublic.blob.core.windows.net/web/f/ClientFilesRule.pdf>

²¹ ABA Model Rule 1.16, Declining or Terminating Representation

²² ABA Formal Op. 471 (Jul. 1 2015).

in which an attorney is permitted to refuse. Any materials that would violate a duty of nondisclosure to another person or materials containing information which, if released, could endanger the health, safety, or welfare of the client or others are not considered within the scope of what the former client is entitled to. Additionally, any documents reflecting only internal firm communications and assignments are not required to be included either. The attorney should be advised to generally restrain from doing anything that could harm or prejudice the client, so refusing to turn over a client files when the client has an upcoming deadline or appeal deadline is generally not advisable and could lead to a malpractice suit or ethics complaint, whether meritorious or not.

At a minimum, the formal opinion concludes the former client is entitled to any materials provided by the client to the firm, any filed legal documents, executed instruments, correspondence in relation to the representation, discovery or evidentiary documents, and any third party assessments or evaluations paid for by the client.²³ The ABA then clarified that Rule 1.16 does not entitle a former client access to documents or materials related to drafts, internal memoranda, research, or personal notes. The ABA does note there can also be circumstances in which an attorney is required to provide materials that former clients are not typically entitled to. In instances in which the representation is terminated prior to the conclusion of the matter, the ABA concluded that an attorney would be required to provide the former client with any paper or property generated by the attorney for the attorney's own purpose, such as personal notes, internal memoranda and research.²⁴ My standard practice is to turn over the entire file when the client asks for it. The benefits of doing so outweigh the benefits of not doing so regardless of the situation in my opinion.

Limited Scope Representation: Latest Risks and Opinions

²³ Id. at 5-6.

²⁴ Id.

Limited scope representation (“LSR”) has been recognized by the ABA for over a decade, but has only recently been utilized by a growing number of states. Put simply, LSR refers to a situation where an attorney and his or her client decide that the lawyer will handle certain parts of the case, while the client will handle other parts. This set-up is different from the typically attorney-client relationship, where the lawyer handles every aspect of the case from start to finish. LSR can be any arrangement from simply calling a lawyer to receive the legal information pertinent to your case to hiring a lawyer to coach you on how to represent yourself at court hearings.²⁵ LSR is often utilized when a client cannot afford to hire an attorney to represent his or her entire case. Courts are also a proponent of limited scope representation, as it helps streamline the judicial process and encourages settling out of court.²⁶

In late 2017, New York approved the use of limited scope representation in cases involving consumer credit disputes, foreclosures, evictions, divorces and veteran’s rights. New York is not a stranger to the “unbundling” of services, otherwise known as LSR. It has commonly been used in family law and bankruptcy. However, as the utilization of LSR has expanded outside of these few practice areas, more requirements have been attached to it. In New York, attorneys utilizing the limited scope legal assistance have to complete a certified training course and any retainer agreement has to be in writing. They must also demonstrate that their clients gave informed consent on the fees they may be charged. Additionally, the tribunal that the lawyer intends to use must deem the limited appearance appropriate. However, New York’s rules are actually behind other states, like Mississippi. Mississippi allows lawyers to take on pro bono assignments that would otherwise have a conflict with the firm’s clients, limiting any resulting disqualifications only to the participating attorney and not the law firm as a whole.²⁷ This nuance adds yet

²⁵ Limited Scope Representation. *California Courts*. Retrieved from <http://www.courts.ca.gov/1085.htm>

²⁶ Koslow, E. (2017) Three Important Benefactors of Limited Scope Representation. *The Daily Record*. Retrieved from <https://thedailyrecord.com/2017/06/26/3-important-benefactors-of-limited-scope-representation/>

²⁷ Miss. Model Rules 6.5(a), Rules of Professional Conduct, Mississippi, 2011 Miss LEXIS 162 (Miss. 2011).

another benefit to limited scope representation beyond what it is typically utilized for. Overall, the concept of LSR will make the legal profession more accessible and applicable to today's consumer.

As with many other instances, a lawyer can best insulate him or herself with a detailed writing agreed to by the client clearly delineating a "limited engagement" setting forth what will be done, what will not be done, and billing rates or charges.

New Social Media Landmines

As social media continues to be increasingly relevant, it is important to remember that attorneys have an increased duty to present themselves professionally, at all times, online. Although there is undoubtedly several benefits to wielding social media for the development of your brand, there are inherent risks that come with exposure to the public via social media platforms.

It is easier now than ever before to directly connect to clients. However, whether they be prospective, current, or former, attorneys should refrain from becoming "friends" with those clients on social media. There are obvious issues associated with simply allowing a client to view an attorney's posts, but even being associated with a client's celebratory posts about a favorable judgment can prove to create headaches.²⁸

Social media has become a particularly powerful tool when researching jurors during voir dire. Courts have encouraged attorneys to utilize social media technology to find improper juror issues, but it comes with a great burden to ensure that these issues be addressed in a timely fashion and that any research not raise improper communication between jurors and counsel.²⁹ While there are obvious issues with attempting to use deception in order to gain access to such information, there are increasingly more lines being drawn as to what methods jurisdictions will allow in attempting to be transparent

²⁸ Hricik, David C., *Lawyers and Social Media: From the Absurd to the Troubling* (January 16, 2019).

²⁹ *Johnson v. McCullough*, 306 S.W.3d 551, 558 (Mo. 2010).

during research. The State Bar of New York has issued opinions as to what may constitute improper communication, even though those opinions conclude that attorneys likely have a duty to research jurors.³⁰ Any indication that a juror may have received a communication that an attorney accessed their information is considered by the State Bar of New York to be improper, even so much as sending a “friend request”.³¹

Attorneys may want to offer public commentary on current legal issues through a blog.³² Attorneys considering a blog post on a new issue should be careful that their advice or anecdote does not violate any of the Rules. In March of last year, the ABA issued an opinion titled “Confidentiality Obligations for Lawyer Blogging and Other Public Commentary”.³³ Model Rule 1.6(a) provides that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.” An attorney should avoid relaying stories about actual clients and representing these stories as hypotheticals, as doing so may violate the attorney’s duty of confidentiality if the contents of the story make it likely that a third party could identify the identity of the subject of the hypothetical.

Inadvertent Attorney Advertising Online

As more and more of the legal profession utilize social media and the internet to both communicate and advertise, the field of legal ethics has to attempt to keep up. A large majority of attorneys are now using social media platforms like Facebook and LinkedIn to enhance their business. However, there are inherent risks that come along with the use of apps like these. Legal advertising already faces many challenges regarding ethical standards, making the use of the internet to advertise especially prone to possible ethical issues. A major concern with advertising online is the inadvertent

³⁰ N.Y. St. B. Ass’n. Comm. on Prof. Ethics Formal Op. No. 2012-2 (2012).

³¹ Id.

³² Examples include “Canna Law Blog”, written by the Canna Law Group; and “The Art Law Report”; written by Sullivan and Worcester.

³³ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 480 (2018) “Confidentiality Obligations for Lawyer Blogging and Other Public Commentary.

disclosure of privileged information. Additionally, when a firm is attempting to run a successful business, how do they ethically address issues like customer reviews on Yelp?³⁴

The difficulty the legal profession has had with the emergence of attorney online presence is whether their actions should be classified as advertising or free speech. For example, does an attorney's LinkedIn profile qualify as advertising for that attorney or simply fall under free speech? This is an extraordinarily important question for attorneys to know the answer to, as 98% of all individual lawyers use the LinkedIn app. Several State Bar Associations have offered opinions on the specific topic. The New York State Bar Association offered a social media update in 2015 that explained if an attorney's profile is comprised of work done in prior employment it qualifies as an advertisement. However, if a profile merely contains biographical information and previous employment, that does not constitute advertising. It is important to note that if a profile contains subjective statements about a lawyer's skill level, information about practice areas, endorsements, or reviews from clients or colleagues, it will likely qualify as advertising on behalf of the attorney. The waters become murky when addressing the issues of specialties, as lawyers are prohibited from declaring they are a specialist or expert unless properly certified. However, this becomes an issue when the apps have headings such as "Skills and Expertise." Although an attorney may want to make it known they excel at estate planning, it is best practice to include a disclaimer as required by Rule 7.1(e), as this claim likely falls under Rule 7.1(d) "characterizing the quality of the lawyer's services."

An issue that arises both in regards to LinkedIn endorsements, as well as Yelp reviews, is the attorney's duty towards these outside statements. It is the job of the attorney to ensure that these posts are accurate. It is not acceptable for a lawyer to passively allow misleading information to remain in these posts. Therefore, it is an

³⁴ <https://www.straffordpub.com/products/legal-ethics-and-attorney-social-media-activity-navigating-ethical-risks-of-linkedin-twitter-facebook-blogs-2015-10-07>

attorney's duty to actively monitor these medias and possibly release curative posts to address any issues. However, an issue arises when having to address complaints posted online by former clients. Attorneys have to be cautious in not exposing confidential information, but also have to address the issue created by the former client. The realm of social media and advertising is a legal ethics minefield and must be navigated as such.

In more general terms, if a social media platform is used purely for personal, rather than professional purposes, then it does not qualify as advertising. However, if it is a hybrid, consisting of both personal and professional purposes, then it could qualify as advertising and an attorney should ensure it is in compliance with both the advertising and ethics rules. Some jurisdictions require that an attorney submit their potential advertising materials to the state bar prior to use. If this is the case, it is important for attorneys to recognize that their social media may be considered advertising and they need to comply with the applicable rules, such as submitting material for review. Some states require attorneys to attach a disclaimer to their advertising, so it is important to note that may be necessary on all social media pages. However, this can become difficult when using social media like Twitter, which only allows a limited amount of characters per post. Sometimes it simply is not feasible to attach a disclaimer of "Attorney Advertising" on a 140-character post. The primary advice given to attorneys in this situation is simply to avoid posting any content that could possibly be classified as advertising. The rules regarding the topic of inadvertent advertising online are in a state of flux and it is best practice to err on the side of caution until these emerging rules become more concrete.³⁵

The Internet, Multijurisdictional Practice and UPL

The expansion and continued growth of the Internet has brought along ethical and logistical challenges never before seen. A few examples will be addressed below. The

³⁵ <http://media.straffordpub.com/products/legal-ethics-and-attorney-social-media-activity-navigating-ethical-risks-of-linkedin-twitter-facebook-blogs-2015-10-07/presentation.pdf>

first is communicating with lawyers through text messages. Communication with text messages could present all types of problems, including confidentiality, preservation, interpretation issues, translation issues, auto-correct issues, and response issues. Receiving text messages from clients could also be annoying and not the most productive use of your time. For these and other reasons, I expressly prohibit communications by text messages in my fee agreements, which contain the following language, “Do not communicate with us by text messages. Text messages will not be checked, responded to, or preserved.”

Another topic drawing recent attention is social media and its evidentiary and ethical considerations. I received a recent disclosure statement that was a “Social Media Report” put together by the insurance company for the defense in a personal injury case. The Report contained a synopsis of my client’s entire social media history, with posing, timelines, and photographs, the obvious intent to show that my client is not as injured as she claims to be. I have also been in trial where the defense dedicated most of its trial time to reading and cross-examining my client on her Facebook and other social media posts as admissions against her interest. Social media is being used as evidence to the detriment of our clients. Warn clients against such unnecessary risks. I do so, including in my standard fee agreements, as follows:

You further agree not to discuss, reveal, post, or comment on the subject matter of this dispute or any persons involved or in any way related to this dispute on any electronic medium (such as Facebook, MySpace, Twitter or blogs). You further agree that you will not speak to any third party (media, insurance representative, etc.) without the express written consent of Sherrets Bruno & Vogt LLC.

Just like your clients, information you post on social media can be used against you. Lawyers have been disciplined for social media activity. For example, an Illinois Public Defender was suspended from the practice of law in the spring of 2010 for content

she posted on her blog, which included stories of her defense activities, using either client names or jail numbers that would have allowed them to be identified. The attorney lost her job and was suspended from the practice of law for 60 days. A Florida lawyer was disciplined for calling a judge names on a blog. The Florida Bar determined that the lawyer's post violated five ethics rules and he agreed to a public reprimand and a fine. A recent law school graduate waiting to take the bar exam was arrested for sexual solicitation of an underage girl online. He ultimately was able to take and pass the bar, but then was denied admission to practice by the Supreme Court of Louisiana. In Minnesota, an attorney was publicly reprimanded for posing as a former client of and posting a negative review about opposing counsel online.

These are just a few examples and reminders that the information a lawyer posts is out there forever and could have dire consequences. Think long and hard about what you write online and whether writing online is even worth doing so.

Multijurisdictional practice creates a whole area of complications for lawyers. There are different court rules, different ethical rules, different procedures, different local customs and practices, and different ways to advertise. A multijurisdictional attorney is bound to know the law and procedures of each jurisdiction where he or she practices and ignorance is no excuse. A couple examples of differences of the jurisdictions where I practice are some states have certified specializations of areas of practice, some require hearings on each motion or request for relief while others rarely allow hearings, some perform the recovery of attorney fees to the prevailing party while others do not, some require a jury trial to be timely requested while others do not, some require the parties to retrieve and take custody over exhibits after a proceedings, while others require exhibits to remain in the custody of court reporters, and some states have specific meet and confer requirements before a discovery motion can be brought while others do not. Practicing in multiple jurisdictions is not easy and requires you to be cognizant of the rules and procedures of each jurisdiction. Being unprepared or lacking the requisite knowledge

subjects a lawyer to an immediate lack of credibility before the opposing counsel, clients, and the Courts and could cause disciplinary complaints and legal malpractice suits.

The unauthorized practice of law is becoming more prevalent with the expansion of technology and the internet. ABA Rule 5.5 states, in pertinent part:

a) 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.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

This rule prohibits a lawyer licensed in one state from practicing in a state where a lawyer is not licensed without permission from the presiding tribunal. A lawyer can protect himself from obtaining a license in a state where he or she wants to practice, employing local counsel, and/or applying for and obtaining permission to appear pro hac vice in a specific case. This rule further prohibits a lawyer from advertising him or herself out as being admitted to practice in a jurisdiction where he or she is not licensed. This could be problematic in a law firm with offices located in different states or with lawyers licensed in multiple, but different states. A good way to avoid confusion is to specifically designate the licensure of all lawyers on the letterhead and website.

With the onset of the internet, more and more laypeople believe they have the ability to be lawyers because they performed a google search on the issue or because they talked to someone that had a similar case. One circumstance where the unauthorized practice of law surfaces is if an entity appears in a case and the owner or representative that is not a lawyer tries to appear on its behalf. In some states, including Nebraska, a

non-lawyer cannot represent or appear on behalf of an entity. Doing so constitutes the unauthorized practice of law and the Nebraska Supreme Court has determined that any pleading filed by a non-lawyer constitutes the unauthorized practice of law and that pleading is void and has no effect.

The Latest Legal Tech Apps and Innovations and Their Potential Risks

A majority of attorneys do considerable work remotely, and use devices outside the office that are typically personally-owned devices.³⁶ This means their ownership, settings, and maintenance are almost always entirely outside the oversight of the lawyer's firm or IT department. This risk exposure is increased when considering the newest apps and technology that are available to mobile attorneys from the convenience of their cell phone or tablet devices.

New apps have emerged in the last few years that seek to make attorneys' lives easier as they become increasingly mobile and demand access to client files and information on the go. Document manager apps such as GoodReader and ReaddleDocs, that have been created for tablet and phone devices, allow for cloud-based access to documents such as trial transcripts and depositions and allow attorneys to read and mark up those documents from anywhere. There are even apps being introduced into the marketplace to assist in trial proceedings such as TrialPad, which is designed to organize case presentations specifically to be utilized in the courtroom.³⁷

Technology has also pushed the discussion for firms to consider the concept of Virtual Law Practice. Apps like Zoom, Hangouts, and Slack have afforded firms to connect and meet with clients from a distance, as well as increasing productivity within

³⁶ Cybersecurity and Small Law Firms, CNA
https://www.bna.com/uploadedFiles/BNA_V2/Marketing_Services/2017_Marketing_Services/CNA_White_paper1_Cybersecurity_SmallFirms%20FINAL_041317.pdf

³⁷ <https://www.litsoftware.com/trialpad/>

firms and how they communicate internally.³⁸ Even more popular among modern firms, programs like Dropbox, Rocket Matter, NetDocuments, MyCase and several others have utilized cloud-based technology catered for law firm document management. The use of cloud-based technology and these efficiency apps are currently being utilized by 54% of U.S. firms, and that percentage will only increase in the coming years.³⁹

All of these different apps create a serious need to address cloud security for sake of both attorneys and their clients, which may not have been contemplated by the firm or their respective IT departments. In 2012, 68.6 million account details within DropBox were hacked and made available to the public. Instances such as this have been found to be the result of utilizing free versions of offered apps and programs as well as a glaring lack of integration between those apps and their firm's technology security.⁴⁰ Attorneys will do well to make sure that any new app, however convenient, is accounted for in plans to protect the integrity of all client data by remembering to keep IT involved and informed in the process. Law firms should also be wise to review software polices to see to what extent privileged or sensitive information will be disclosed and to whom.

³⁸ "Mobile Business Productivity Apps Improve Your Online Presence" Susan Gilbert, May 8, 2019. <https://www.business2community.com/mobile-apps/4-mobile-business-productivity-apps-to-improve-your-online-presence-02196409>

³⁹https://www.americanbar.org/groups/law_practice/publications/techreport/ABATECHREPORT2018/2018Cloud/

⁴⁰ ITLA/InsideLegal Technology Purchasing Survey, 2016.

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