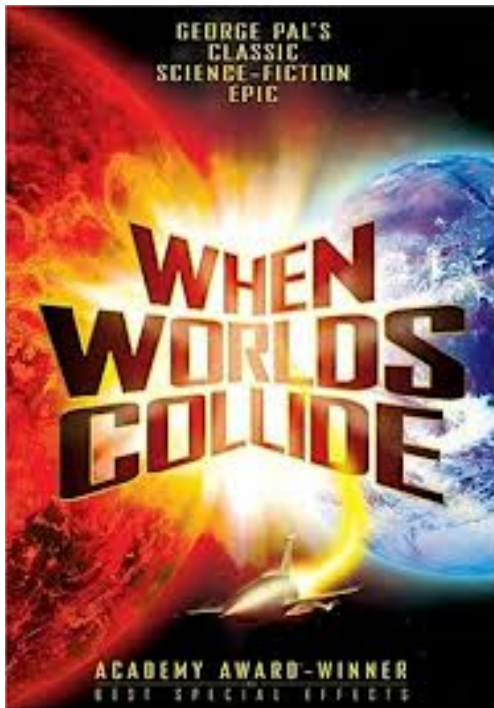


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Association of National Advertisers | Est. 1910



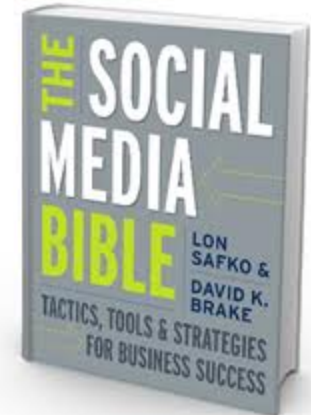
When Worlds Collide

Old Ethics and Social Media

Douglas J. Wood
and
Kathryn Barrett-Park
April 24, 2014

Social Media

“...activities, practices and behaviors among communities of people who gather online to share information, knowledge, and opinions using conversational media.”

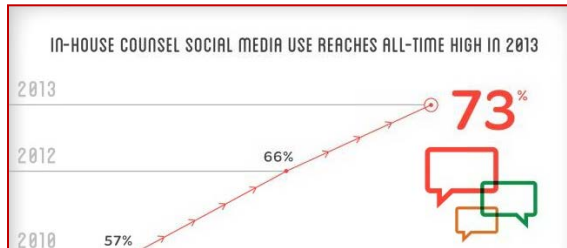


The New Language of Social Media

- User Generated Content
- Podcasts and Webcasts
- Advercasting
- Blogs, Vlogs, RSS Feeds
- Key Words and Metatags
- Social Networking
- Virtual Communities and Reality
- Streaming Music and Video
- Interactive Gaming
- Pre-Roll/Post Roll, Interstitial Advertising
- Search Engine and Optimization Revenue Model
- Viral and Buzz Marketing
- Twitterjacking
- Cybersmearing
- Embedded Players, Gadgets and Widgets
- Opt In and Opt Out
- Promercials
- Microsodes, Mobisodes
- Digital Downloads
- CGI and Video FX
- DVRs/On-Demand Programming
- Satellite, Wired, Unwired, WiFi
- Favorites and Bookmarks
- SMS, WAP
- Advergaming
- Astroturfing
- Typosquatting
- e-[fill in the blank]

I H8
TXT
SPK

2013 IN-HOUSE COUNSEL NEW MEDIA ENGAGEMENT SURVEY



LINKEDIN REMAINS THE "GO TO" NETWORK FOR IN-HOUSE COUNSEL

67% OF IN-HOUSE COUNSEL HAVE BEEN ON **LinkedIn** FOR PROFESSIONAL REASONS DURING THE PAST DAY OR WEEK.

WIKIPEDIA EMERGES AS A PRIMARY INFORMATION SOURCE

65% OF IN-HOUSE COUNSEL USE **WIKIPEDIA** TO CONDUCT COMPANY AND INDUSTRY RESEARCH.

<http://insidecounselsurvey.com>

"INVISIBLE USERS" GROWING

74% OF IN-HOUSE COUNSEL SAY THEY USE SOCIAL MEDIA IN **LISTEN-ONLY MODE**.

UP from 68 percent who identified themselves as "invisible users" in 2012.

SMARTPHONE USAGE ON THE RISE

IN-HOUSE COUNSEL WHO READ GENERAL BUSINESS MEDIA ON THEIR SMARTPHONES

UP from 42% in 2012.

53%

LAW BLOGS GAIN EYEBALLS AND CREDIBILITY

OF IN-HOUSE COUNSEL BELIEVE QUALITY LAW FIRM BLOGS INFLUENCE HIRING DECISIONS.

PEER-DRIVEN RANKINGS: IF A TREE WERE TO FALL . . .

2% OF IN-HOUSE COUNSEL SAY THEIR DECISIONS TO RETAIN OUTSIDE COUNSEL ARE INFLUENCED TO A "GREAT EXTENT" BY **PEER-DRIVEN RANKINGS** (Chambers, U.S. News-Best Lawyers, etc.).

VIDEO CONSUMPTION LAGGING

17% OF IN-HOUSE COUNSEL SAY THEY ACCESS SUBSTANTIVE **VIDEO CONTENT** to "some extent" through law firm websites and firm-branded YouTube channels.

“From 1995 to 2000, the web went from something only some people used to something almost everyone used to conduct business. I view social media the same way – we’re approaching that stage when almost everyone will have to figure out how to use it to conduct business successfully.”

Comment of CEO in “Leading Through Connections: Insights from the Global Chief Executive Officer Study,” IBM Corporation 2012, at 36. See www-935.ibm.com/services/us/en/c-suite/ceostudy2012.



Social Media: How It Works



•Enable Conversations



- Enable Conversations
- Influence Conversations



- Enable Conversations
- Influence Conversations
- Monitor Conversations



- Enable Conversations
- Influence Conversations
- Monitor Conversations
- React to Conversations

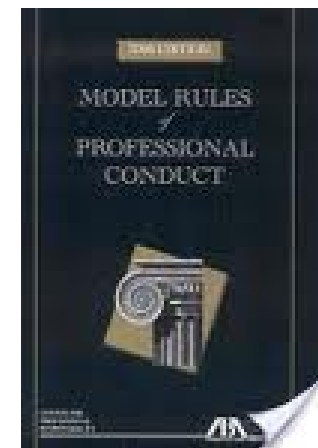


- Enable Conversations
- Influence Conversations
- Monitor Conversations
- React to Conversations
- Monetize Conversations



Traditional Issues Applied in New Mediums

- Model rules generally do not specifically address electronic communications, storage and delivery systems, new technologies, social media
 - ABA adopted revisions/comments to some model rules, but overall no revolutionary changes
- Patchwork quilt of local regulation



Social Media Problem Areas

- Protection of attorney-client privilege and confidentiality
- Risk of forming attorney/client relationship
- Advertising rules
- Other ethical pitfalls and issues



Ethical Rules Most Likely Invoked

- Model Rule 1.1 (Competence)
- Model Rule 1.3 (Diligence)
- Model Rule 1.6 (Confidentiality of Information)
- Model Rule 1.8 (Conflict of Interest)
- Model Rule 7.1/7.2 (Advertising)
- Model Rule 8.4 (Misconduct)



Protection of Attorney-Client Privilege and Confidentiality

- Model Rule 1.6: A lawyer shall not knowingly reveal confidential information, unless:
 - the client gives informed consent
 - the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
 - the disclosure is permitted by 1.6(b)
- New Model Rule 1.6(c) and comments: A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure, or unauthorized access to, information relating to the representation of a client



Protection of Attorney-Client Privilege and Confidentiality

- You must protect client's identity and information
- Remind clients not to:
 - Ask for advice online
 - Forward attorney/client communications to friends and family
 - Discuss legal matters on social media outlets
 - *Lenz v. Universal Music Corp.*, (N.D. Cal. 2010)
 - Client discussed attorney/client communications in e-mails and instant chats with friends and family and in blog postings
 - Court found Lenz had waived privilege; Universal was entitled to discovery of certain privileged communications



Protection of Attorney-Client Privilege and Confidentiality

- Remind clients not to:
 - Use work email accounts if personal legal matter (potentially no expectation of privacy)
 - *Scott v. Beth Israel Med. Ctr.* (N.Y.S. 1st 2007): Plaintiff had dispute with employer and communicated with lawyer via work email. Employer obtained emails. Ct held privilege had been waived. P had no expectation of privacy because employer (i) prohibited personal use of email system; (ii) warned employees that they had no right to privacy and employer had right to access and disclose without notice.
- Be careful if seeking opinions or guidance on blogs, listservs or chat rooms



Protection of Attorney-Client Privilege and Confidentiality

Inadvertent disclosure

- Beware of auto-complete and “reply all”
 - *Eli Lilly* (2008) inadvertent disclosure of confidential settlement to NYT reporter
 - *Terraphase Engineering* (2010) law firm disqualified from case because read privileged emails received because of autocomplete, defendant required to pay \$40,000 fees and costs, general counsel removed from case.
 - Lawyer who is mistakenly copied on an e-mail must notify the sender and consult with the lawyer’s own client in deciding whether and how to use the information. (PA Opinion 2011-10)



Inadvertent Formation of Attorney-Client Relationship/Conflicts of Interest

- Answering questions through social media websites, chat rooms, blogs, etc. could lead to formation of an attorney-client relationship
- Obtaining confidential information could lead to disqualification with respect to existing clients who would have an interest in knowing that information
- Model Rule 1.18: Duties to Prospective Client
 - Must keep communications confidential
 - Must ensure no conflicts of interest



Inadvertent Formation of Attorney-Client Relationship/Conflicts of Interest

- Include clear “plain English” disclaimer and distinguish between information and legal advice and limit information provided by prospective clients to only information necessary for purpose
- Avoid the unauthorized practice of law (See ABA Model Code 5.5(b))
- Avoid violating special rules for in-house admission (See ABA summary available at www.americanbar.org)



Advertising

- Law firm websites, blogs, bulletin boards, lead generation tools and social networking websites all have potential to implicate Rules 7.1-7.3 relating to attorney advertising and solicitation, other rules may be implicated as well
- New Model Rule 7.2: A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as:
 - The lead generator does not recommend the lawyer;
 - Any payment to the lead generator is consistent with Rules 1.5(e), 5.4; and
 - The lead generator's communications are consistent with Rule 7.1



Advertising

New Model Rule 7.2:

- To comply with Rule 7.1, a lawyer may not pay a lead generator that states, implies, or creates a reasonable impression that it:
 - Is recommending the lawyer;
 - Is making the referral without payment from the lawyer; or
 - Has analyzed a person's legal problems when determining which lawyer should receive the referral



Advertising – Ethics Opinions

California State Bar

“Under what circumstances would an attorney’s postings on social media websites be subject to professional responsibility rules and standards governing attorney advertising?”

- Case finally over. Unanimous verdict! Celebrating tonight.
- Another great victory in court today! My client is delighted. Who wants to be next?
- Won a million dollar verdict. Tell your friends and check out my website.
- Won another personal injury case. Call me for a free consultation.
- Just published an article on wage and hour breaks. Let me know if you would like a copy.



Advertising – Ethics Opinions

- Case finally over. Unanimous verdict! Celebrating tonight.
 - Good. Attorney status postings that simply announce recent victories do not constitute advertising under the rules.
- Another great victory in court today! My client is delighted. Who wants to be next?
 - Bad. “Who wants next?” is a communication and constitutes advertising. “My client is delighted” is a client testimonial and is subject to the rule (i.e., requires disclaimer)
- Won a million dollar verdict. Tell your friends and check out my website.
 - Bad. “Tell your friends...” in a communication and constitutes advertising subject to the rule.
- Won another personal injury case. Call me for a free consultation.
 - Bad. A “message or offer made by or on behalf of a member concerning the availability for professional employment of a member or law firm” is a communications and constitutes advertising subject to the rule.
- Just published an article on wage and hour breaks. Let me know if you would like a copy.
 - Good. “The attorney is merely relaying information regarding an article that she has published, and is offering to provide copies.”

CA Eth. Op. 2012-186, 2012 WL 6859259 (Cal.St.Bar.Comm.Prof.Resp.)



Advertising – Ethics Opinions

New York State Bar

1. May a lawyer answer legal questions in chat rooms or on other social media sites on the Internet?
2. If so, may the lawyer also offer his or her legal services in the course of answering questions?



Advertising

New York State Bar

Rules:

- An “advertisement” means “any public or private communication made by or on behalf of a lawyer ... about that lawyer..., the primary purpose of which is for the retention of the lawyer...”
- A “solicitation” means “any advertisement initiated by or on behalf of a lawyer...that is directed to, or targeted at, a specific recipient or group of recipients..., the primary purpose of which is the retention of the lawyer...and a significant motive for which is pecuniary gain.” But note, a solicitation does not include “a proposal or other writing prepared and delivered in response to a specific request or a prospective client.”
- A “computer-accessed communication” means “any communications made by or on behalf of a lawyer ... that is disseminated through the use of a computer or related electronic device, including, but not limited to, websites, weblogs, search engines, electronic mail, manner advertising, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other Internet presences...”



Advertising – Ethics Opinions

New York State Bar

1. May a lawyer answer legal questions in chat rooms or on other social media sites on the Internet?

- Yes.
- Answering questions on the Internet is analogous to writing for publications on legal topics.
 - ...refrain from giving ... a general solution applicable to all apparently similar individual problems...
 - ...caution [readers] not to attempt to solve individual problems on the basis of the information conveyed by the lawyer...



Advertising – Ethics Opinions

New York State Bar

2. If so, may the lawyer also offer his or her legal services in the course of answering questions?

- Maybe
- Encouraging a person to retain a lawyer in response to a question is prohibited absent disclosures, but
- If a lawyer's primary purpose in answering a question is not to encourage his own retention but rather is to educate the public by providing general answers to legal questions, it's permitted.
- Beware chat rooms – lawyers must respond only to the person making the request and not encourage the group to seek legal advice – directly or off line.



Advertising – Ethics Opinions

New York State Bar

Conclusion:

“A lawyer may provide general answers (not individual advice) in response to legal questions from laypersons on real-time or interactive social sites on the Internet, but the lawyer may not engage in solicitation absent compliance with Rule 7.3. If a person initiates a request on the site to retain a lawyer, the lawyer may respond with a private written proposal outside the site so that persons who did not request the proposal cannot see it.”

NY Eth. Op. 899, 2011 WL 7784112 (N.Y.St.Bar.Assn.Comm.Prof.Eth.)



Other Ethical Pitfalls and Issues

- TX: Judge caught an attorney lying about the reasons he needed a continuance, by viewing the attorney's Facebook profile where judge learned attorney was on vacation and not attending a relative's funeral
- TX: Judge orders 10 hours of ethics classes for lawyers accused of reading judge's text messages
- NV: Lawyer sitting as a temporary *pro tem* judge was removed from the bench after the local district attorney believed his My Space profile page exhibited hostility to prosecutors and could result in bias against DA's office
- NC: Judge was reprimanded for using Facebook to talk to defense attorney about a child custody case, including indications of when the verdict would be delivered
- CA: Associate reprimanded by judge and subsequently resigned after writing blog post calling opposing counsel a 'chicken' for requesting continuance



Other Ethical Pitfalls and Issues

- OH: Judge posted 80 anonymous comments on a newspaper's website. Comments included personal attacks on an attorney's performance and a statement that a defendant in a murder case was given a lenient sentence by a jury because of his race
- FL: Criminal attorney publicly reprimanded and fine for derogatory remarks made on JAABlog about judge whom he believed was pressuring defendants into waiving their speedy trial rights
- IL: Assistant public defender was fired and charged with ethical violations for blogging about cases she worked on and allegedly revealing privileged information
- CA: Attorney was suspended for 45 days as a result of blog post about a case while serving as juror. Paid \$14,000 in legal fees and subsequently lost his job



Recommendations

- Just the facts...
 - Don't offer your services
 - Don't quote clients
 - Don't invite viral discussions
 - Don't talk about fees
 - Don't make generalities
 - Don't discuss retention in chat rooms
 - When in doubt, disclaim, disclaim, disclaim

**Just the facts, mam.
Just the facts.**



Recommendations

- Just the facts...
 - Refrain from editing, updating, expending or otherwise “claiming” profiles created by third parties unless you want to be responsible for them
 - SC: “Claiming” listings ok (e.g., Avvo) OK, but monitor the “claimed” listing to make sure all comments are in conformity with the ethical rules, especially the rules for testimonials and client endorsements that may create unjustified expectations and comparisons (SC Opinion 09-10)
 - Remember rules prohibiting use of words such as “specialist,” “certified” or “expert” – But what about LinkedIn “specialties” and endorsements?

**Just the facts, mam.
Just the facts.**

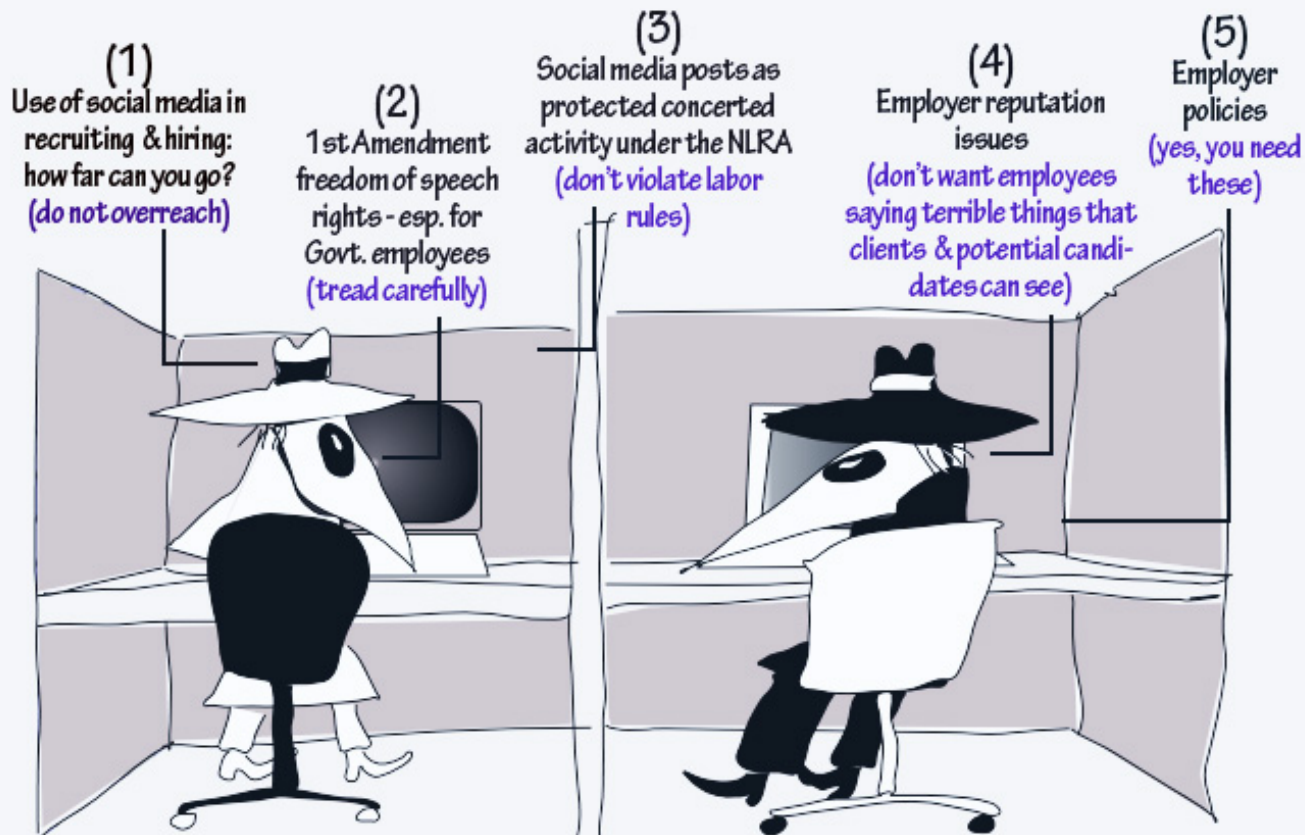


Recommendations

- Just the facts...
 - Don't assume common sense answer in a paper world is also the right answer in a digital world
 - Determining when, to whom and if an attorney-client relationship exists is more complex in a world of social media
 - Technology blurs traditional distinctions (employee, consumer, family member, blogger, poster, juror, witnesses, experts, judges, lawyers) – risking disqualification or worse
 - Blogs, professional networks, buzz, viral – advertising?
 - Mistakes don't just mean potential embarrassment, they may mean professional discipline – don't be the next case!

**Just the facts, mam.
Just the facts.**





Social Media In the Workplace 5 Things Employers Should Consider

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Where to find more information

- American Legal Ethics Library (www.law.cornell.edu/ethics)
- Center for Professional Responsibility (www.abanet.org.cpr)
- Legalethics.com
- Legal Ethics Forum (legalethicsforum.typepad.com)
- Legal Profession Blog (lawprofessors.typepad.com/legal_profession)
- Blogs.harvard.edu/ethicalesq
- Ellblog.com (e-discovery blog)

