



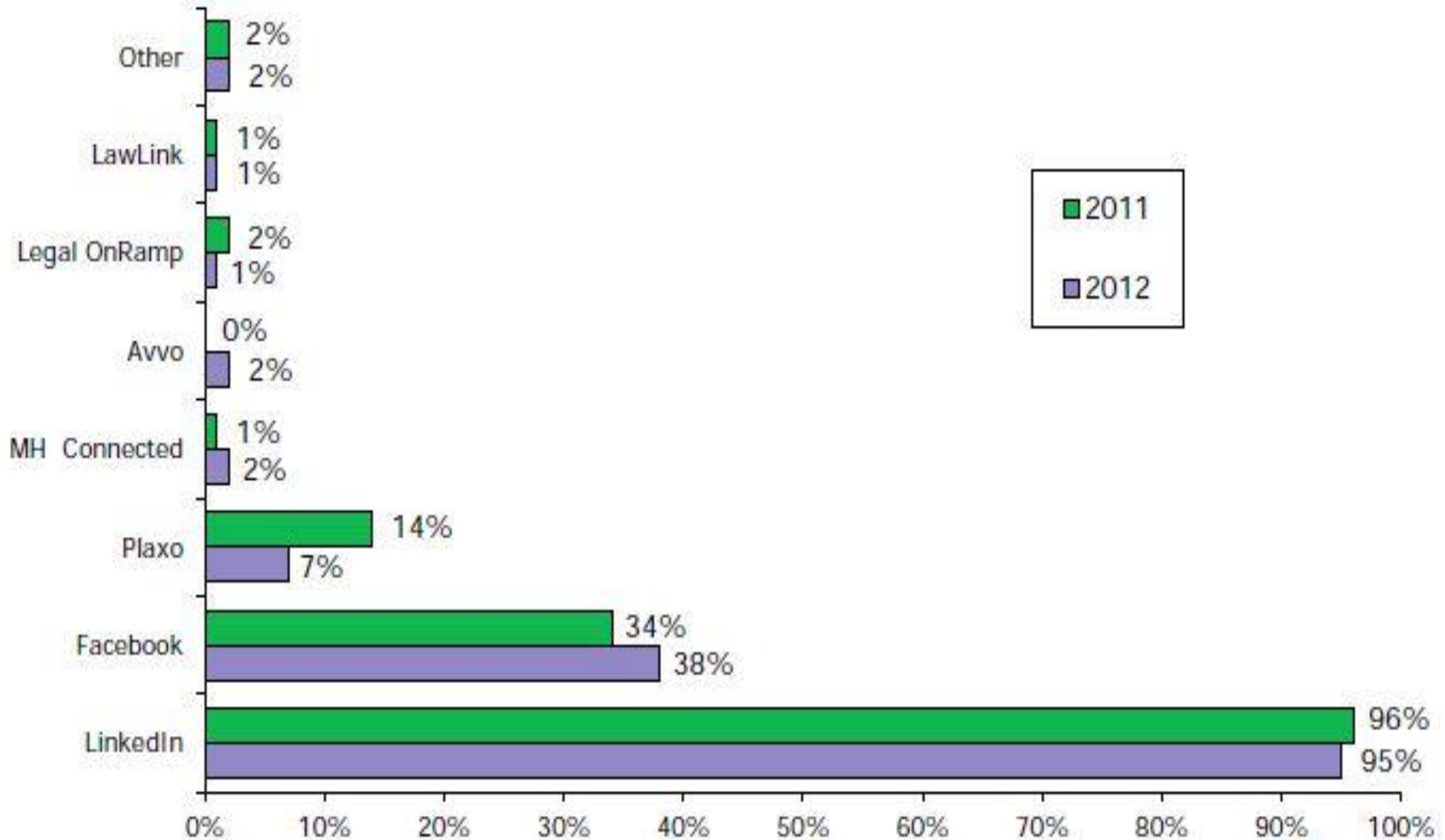
**NAVIGATING THE  
ETHICAL MINEFIELD OF  
SOCIAL MEDIA FOR  
CALIFORNIA ATTORNEYS**

# + Presented by: Lisa G. Sherman, Esq.

- Ms. Sherman practices employment law and is licensed in California and Nevada. She can be reached at her website: [sherm-law.com](http://sherm-law.com) (which she is in the process of updating to comply with what she will preach today) or email: [lisa@sherm-law.com](mailto:lisa@sherm-law.com).
- Ms. Sherman serves as Of-Counsel to Leader Counsel. <http://llaw.la/attorneys.html>
- **DISCLAIMER**
- *The contents of this presentation do not constitute legal advice and does not constitute an attorney-client relationship.*



# ABA SURVEY OF ATTORNEY SOCIAL MEDIA USE IN AUG 2013





## SOCIAL MEDIA IS HERE TO STAY....



- 40% of attorneys who have blogs report it has led to increased business!
- Rules Unclear/ever-changing
- Antiquated laws- applying offline conduct to online conduct
- Ignorance of how to work a technology is NO excuse. Cal. State Bar Committee on Professional Responsibility and Conduct (COPRAC) Op. 2010-179.

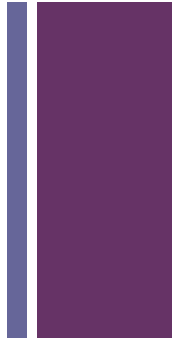
# + SOCIAL MEDIA PLATFORMS IN PLAY FOR ATTORNEYS

- Attorney Websites: Advertising & Marketing
- Atty's Commenting on Social Media
  - Chatrooms
  - Listservs: public conversation transmitted through web which is analogous to a public bulletin board, even where it is closed





# SOCIAL MEDIA AT ISSUE



- Commenting or posting on Internet
- Blogs: Discussing Particular cases or players
- Facebook: “Friending”/personal v. business/cases/clients/promoting oneself/confidential or embarrassing info.
- Twitter: Disclosures more than 140 characters/Anthony Weiner
- Linked In: Specialist/Expert and endorsements
- My Space: biased comments about others in profession
- You Tube
- Chat Rooms
- ListSrvs: who is the recipient?
- Researching Other People’s Social Media to investigate

California Federal Court Dismisses Co... tradesecretslaw.com — A designer and marketer of stereophonic tech...

X1 Social Discovery x1.com — X1 offers next generation enterprise search, eDiscovery and...

Social Networking Law Blog – Social Media L... socialnetworkinglawblog.com — Think of this site as the Blawg on...

Axiom Law | This Changes Everything axiomlaw.com — Clients are demanding control, firms are looki...

Lexis® Total Research System Sign In lexisnexis.com

ethics opinions on social media ethics v... search.yahoo.com — Yahoo Web Search HomeMailNewsSportsFinan...

cconnect.s3.amazonaws.com/wp-content... cconnect.s3.amazonaws.com

Annual Conference Early Registration En... aowi.org — Keynote Address by Accessibility Expert Kevin McGuire...

TENESQUIRE: The

Add Friend



FASTEST JURY VERDICT: A DOZEN Chicago police officers hit the apartment my client was found half-naked in at 7:00 a.m. with his girlfriend. With in minutes of battering down the door, TWO cops testified my client, Christian, told them, "I stay here with my girl," and that "I have a pistol under the mattress in our bedroom." The state further introduced 3 pieces of mail showing the gas bill was in my client's name and registered to that address. Rejecting the state's offer for a plea of 15 years -- I took it to a jury trial. It was a CLASS X GUN CASE and the jury just came back in 36 MINUTES with a verdict of NOT GUILTY!!



Share

- Recent 2013 2012 2011 2010 Born

Sponsored \$125 Cash Bonus chase.com



Get \$125 when you open a Chase Total Checking™ account & set up Direct Deposit. See how!

Chat (Off)



Bookmarks Reading List

- California Federal Court Dismisses Co...  
tradesecretslaw.com — A designer and marketer of stereophonic tech...
- X1 Social Discovery  
x1.com — X1 offers next generation enterprise search, eDiscovery and...
- Social Networking Law Blog - Social Media L...  
socialnetworkinglawblog.com — Think of this site as the Blawg on...
- Axiom Law | This Changes Everything  
axiomlaw.com — Clients are demanding control, firms are looki...
- Lexis® Total Research System Sign In  
lexisnexis.com
- ethics opinions on social media ethics v...  
search.yahoo.com — Yahoo Web Search HomeMailNewsSportsFinan...
- cconnect.s3.amazona ws.com/wp-content...  
cconnect.s3.amazonaws.com
- Annual Conference Early Registration En...  
aowi.org — Keynote Address by Accessibility Expert Kevin McGuire...
- TENESQUIRE: The

out.)

First and foremost, this tweet was actually sent by a Biglaw partner. This was his **Twitter bio**:



2,093 TWEETS

542 FOLLOWING

116 FOLLOWERS

Follow

Shortly after the tweet heard around the world went out, Regan **deleted his account** on the social





# INITIAL TWEET

- [@SteveRegan4](#) "Don't screw up this like ACA. No such thing as greenhouse gas. Carbon is necessary for life."



The image is a screenshot of a web browser displaying a tweet. The browser's address bar shows the URL <http://abovethelaw.com/2013/10/a-biglaw-partners-big-twitter-meltdown/>. The tweet is from the account **SCOTUSblog** (@SCOTUSblog), which has a verified profile. The tweet text reads: "Being an expert climatologist / real-estate attorney is very stressful. Breathe. RT @SteveRegan4: @SCOTUSblog Go f@ck yourself and die." The tweet is dated 5:51 PM - 15 Oct 2013 and has 21 retweets and 36 favorites. The browser's sidebar on the left shows a bookmarks list with various legal and social media links. The right sidebar shows a list of image thumbnails.

Bookmarks Reading List

California Federal Court Dismisses Co...

retslaw.com — A designer keter of stereophonic tech...

X1 Social Discovery

— X1 offers next generation se search, eDiscovery and...

Social Networking Law Blog - Social Media L...

tworkinglawblog.com — this site as the Blawg on...

Axiom Law | This Changes Everything

w.com — Clients are ing control, firms are looki...

lexis® Total Research System Sign In

is.com

ethics opinions on social media ethics v...

ahoo.com — Yahoo Web HomeMailNewsSportsFinan...

connect.s3.amazonaws.com/wp-content...

t.s3.amazonaws.com

Annual Conference Early Registration En...

— Keynote Address by ibility Expert Kevin McGuire...

ENESQUIRE: The



Home →

# Sorry, that page doesn't exist!

Thanks for noticing—we're going to fix it up and have things back to normal soon.



- العربية
- беларуская
- català
- Čeština
- Dansk
- Deutsch
- Ελληνικά
- English
- English (UK)
- Español
- Euskara
- فارسی
- Suomi
- Filipino
- Français
- Gaeilge
- Galego
- עברית
- हिन्दी
- Magyar
- Indonesian
- Italiano
- 日本語
- 한국어
- Kurdî (Kurmanjî)
- Malay
- Nederlands
- Norsk
- Polski
- português (Brasil)
- română
- Русский
- shqip
- srpski
- Svenska
- தமிழ்
- Türkçe
- Українська
- мова
- لُؤو
- LOLCATZ
- 简体中文
- 繁體中文

© 2013 Twitter About Help Status

h HD

on for MSJ

oa-- nt v.3.pdf

oa-- rials.pdf

oa-- nt v.3.pdf

niaRules Conduct


BarAct

pdf

shop CS


weet as if ing\_files

weet as if ing.html



Regan deleted his Twitter account shortly thereafter. Regan's tweet didn't go unnoticed, as SCOTUSBlog has more than 143,000 Twitter followers.





Reed Smith released this statement to Am Law Daily after: “The posting of offensive commentary or language on social media is inappropriate and inconsistent with Reed Smith’s social media policy. We are addressing this matter internally.”

The firm has not been blind to the pitfalls of Twitter. News came out in 2010 that it was sending its senior lawyers to "[Tweet School](#)" to teach them how behave on the microblogging site, The Guardian reported at the time. It's not clear whether Regan attended.



# MAIN AREAS OF CONCERN



- Confidentiality/What's Private and What's Public
  - Attorney Websites
  - Client intake forms, emails, attachments, contacts on LinkedIn
  - Juror or potential juror read? Judge? Represented party? Ex parte communication?
- Attorney/Client Relationship
  - Inadvertent creation
  - Unauthorized practice of law
- Conflict Rules
  - Violate duty of loyalty to clients
- Content about legal services or attorney
- Formal Discovery to party or social media service provider





# SOURCES OF COMPLIANCE



- ABA Model Rules, state rules control.
- Cal Rules of Professional Conduct – Cal. State Bar: Pub. 250
  - 1-120: not knowingly assist in violating rules of professional conduct
  - 1-400: Advertisement/Communications: 16 enumerated stds. Twitter: link...
  - 3-110: prohibited from directing third party's investigative efforts have an ethical duty to supervise nonlawyers working under their direction
- Cal Rules of Court
- Business & Professions Code – State Bar Act
  - Moral Turpitude
  - Cappers/Solicitation: intent to deceive, collude, impersonating another is a misdemeanor.
  - No false & misleading advertising, no guarantees re: outcomes
- Cal. Ethics Opinion: formal/informal
- Cal State Bar Disciplinary Proceedings
- Cal Case law

# + ATTORNEY WEBSITES

- Cal. Opin 2001-155: law firm website subject to prof responsibility standards governing atty advertising b/c website concerns a lawyer's availability for professional employment.
- Cal. Opin. 2005-68: Disclaim duty of confidentiality to visitor to atty's website. Receiving confidential info from visitor may conflict atty from representing opposing party. Ex: divorce
  - Atty-clt relationship not a prerequisite to duty of confidentiality
  - Only ask visitor for contact info to conduct conflicts ck.
  - Disclaimer agreed to by visitor bf contacting "I understand and agree that law firm will have no duty to keep confidential the info I am now transmitting to law firm. Nothing contained in the website or communicated through it will crate an atty-client relationship."
- Cal. Formal Opin. 2003-161: communication in a non-office setting, such as posting, where person seeks legal advice entitled to protection as a confidential communication.



# Attorney Postings

- Advertising for seminars ok so long as not soliciting work.
  - LA County Bar Opinion 494 (1974): seminars, educational programs or mailing of bulletins or briefs is fine.
  - Belli v. State Bar, 10 Cal.3d 824 (1974)
    - Pamphlets stated Belli as “World-famed attorney who served Jack Ruby....” not ok.
    - Suggesting attendees will be dazzled by the services they received from belli not ok.
    - Accomplishments or atty background ok
    - State Bar one year suspension sought too harsh, 30 days sufficient.



# + Emails/ListServs/Blogs

- Lawyers have no duty to encrypt confidential communications. LA Cty Bar Opin 514 (8/05)
- Avoid confidential or private info on listserv that could be identified to a particular case or controversy. Same opinion.
- Blogs
  - False blogs or commenting on cases may result in disciplinary action.
    - Ill complaint: In Matter of Joanne Dennison (1/13) re: corruption in cook county and particular case where judge was disqualified.
  - Responding to former client's postings must be proportionate, restrained and not reveal confidential information
    - LA City Bar Opin. 525 (12/12): website discussion that attorney is incompetent, overcharged client and recommending not hire him
    - Ill bar: AVVO revealing confidential client information crossed line
    - Ga. Supreme Court in Matter of Margaret Skinner (3/13) reprimand was insufficient when atty used confidential information to rebut client's negative reviews of atty.

# + Posting Case Results

- *Steiner v. Superior Court*, 220 Cal.App.4<sup>th</sup> 1479 (10/30/13)
  - Attorney post results of similar case on website during trial, court allows giving jury limited instruction prohibiting internet access
- Cal. Opin. 2012-186 (12/12): Announcing case results or providing copies of an article is ok so long as not soliciting work.





■ **John F. Kennedy** is celebrating his victory for blacks nationwide who will be attending the University of Alabama in September. Go Crimson Tide!!!

- Wall
- Info
- Photos
- Boxes

Write something...

V is for Victory!!! Check out my website... JFK.com....

Share

- View photos of JFK (5)
- Send JFK a message
- Poke message

**Information**

**Networks:**  
Washington D.C.

**Birthday:**  
May 29, 1917

**Political:**  
Democrat

**Religion:**  
Catholic and women

**Interests:**  
Marilyn Monroe and other women

500 Friends



**John F. Kennedy** is preparing to announce my candidacy. Before I do, one last article on those communist cubans... Who wants a copy?  
October 7, 1963



**Bobby Kennedy to John F. Kennedy** Have you finalized your plans for running for President? That million dollar verdict for Marilyn should help for your war chest.  
October 1, 1963



**John F. Kennedy** I cant believe that we fooled them in court today, Marilyn! Let's celebrate after I get rid of my wife.  
June 11, 1963



**John F. Kennedy** JFK scores a touchdown today for my favorite client, Marilyn Monroe. It'll teach that reporter to try and make money from pictures of my bombshell buxom blond beauty!!!  
2 LIKES. COMMENT: You were fantastic today in court, Jack. If anyone is looking for the most handsome, dazzling lawyer, Jack is it!



**John F. Kennedy** "Another great victory in Court today!!! My Client is delighted!!!  
September 9, 1962  
Marilyn Monroe:



October 28, 1962  
**John F. Kennedy** wishes he was at Frank's house smoking cuban cigars and soaking in the hot tub... Instead I'm preparing to destroy Atty Perry tomorrow as I did the last time when the jury returned a defense verdict for my client in less than an hour. Who wants to be next? Call me for a free consultation....  
April 17, 1961



# + Posting Public Client or Case Info on Social Media

- Even if the information is in public record, if it discloses facts that may cause a client or former client public embarrassment, it is prohibited. *In re Johnson*, 4 Cal. State Bar Ct. Rptr. 179 (Rev. Dept. 2000).
  - Get informed consent from client before revealing the particulars of any case!
- As an officer of the court, lawyers do not have the same First Amendment Free Speech rights as others.
  - Justice O'Connor's comment in her concurring opinion in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1081 (1991) "Lawyers are officers of the court and as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. Proceed with discretion!"



# + Attorney Advertising

- Must be true.
- If adopt third party website profiles, content must comply with rules.
- Avoid comparative or boasting language
- Do not use expert or specialist if not certified by state bar.
- Text messages should link to disclaimer.



# + Investigations by Attorneys or at Attorney's Direction

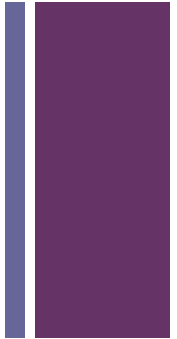
- An attorney who commits or consents to deceit or collusion with intent to deceive a party is guilty of a misdemeanor. Cal. B&P 6128(A).
- Investigating opposing parties' social media
  - “Any person who knowingly and w/o consent credibly impersonates another actual person ... on an internet web site or by other electronic means for purposes of harming, intimidating, threatening or defrauding another person” is also guilty of a misdemeanor and liable for civil and injunctive relief. Cal. Penal Code 528.5.
  - Cal law prohibits lawyers from engaging in acts involving moral turpitude, corruption or dishonesty, whether as an atty or o/w and requires attys to employ such “means only as are consistent with truth.” Cal. B&P 6106 & 6068(d).

# + Using Social Media in Investigations...

- Cal lawyers shall not knowingly assist in, solicit or induce violation of the Rules of Prof Conduct. (Cal Rules of Prof'l Conduct R 1-120); attys are prohibited from directing a third party's investigating efforts have an ethical duty to supervise nonlawyers working under their direction. (Cal Rules of Prof'l Conduct R 3-110).
- No Friending the Enemy directly or through someone else: Phil. Bar 3/09
  - Violation of rule re procuring a nonlawyer to do what he could not do himself which was engaging in dishonesty, fraud,deceit or misrepresentation b/c the plan is deceptive by omitting his true purpose.
  - Deception is deception regardless of the victim's wariness in her interactions on the internet and susceptibility is being deceived. The fact that access is easy does not mean the deception is ethical.
  - Rejected atty's comparison to videotaping plaintiffs in pi cases who are performing acts they claim they cannot do in public. The videographer does not need to ask permission if he presents himself in public. This is deemed a private area; if the videographer needed to gain access in side a house then the same situation arises.
  - Also violates rule re: not knowingly make a false statement of material fact to a third person. Also, potentially also dealing with an unrepresented party.
  - Whether the atty gets the info and if it is usable is a matter of substantive and evidentiary law to be addressed by the court.
  - Only use real name to unrepresented parties to obtain information
  - Do not create sham postings.



# Transmitting and Storing Client Confidential Information



## ■ Transmitting Obligations

- Cal. State Bd Opin 2010-179-laptop at Starbucks ok where limited access
  - Level of security appropriate- atty must take reasonable precautions and if not competent seek out someone who is
    - firewalls, username/password protect, encryption not required
    - service provider protects confidentiality
  - Legal ramifications if intercepted
  - Degree of sensitivity of info
  - Possible impact to client if inadvertently disclosed
  - Urgency of situation
  - Client's instructions and circumstances.

# + Metadata & Metatags

- Cal Opin. 2007-174: return client info and atty is ethically obligated to take steps to strip from each of these electronic items any metadata reflecting confide info belonging to any other client.
- Attys may look at metadata but prohibited from using a program to intentionally scrub the info. Wash. Opinion.
- Protect electronic metadata of info sent on behalf of client by sending hard copies or pdf's.
- Receiving atty has duty to promptly notify sender if confidential metadata in document is readily accessible, but lawyer may not use a program to access metadata that the send tried to affirmatively remove.
- Calif not say that forensic mining for metadata is prohibited. ABA opinion says metadata mining is permissible
- Hidden text not visible to the eye but visible to search engines or using another firm's name in a website page using metatags by using another lawyer or law firm's name secretly to unfairly manipulate search engines or purchase advertising on a search engine by keying in specific word or phrases in favor of atty's website is almost always prohibited b/c it is false and misleading. Fla.



# + STORAGE- Virtual Law Offices

- “Virtual Law Office” same requirements to protect confidentiality
  - credentials of vendor
  - data security
  - vendor’s transmission in the cloud/third party servers
  - atty’s ability to supervise vendor
  - terms of service of k with vendor
  - reassess periodically
  - disclose to client and seek consent that outside vendor providing technological basis to protect confidential info.
- Cal. Formal Opin. 2012-184- cloud computing
  - Same obligations for atty
- Cal. Formal Opin. 2013-188: inadvertent disclosure by opposing counsel of confidential info
  - Must immediately disclose, return, not read or o/w use
- Fla. Opin 12-3: suggestions for due diligence
  - Ensure online data storage provider preserves confidentiality and security and if served with subpoena for production
  - Investigate online security measures, policies, recoverability
  - Guard against reasonably foreseeable attempts to infiltrate

■

# + Groupon Type Websites

- **ABA formal ethics opinion 465 (10/21/13)** that lawyers may market using Groupon type websites however there are numerous issues with prepaid deals, especially how to manage payment of advanced legal fees.
  - Not reference Groupon specifically but “daily deals” advertised on a website and consumers who want deal notifications can sign up to receive them in emails. After a certain no of people purchase the “deal” the marketing organization and business share the proceeds. Buyers get a voucher, code or coupon.
  - Opinion says “deal of the day or group coupon marketing programs” are structured two ways: 1. “Coupon deals”: lawyer sells a coupon for a 50% discount for a certain number of hours of legal services. 2. “Prepaid deals” lawyer charges a certain reduced amt up to a certain no of hours for legal services which would be double the value of the amt paid. Payments are collected by marketing organization and prepaid structure is what the opinion addresses.
  - “Coupon deals” can be structured to comply with model rules b/c no legal fees are paid unless an atty/client relationship is established after which time is spent and discounted fees are collected. Aggregate amt from coupon sales may be deposited in the lawyer’s general acct. Conversely, funds collected in “prepaid deals” amt to advanced legal fees that must be identified by purchaser name and deposited in the trust acct. Lawyer is required to obtain sufficient info about the prepaid deal buyers to comply.
  - What if deal is purchased and never used? Lawyer can retain the funds from a coupon deal as long as the offer explains that there will be no refunds, however, funds collected in a prepaid deal most likely will need to be refunded to prevent the fee from becoming unreasonable/excessive under the model rules.
  - If a lawyer cannot perform the legal services b/c of a conflict of interest or other ethical restriction, atty must provide full refund even if the deal is structured as a coupon. The lawyer must return the full amt including the amt retained by the marketing organization b/c it is unreasonable to withhold any portion of the amt paid by the purchaser if the lawyer is precluded from providing the proffered services through no fault of the purchaser.
  - Lawyer has a duty to ensure that the marketing statements are accurate, scope of services clearly defined and circumstances of refunds fully described. Advertising should state that an atty client reltship will not exist until the consultation takes place.
  - Indiana opinion (Indiana state bar Assn Legal Ethics Commn Advisory Op 1 (2012)) Indiana reached virtually same conclusion and stated that this type of marketing is “fraught with peril”

# + YOUR DUE DILIGENCE

- **Examine Email Communications**
- **Do you intend to take on the duty of confidentiality to the party making an inquiry through your website?**
  - CRC 3-100 & B&PC Sec. 6068(3) applies to prospective clients, even if the potential client does not hire you.
- 
- Inviting legal inquiries via a website w/o a qualification runs the risk of unintended obligations to third parties and can create conflicts of interests.
- 
- **DISCLAIMER:** advise the visitor that communication through your website will not create an atty-client relationship and that the visitor should not submit confidential info because it will not be treated as such. The disclaimer is **ONLY** effective if it states it in sufficiently plain terms that a visitor would not believe that they are consulting you in a confidential manner.
  - Preferred method is to require the visitor to click an “acceptance” of the disclaimer language bf he/she emails you
  - Ask visitor to provide only limited info for purposes of conducting a conflicts check bf any substantive info is exchanged.
  - Location of disclaimer is imp. Do not bury in fine print or in a terms and conditions page no one will read. It should be prominently displayed and in a font that is consistent with that utilized on the website.
- 





## **Do you take reasonable steps to ensure confidentiality in email communications**

CRPC 3-100 Confidentiality of Info in a Client-Lawyer Relationship requires that you keep the communications confidential and if nec, be able to demonstrate your email security protocols. Include disclaimers advising of the confidentiality of the communication, request notification and deletion of an email if it is inadvertently received, as well as taking reasonable steps to protect and secure communications. See COPRAC Ops. 2010-179 and 2012-186; San Diego Bar Assn Legal Ethics Committee Op. 2012-2.



## **Examine On-Line Testimonials and Recommendations about You.**

Website testimonial or LinkedIn recommendation could be viewed if no disclaimer as implying “similar results” thereby creating an unjustified client expectations and running afoul of rules prohibiting false, misleading or deceptive communications – CRPC 1-400, B&PC Sec 6157.1, and MRPC 4.1.

Cautious of LinkedIn’s specialties section or letting others call you a specialist b/c the state bar may find it violates CRPC 1-400(D)(6) if the lawyer does not have the requisite bar certification.



**Do not engage in any communications that constitutes giving legal advice.**

CRPC 3-110© Failing to Act Competently. If the chat creates a prospective or actual atty-client relationship, the atty could have an obligation to provide affirmative advice on legal issues .  
RISK: *Tostad v. Vesely*, 291 N.W.2d 686 (Minn. 1980) jury verdict against law firm for \$650k in malpractice verdict for not providing advice about statute of limitations in a case involving a single online communication.





**Are your known profiles factually and legally accurate? (Linked In, FB and AVVO, for ex)?**

Once a lawyer creates or adopts a profile anywhere, he is ethically responsible for the veracity of the info contained therein. Once the atty has control over the content, he will be held accountable for its accuracy. Nothing false, misleading or deceptive!

**Just because a court case is public record does not mean you may discuss it.**

Atty/client confidentiality applies to all info relating to the representation, whatever its source... CRPC 3-100, Disc. [2].


Atty blogger was accused by a client of breaching atty-client confidentiality after blogging about the case. Client info, even if found in the public domain, and even if the case is settled, can still be subject to the duty of confidentiality, absent client authorization to disclose such info.

Confidence is far broader than you think. It is a client confidence if it involves any info related to the representation and its use or disclosure could be embarrassing or detrimental to the client.

## **Examine Your Involvement in Blogs or Postings.**

Legal results: describing legal results without a “results-may-vary” disclaimer could violate lawyer adv restrictions on communications involving guarantees, warranties or predictions or testimonials. (CRPC 1-400, Std. 1-2)

Unintentional provision of Legal Advice: legal advice can create an implied atty-client relationship even in the absence of a formal agreement b/w the lawyer and the client. Would the reader think you are giving him/her legal advice upon which he/she can rely? If yes, you are creating a prof relationship that could prevent future representation of a client you actually want to represent. Put a disclaimer and make sure your content is not advice.




A communication: a blog is a website and subject to the same restrictions regarding atty communications and advertising.

COPRAC Op. 186 (2012) states: “[m]aterial posted by an atty on a **social media** website will be subject to the professional resp rules and stds governing atty advertising if that material constitutes a communication within the meaning of 1-400... [and] Article 9.5 (Legal advertising) of the State Bar Act.”

If the blog is about your legal practice, it will likely be deemed a “communication” under CRPC 1-400, therefore, put a disclaimer and contact info for the person info responsible for its content as required by the rule.

If your intent is publicity and goodwill the content does not encourage business, then the blog may not fall within the definition of a “communication.”



Providing legal advice outside where you are licensed is the unauthorized practice of law. In Calif, it is not only a disciplinary violation, but a misdemeanor. B&P sec. 6126. Aiding and abetting the unauthorized practice of law can also subject a lawyer to discipline. CRPC 1-300(A). A law firm that sponsors a lawyer's blog through its website must be aware of these issues.

Make sure the jurisdiction where you are licensed and admitted to practice law is prominently displayed in your disclaimer and DO NOT inadvertently engage in communications that constitute legal advice!



## **Is your client communicating with you through privileged channels?**

*Holmes v. Petrovich Development Co.*, 191 Cal.App.4<sup>th</sup> 1047 (2011) highlights the risk. A client's email communications with her atty on the employer's computer was not privileged b/c co. had written policy that they could read all emails sent or rec'd through the system. Atty's duty of competence requires advising clients in such situations of the dangers of communicating with counsel on er provided computer. See ABA Formal Op. 11-459.


Place a social media and email warning in the client fee agreement at the outset of the a/c relationship.



## **Do you handle inadvertently disclosed transmissions appropriately to avoid disqualification and sanctions?**

Have you hit reply all or typed the first two letters of someone's email address and hit send only to learn it was the wrong Suzie? Have you rec'd email correspondence from opposing counsel not intended for you. If you receive a communication that appears privileged and inadvertent disclosure occurs, Cal law requires you to stop reading the communication and notify the other side to try and resolve the issue. *Rico v Mitsubishi Motors Corp.* 42 Cal.4<sup>th</sup> 807 (2007). Failure to abide by *Rico* requirements could result in disqualification and sanctions.





## **Have you ensured that your client's confidential documents are stored such that their confidentiality is preserved?**

Cloud technology allows you to access elec files anywhere with any device but usually the cloud is located in a server somewhere else. Store, view and transfer docs from a cloud requires forethought. Confidentiality is of upmost importance. If you access the cloud server at Starbucks through a public Wi-Fi service are you compliant? Consult COPRAC 2012-184 on maintaining a virtual law office practice and COPRAC Op. 2010-179 which states that a lawyer is responsible for knowing enough about the technologies she uses to comply with rules of prof conduct.


Consider encryption software for your data bf you put in the cloud. You can use “double security verification process” offered by dropbox for ex where you enter your first password and then a second one time only required password through text to the mobile phone you registered with them.



## **Is your website compliant with communication and advertising rules?**

An atty's website provides info about availability for prof employment is a "communication" under CRPC 1-400(A) and an "advertisement" under B&PC 6157-6158.3. (COPRAC Op. 2001-155). Therefore, you may not have any false, misleading, or deceptive communications and abide by other advertising restrictions. A website is not a "solicitation" under CRPC 1-400(B) even if it permits direct communication to and from a lawyer by email, b/c the communication is not delivered "in person" or "by telephone." CRPC 1-400(B). Guide your web site designers!

Stock photos can mislead. If you show images of women and minorities on firm's career page when the firm has no women or minority might be considered false and misleading (or firm's desire to attract minorities). Likewise, a photo showing a group of professionals w/o more on a solo practitioner's home page could be also misleading.



**Multijurisdiction compliance:** must comply with the rules of prof conduct in every state in which you practice. Beware of noncompliant testimonials, misleading domain names, not listing states you are admitted, providing person's name and contact info.

**Prior version retention:** CRPC 1-400(F) states a member shall retain for 2 years a true and correct copy or recording of any communication made by written or electronic media. SnagIt or screen shots?

**Contingency fees:** You must abide by statutory requirements if you state that all injury cases will be handled on contingency and make sure you include whether that includes legal expenses. Ensure your website complies with rules.

**Contact person:** law firm's website, blog or firm Fb page is considered an "advertisement" under B&PC 6157 to 6158.3 and ABA Model Rule 7.2©. Therefore they must include the name and office address of at least one lawyer who is resp for its content. CRPC 1-400, Std. (12)

**Turnkey websites:** ghostwritten content is permissible if it complies with CRPC 1-400. Lawyer is still responsible for its content. COPRAC Op. 2010-179.



## **Using social media to investigate your client, opposing parties and witnesses?**

Lawyer competency could require investigating evidence on social media services.

Incriminating info on opposing party's facebook page?

## **Do you know the ethical limitations on investigating....What's permissible and impermissible?**

You cannot create online relationships with represented parties.  
CRPC 2-100

You cannot deceive or employ someone else to deceive a party.



## **Do your tweets comply with communication and advertising restrictions?**

If you tweet a favorable result you may violate rule against advertising specific case results b/c 140 character limit on a tweet makes it impossible to include the required advertisement disclaimer CRPC 1-400, Std. 5. With client approval, provide a teaser tweet followed by a link to the news on your website with proper disclosure. COPRAC Op 2012-186 for guidance and five statement exs). Also put a disclaimer in your Twitter profile.

## **Do's and Don't's for Attys on Social Media**



Do not post, tweet, blog any confidential information ever. When in doubt, leave it out! Alternatively, seek permission (express informed consent) from clients before posting

Write globally about a legal issue, leaving out specific facts about your clients. Ok to comment on cases you are not involved in.

There is NO impenetrable wall separating your personal social media use and your professional reputation.

Include pop up disclaimers on your websites, email and twitter

Do not give legal advice online. Talk generally about the law but do not apply to the specific facts.



Avoid unintentionally turning a friend into a client.

If an atty puts a post on a person's blog or informal conversation in a chat room leave someone with the reasonable expectation that the atty is willing to discuss the possibility of an atty-client relationship, the atty may obtain confidential info from a prospective client that would bar representing any person who has materially adverse interests.

Also, pay attention to conflicts where an atty's online commentary about legal issues and client's legal position on the same issues.

Carefully vet recommendations and endorsements b/c you do not want a “one click ethics violation”

Use good judgment and common sense. Maintain good manners, honesty and act like a professional online.

Lawyers should not be friending judges b/c it may be a violation of impartiality and decorum of the tribunal by knowingly seeking to influence a judge, juror, or other official or communicate ex parte with such a person during a proceeding.

Behave on social media as you do offline!

Use Disclaimers on everything you post online! Having something is better than having nothing.



