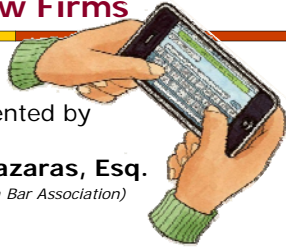


Ethics of Social Media Marketing for Law Firms

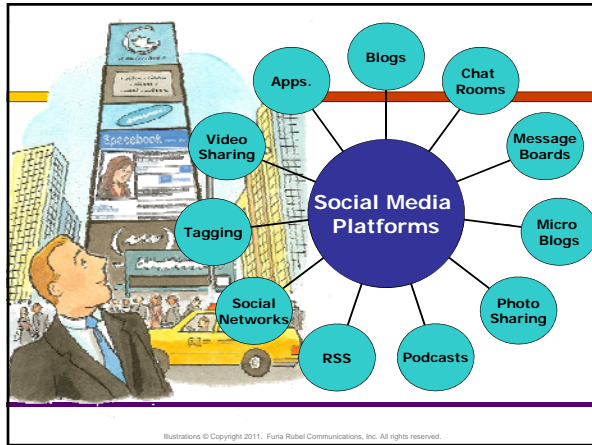
Presented by

Paul J. Kazaras, Esq.
(Philadelphia Bar Association)

Gina F. Rubel, Esq., Moderator
(Furia Rubel Communications, Inc.)



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Audiences Online

- Alumni (education / business)
- Business / community leaders
- Clients
- Colleagues
- Competitors
- Experts
- Family / friends
- Government officials
- Judges
- Jurors
- Media
- Opposing counsel
- Prospective clients
- Referral sources
- Thought leaders
- Witnesses

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Relevant Rules of Conduct

- Duties to Prospective Client 1.18
- Trial Publicity 3.6
- Communication with Person Represented by Counsel 4.2
- Dealing with Unrepresented Person 4.3
- Unauthorized Practice of Law 5.5
- Communications Concerning Lawyer's Service 7.1
- Advertising 7.2
- Direct Contact with Prospective Clients (Solicitation) 7.3
- Disciplinary Authority; Choice of Law 8.5

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Best Ethics Practices

- *Have a Law Firm Social Media Policy and Comply**
- *Know the Rules of Professional Conduct and Comply**

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Popular Social Media Platforms

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ABA's Commission on Ethics 20/20

Topics explored:

- Online social and professional networking services
- Paying for online advertising, referrals and leads
- Lawyer websites

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ABA's Ethics 20/20 Recommendations

"The Commission concluded that no new restrictions are necessary ..., but that lawyers would benefit from more guidance on how to use new client development tools in a manner that is consistent with the profession's core values."

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ABA's Ethics 20/20 Recommendations

Proposed amendments to Rules:

- 1.18 (Duties to Prospective Clients)
- 7.2 (Advertising)
- 7.3 (Direct Contact with Prospective Clients)

"...clarify how lawyers can use new technology to disseminate important information about legal services and develop clients."

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Duties to Prospects /Clients Rule 1.18

- A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- Fruits of conversation are confidential.
- Be mindful of conflicts and receipt of disqualifying information.

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ABA's Ethics 20/20 Recommendation Rule 1.18

Proposed amendments to Rule:

Rule 1.18 Duties to Prospective Client

(a) A person who ~~discusses~~ communicates with a lawyer ~~about~~ the possibility of forming a client-lawyer relationship ~~and has a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship~~ with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with learned information~~ from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

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(Un)Represented Parties Rules 4.2 & 4.3

- Communications with (un)represented parties (Rules 4.2, 4.3)
 - Posting as a "communication"?
 - Intent to obtain information, from a person who might be represented (employee of corporate defendant)
 - Disclosure of client in communications with unrepresented parties

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Unauthorized Practice of Law Rule 5.5

- Unauthorized practice of law
 - **Disclose licenses**
 - You may not know where reader is located
 - Rules vary widely in different jurisdictions
- Creating an attorney/client relationship
 - Do not give specific advice
 - Do give general responses
 - Do refer reader to proper resources

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Communications Concerning Lawyer Services – Rule 7.1

CANNOT

- Be false or misleading
- Omit necessary facts
- Compare one lawyer with another
- Contain subjective claims
- Create unjustified expectations

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Advertising Rule 7.2

- Copies/Records kept 2 years
- No referral payments to non-lawyers
- No celebrity endorsements
- Disclose paid endorsements
- No non-lawyer, non-client portrayals or reenactments
- Fee language restrictions
- Geographic location disclosures

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ABA's Ethics 20/20 Recommendation Rule 7.2

No proposed amendments to Rule – only comments.

[3] Adds "the Internet, and other forms of electronic communication" as forms of advertising

[5] Lawyers are not permitted to pay others for "recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities or qualities."

[5] "Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the person does not recommend the lawyer and any payment is consistent with Rule 1.5(e) (division of fees) and Rule 5.4 (professional independence of the lawyer)."

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LinkedIn Recommendations, Facebook Reviews, etc...

Recommendations (*gray area*)

- **Indiana** Rules of Professional Conduct - 7.2(d): A Lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication which:... (3) contains a testimonial about or endorsement of a lawyer...
- **Some states prohibit attorney from using testimonials in advertising materials**

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Direct Contact - Prospects Rule 7.3

- CANNOT solicit in-person or via phone
 - Family, previous clients, attorneys - OK
- CAN send written communications
 - Comply with 7.1
 - E-mail considered written
 - Ban on real time electronic chat—but see Philadelphia Bar Opinion 2006-10

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ABA's Ethics 20/20 Recommendation Rule 7.3

Rule Title and Content Change from "Direct Contact with Prospective Clients" to "Direct Contact with Potential Clients"

Comments:

Added new: [1] "A solicitation is a targeted communication initiated by the lawyer that is directed to a specific potential client and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches."

[2] Clarifies communications that are in-person, live or real-time versus those that can be communicated otherwise.

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Real Time Communications – Phila. Bar Opinion 2010-6

- Pennsylvania Rules of Professional Conduct on electronic communications and solicitation have not kept up with technology.
- An attorney can participate not only in a blog but also in a live chat room.
- Attorneys must be guided behind the purpose of the prohibitions in Rule 7.3 as regards electronic communications.

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Trial Publicity Rule 3.6

DON'T make statements that:

- May materially prejudice the case
- Concern character, credibility, reputation, criminal records, suspects, witness identities, confessions, admissions
- Concern defendant's failure to make a statement
- Concern expected testimony or possibility of guilty plea
- Concern evidence to be presented
- Are inadmissible

DO make statements that:

- Refer to general nature of claim or defense
- Deal with info contained in public record
- Provide general scope of issues

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Multi-State Practices Rule 8.5

- Must comply with home states' rules where:
 - Office is located
 - Attorneys' admitted
 - Seeking clients
 - Advertising / Marketing
- Must follow all states' rules in which you are marketing

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Litigation & Law Practice Management Issues

- Communications with clients/prospects, judges, opposing counsel, witnesses, parties, etc.
- Discovery / E-discovery
- Judges (neutrals) use of social media
- Juror selection / instructions
- Party communications
- Trial publicity
- Witness investigations

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Court Rules Social Media Sites Discoverable

- **McMillen v. Hummingbird Speedway**, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. County Ct. Sept. 9, 2010)
 - Defendant allowed to access plaintiff's Facebook and MySpace
 - "Where there is an indication that a person's social network sites contain information relevant to the prosecution or defense of a lawsuit"

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Non-Public Portions of S.M. Sites Discoverable - Relevant

- **Zimmerman v. Weis Markets, Inc.**, PICS Case No. 11-0932 (C.P. Northumberland)
 - PI defendant permitted to discover plaintiff's non-public portions of Facebook & MySpace
 - Court noted that authorities recognized that these social network sites did not guarantee complete privacy

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Stored Communication Act Affords S.M. Providers Protection

- **Crispin v. Christian Audigier Inc.**, Case No. CV 09-09509
 - Judge Margaret Morrow of the U.S.D.C. Central District of CA ruled that Facebook & MySpace are providers of Electronic Communication Services (ECS) & Remote Computing Services (RCS) under the Stored Communications Act1 (SCA)
 - Private communications on these sites are afforded protection from disclosure.

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Limited Discovery of Facebook Post Allowed in Harassment Case

- **EEOC v. Simply Storage Management**
 - Discovery order / Sexual harassment
 - U.S.D.C. - Southern District of Indiana
 - How much information from such sites is discoverable to an employer defending an employment discrimination claim?
 - Court permitted discovery of relevant information

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Phila. Bar Association Prof. Guidance Committee

- **Op. 2009-02 (March 2009)**
 - Third party cannot “friend” **witness** via social networking solely to obtain info for lawyer in pending suit
 - Deception - violation of Rules 8.4 and 4.1 and
 - Supervisory violation under Rule 5.3 because the third party would omit a material fact

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Bar Assoc. City of New York Com. on Prof. and Judicial Ethics

- **Opinion 2010-2 (Sept. 2010)**
 - Lawyer does not violate rules of prof. conduct by “friending” unrepresented party for purpose of obtaining info. from the social network of that party if the lawyer or lawyer’s agent uses his real name and real profile
 - Lawyer who uses truthful information to gain access to unrepresented party’s social networking site is not required to disclose reason for request

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ABA JOURNAL
Law News Now

JUDICIARY

Ga. Judge Resigns After Questions Raised About Facebook Contacts

The New York Times

For Judges on Facebook, Friendship Has Limits
By JOHN SCHWARTZ
Published December 10, 2009

Judges and lawyers in Florida can no longer be Facebook friends.

LAW.COM

Facebook Friend Earns Judge a Reprimand

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JUDICIARY

Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches #ABACHicago

Posted Jul 31, 2009, 03:18 pm CDT
By Mely McDonough

Galveston, Texas-area lawyers on Facebook may want to double-check their friends list, especially if they're about to appear before Judge Susan Criss.

That's because Criss, a state court judge who is learning to adapt to social media as a way to connect with long-lost friends and is leveraging Facebook as a judicial campaign tool, has also learned a few things she didn't expect.

Biggest surprise: Even lawyers don't fully grasp how public social media is, even when privacy controls are in place.

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As jurors go online, U.S. trials go off track
Facebook, Twitter and smart phones cause mistrials, appeals and overturned verdicts

- Since 1999, at least 90 verdicts have been the subject of challenges because of alleged Internet-related juror misconduct (Increasing)
- Judges granted new trials or overturned verdicts in 28 criminal and civil cases — 21 since January 2009
- In 3/4ths of the cases in which judges declined to declare mistrials, they found Internet-related misconduct on the part of jurors

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Courts now barring jurors use of social media, blogs and Internet while serving on trials

By: PAUL ELIAS
Associated Press
03/06/10 6:10 PM EST

SAN FRANCISCO — Enough with the tweets, the blogs, the Internet searches.

That's the message being communicated by courts across the country as jurors using their portable electronic devices continue to cause mistrials, overturned convictions and chaotic delays in court proceedings.

Last year a San Francisco Superior Court judge dismissed 600 potential jurors after several acknowledged going online to research the criminal case before them.

Baltimore Mayor Sheila Dixon challenged her misdemeanor embezzlement conviction after discovering five jurors "friended" one another on Facebook during the trial.

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Ethics Resources

- Pacode.com
- PhiladelphiaBar.org
- Philadelphia Bar Ethics Hotline 215-238-6328
- Lfmi.com
- Legalethics.com
- Law.cornell.edu/ethics
- Aprl.net
- Abanet.org/adrules
- ABA/BNA Lawyers' Manual on Prof. Conduct

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