

Ethics and Effectiveness in Use of Social Media

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Why do so many attorneys worry about their state bar advertising rules when considering using social media? Is it concern over the vague and often sweeping nature of these rules? The uncertain and shifting forms of communication they can have with close friends and strangers alike?

To help address these concerns - and to differentiate harmless communication from areas where problems may arise - here are a few things to keep in mind.

Proper Use of Social Media Solves 95% of all Concerns.

It's called "social" media for a reason: it's all about engaging with other people, sharing, helping and entertaining. You know, the things we do when we interact with other human beings, just brought online. You wouldn't go into a cocktail party or meeting and start telling everyone how great you are, would you? Extend your hand and ask to be hired? Of course not. Same goes with social media. It's not designed to be used as a billboard. As long as you are using social media as a means of authentically connecting with others, in ways they expect given the conventions of social media, the attorney advertising rules don't apply.

But use it wrong, and there are a host of ethics considerations that come into play.

The Bar Has Less Power Than You May Think . . .

Regardless of the broad language found in the ABA Model Rules and state Rules of Professional Conduct with respect to advertising, attorney regulators are hemmed in by the First Amendment. And under the First Amendment, those advertising rules can only apply to what's known as "commercial speech." What's "commercial speech?" It's speech that has the primary purpose of proposing a commercial transaction. In other words, advertising. Are you using social media to advertise? Not if you're following tip #1.

Resources: [ABA Model Rules on Lawyer Advertising \(Rules 7.1 - 7.6\)](#); [Bolger v. Youngs Drug Products Corp., 463 U.S. 60 \(1983\)](#); [Sorrell v. IMS Health, 131 S. Ct. 2653 \(2011\)](#)

. . . But There's No Out For Lying.

One core principle that underlies the commercial speech doctrine is that advertisers only enjoy constitutional protections for non-deceptive speech. And under ABA Model Rule (and every state has an equivalent rule), attorneys cannot make false or misleading statements

about their services. Once you cross the line into making marketing statements that are wrong or grossly misleading, you will lose even this protection. While lying outside the advertising context may be constitutionally protected, there is no such right whatsoever when it comes to marketing. Particularly when it comes to professional forms of social media that may be deemed advertising (think profiles on Avvo and LinkedIn), it's critical to avoid overstatement or embellishment of one's background and qualifications.

Resources: [ABA Model Rule 7.1](#); [United States v. Alvarez, 132 S. Ct. 2537 \(2012\)](#); [Bates v. State Bar of Arizona, 433 U.S. 350 \(1977\)](#)

Bar Ethics Rules Limiting Testimonials are Usually Unconstitutional.

If you're worried about the proliferation of client reviews on sites like Avvo and endorsements on sites like LinkedIn, you shouldn't be. Although some state still have ethics rules on the books restricting testimonial advertising, these rules applied broadly offend the Supreme Court's test for appropriate regulation of commercial speech. The Federal Trade Commission has long called on state bars to cease the regulation of testimonial advertising, reasoning that such regulation inhibits competition and frustrates informed consumer choice. And those restrictions on testimonial advertising that have challenged in federal court have uniformly lost.

Resources: [See Comment \[3\] to ABA Model Rule 7.1](#); [FTC Letter Regarding Proposed New Jersey Advertising Guidelines \(2005\)](#); [Alexander v. Cahill, 598 F.3d 79 \(2nd Cir. 2010\)](#); [Public Citizen v. Louisiana Attorney Disciplinary Board, 632 F.3d 212 \(5th Cir. 2011\)](#).

Attorneys Cannot Be Liable for Third-Party Reviews.

Besides the fact that most ethics restrictions on testimonial advertising are unconstitutionally broad, there's another critical fact that applies to client reviews and peer endorsements posted online: the attorney who is the subject of those reviews cannot be held responsible for them. Under 47 U.S.C. § 230, no user of an interactive service can be treated as the publisher or speaker of information provided by another user. This statute broadly preempts any state law that would otherwise hold one person or entity responsible for the words of another. Of course, this immunity does not apply if the attorney is paying others to post such reviews, or is posting edited reviews on the attorney's own website.

Resources: [47 U.S.C. § 230](#); [Zeran v. America Online, 129 F.3d 327 \(4th Cir. 1997\)](#)

. . . But Steer Clear of Bogus "Reviews."

Online review platforms are fairly open. While there is a nascent movement to tie reviews directly to a purchase (such as Amazon's "verified purchase reviews"), most sites require

relatively little information from a reviewer in order to post. So it may be tempting to leave positive reviews for oneself - or pay others to do so for you, or to leave reviews for friends (or even competitors). There's a name for this practice - "astroturfing." And it's false advertising, which will easily lead to bar discipline (and significant public shaming) for any attorney caught doing it. One medical practice has already been prosecuted by the New York Attorney General's office, and ended up with a consent decree and a \$300,000 fine. Earn your positive reviews - don't generate fake ones.

Solicitation & Advertising Rules Still Apply.

Most state ethics rules restrict certain forms of client solicitation and advertising. If you are using social media to advertise or solicit (which you shouldn't be doing), these rules still apply. Just because you used twitter or facebook to invite people to contact your firm doesn't mean that you're off the hook from complying with the advertising rules. The California Bar recently released an ethics opinion that provides a good look - including specific examples - of the types of social media communications that would be considered advertising. The analysis is a good template for what's commercial speech in social media, regardless of the state involved.

Resources: [ABA Model Rule 7.3](#); [State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2012-186 \(2012\)](#)

Touting Case Outcomes in Social Media is a Bad Idea.

Remember what I wrote above about using social media to engage authentically, connect with others and share information that enlightens or amuses them? Touting your case victories does none of that; it is simply bombastic marketing schlock. What's more, the inherent limitations of social media - from the breezy informality of Facebook comments to the rigid, 140-character limit of twitter updates - does not lend itself well to the inclusion of the context or disclaimers required under the RPCs when promoting client outcomes.

Resources: [ABA Model Rule 7.2\(c\)](#)

Your Legal Blog Isn't Subject to the Ad Rules - Unless You are Doing it Wrong.

It's useful to think of legal blogging as akin to writing articles for legal publications: while there may be an underlying business development motive, it's not something that would be considered commercial speech. In determining whether content that has mixed editorial and commercial purposes, courts will look at: 1) the advertising format of the message; 2) whether the message references a specific product; and c) the underlying economic motive of the speaker. All three elements must be met, and obviously, most blogs wouldn't come close to meeting this test. That is, unless you are like Richmond, Virginia attorney Horace Hunter and virtually all you blog about is yourself, your cases, what a wonderful lawyer you are, and

essentially turn your blog into another marketing message on your website. In THAT case, your blog may cross the line into advertising and the rules will apply.

Resources: [Dex Media v. City of Seattle, 696 F.3d 952 \(9th Cir. 2012\)](#); [Hunter v. Virginia State Bar, No. 121472, \(Supreme Court of Virginia, Feb. 28, 2013\)](#)

Professionalism Comes First. It used to be that you'd have to wait until you got back to the office to kvetch about a bad day in court, an insolent client, a blowout with opposing counsel. Today's smartphones and social networks have reduced all barriers, allowing a frustrated attorney to fire off an angry missive for all the world to see before even clattering down the marble courthouse steps. Which is not a good thing. Besides the obvious cost to one's professional standing, reputation for judgment, etc., a poorly thought-out comment can actually lead to discipline if it reveals client confidences or materially interferes with the adjudicatory proceedings. So always make sure that the posts you write are something you would be happy to have the world see.

Resources: [ABA Model Rule 1.6](#); [Gentile v. State Bar of Nevada, 501 U.S. 1030 \(1991\)](#); [Danziger Bridge Case \(NY Times article\)](#); [Embellishment & Falsehoods \(Socially Awkward page\)](#)