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Ethical obligations in a social media posting

ARE YOUR SOCIAL MEDIA POSTINGS ("CELEBRATING A GREAT VERDICT TODAY") A "COMMUNICATION" UNDER THE RULES OF PROFESSIONAL CONDUCT AND THEREFORE SUBJECT TO ATTORNEY ADVERTISING RULES?

In this digital era of social media and self promotion, it's surprising that attorney advertising was illegal until 1977. In 1977, the Supreme Court decision in *Bates v. State Bar of Arizona*, 433 U.S. 350, recognized that lawyer advertising is entitled to First Amendment protection and legalized attorney advertising. Now attorney advertising is governed by Rule 1-400 of the Rules of Professional Conduct, Business and Professions Code sections 6157–6159.2, and Article 9.5 (Legal Advertising) of the State Bar Act. As social media is infiltrating all aspects of our lives and practices, attorneys must be aware of the ethical requirements in our digital postings and advertisements.

Is this a "communication" or a "solicitation"?

Ethical rules regarding attorney advertising differentiate between a "solicitation" and a "communication." Communications are generally allowed within the ethical guidelines and solicitations are narrowly proscribed. Rules of Professional Conduct 1-400(A) and (B) distinguish between the terms "communication" and "solicitation."

A communication is any message or offer concerning availability for legal employment directed to a former, present, or prospective client, and includes unsolicited correspondence and advertisements to the general public. That category is very broad. Communications include: (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

Conversely, a solicitation is a narrow category of communication. A solicitation is either "delivered in person or by telephone," or it is "directed to a specific person known to be represented by counsel" and related to the possibility of hiring a lawyer for money. Most social media postings, as opposed to direct messaging, would be considered a communication.

Key question for determining whether your social media post is a "communication" under the rules

So, you want to post to social media about your recent verdicts and want to know if that would be a communication governed by the Rules of Professional conduct? There's a good amount of guidance in the State Bar Formal Opinions authored by the Standing Committee on Professional Responsibility and Conduct. The key question to ask when determining whether a social media post is a "communication" under rule 1-400(A) is whether it "concern[s] the availability for professional employment" of Attorney. Of note is the fact that the Committee has not addressed whether the initial "friend" or "connection" request, if motivated primarily by business development purposes, can itself constitute a communication subject to rule 1-400.

The Committee found in State Bar Formal Opinion No. 2012-186 that "communications" posted on social media are regulated by either rule 1-400 (Advertising and Solicitation) of the Rules of Professional Conduct of the State Bar of California or "advertising by electronic media" within the meaning of Article 9.5 (Legal Advertising) of the State Bar Act. The Committee emphasized that " [t]he restrictions imposed by the professional responsibility rules and standards governing attorney advertising are not relaxed merely because such compliance might be more difficult or awkward in a social media setting."

In California State Bar Formal Opinion No. 2012-186, the Committee found that a posting of "Case finally over. Unanimous verdict! Celebrating tonight," standing alone, was not a "communication." The Committee added, "Attorney status postings that simply announce recent victories without an accompanying offer about the availability for professional employment generally will not qualify as a communication."

However, a post stating "Another great victory in court today! My client is delighted. Who wants to be next?" was found by the committee to be a "communication." The addition of the phrase "My client is delighted" runs afoul of the prohibition on client testimonials. An attorney cannot disseminate

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"communications" that contain testimonials about or endorsements of a member unless the communication also contains an express disclaimer. (See Rules Prof. Conduct, rule 1-400(E).) Additionally, the post may be presumed to violate rule 1-400 because it includes "guarantees, warranties, or predictions regarding the result of the representation." Because the post expressly relates to a "victory," and could be interpreted as asking who wants to be the next victorious client. Lastly, that post would also need to have a notation stating "Advertisement" or "Newsletter."

Similarly, the Committee found that the phrases "Tell your friends to check out my website" and "Call me for a free consultation" turned social media postings into "communications" and triggered the requirements of rule 1-400.

Posts sharing information about a published article or a legal event will not generally be considered "communications."

Is your blog a "communication"?

If you're a California attorney who blogs, or is looking to start a blog, the new ethics opinion, Formal Opinion No. 2016-196, provides some guidance. According to the opinion, simply blogging in and of itself is not a "communication" covered by California's attorney advertising rules. "An attorney may freely write a blog on any of countless legal and non-legal subjects, and may identify himself or herself as an attorney thereon, without concern of being subject to rule 1-400," the opinion states, "unless the blog or blog post specifically invites the reader to retain the attorney's services or otherwise indicates the attorney's availability for professional employment." Here's what the Committee found in Formal Opinion 2016-196:

Blogs that advertise an attorney's availability for employment are either explicitly, or implicitly through its description of the type and character of legal services offered by the attorney, detailed descriptions of case results, or both are "communications" subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising.

- A blog that is part of a law firm's website will be considered a "communication."
- A blog that is not part of a lawyer or firm's website discussing legal topics is not a "communication" unless it explicitly or implicitly expresses the attorney's availability for professional employment.
- Adding a weblink to a stand-alone blog will not turn the blog into a "communication." But if the blog includes additional information regarding the attorney announcing the attorney's availability for professional employment will itself be a communication subject to the rules and statutes.

A post contains an implicit solicitation when it states a description of the type and character of legal services offered by the attorney or detailed descriptions of case results as an example.

How to ensure that your social media posts comply with your ethical obligations

According to Rule of Professional Conduct 1-400(D), a communication or a solicitation shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or

(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.

There are also sixteen enumerated types of communications presumed to be in violation of rule 1-400, as set forth in the Standards. Those violations include, but are not limited to, posts containing guarantees or predictions; testimonial posts without a disclaimer; posts failing to bear the word "Advertisement" or something similar; posts containing dramatization; posts which state or imply "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.

Don't go deleting your Instagram

Attorneys are required to keep copies of their "communications" for two years. Rule 1-400(F) expressly extends this requirement to communications made by "electronic media." If there's no automatic archive, the Committee recommends that the attorney save screenshots to document the postings.

Conclusion

While social media is expanding into our practices and lives, we must be mindful of the requirements imposed on us by the Rules of Professional Conduct. Creating an awkward post is not an excuse for failing to comply with ethical obligations. There are some rules that have not kept pace with digital developments, such as the requirement that "Advertisement" be in 12 point font, but most others can be easily applied to social media.

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