



For better or worse, social networking is here to stay. It is now part of the way many people convey information personally, professionally and somewhere in between. Unfortunately, social networking poses specific ethical risks for attorneys that, if not addressed, could harm your law firm. It may not be adequate, effective or desirable to simply ban social networking by the members of your firm. It is best to fully understand the risks, discuss them and develop ways for your law firm to avoid the pitfalls of social networking. Below are some of the larger risks associated with social networking for attorneys to consider. Though the ABA Model Rules are referenced throughout the article, it is imperative that you review your state's Rules of Professional Conduct to ensure compliance in your jurisdiction.

### **Inadvertent creation of an attorney-client relationship.**

In most jurisdictions, the existence of an attorney-client relationship is based on a reasonable but subjective belief by the "client" that you are their attorney. Everyone has heard the nightmare story of the attorney who gets sued for something he/she said at a cocktail party to a person who later claims an attorney-client relationship existed. This scenario can easily be extrapolated to the cyber-world where comments and opinions are casually made or a firm's website invites an on-line inquiry. Disclaimers should accompany any website, blog, tweet, comment, or post stating that an attorney-client relationship has not been created. Here is some sample language you can use or change to fit your situation:

The content of this blog/website is intended for informational purposes only. It is not intended to solicit business or to provide legal advice. Laws differ by jurisdiction, and the information on this blog/website may not apply to every reader.

You should not take, or refrain from taking, any legal action based upon the information contained on this blog/web-site without first seeking professional counsel. Your use of the blog/website does not create an attorney-client relationship between you and the XYZ Law Firm.

### **The unauthorized practice of law.**

Another issue related to the inadvertent creation of an attorney-client relationship is the unauthorized practice of law. The ABA Model Rules of Professional Conduct, Rule 5.5 states that "(a) lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." By providing information to an individual in a state where you are not licensed, you run the risk of violating this rule. The problem with the cyber-world is that you really don't know where a person is actually located and what law might apply to them. Again, a disclaimer can be useful in preventing confusion for the consumer and protecting your law firm.

### **Posting on the internet may be considered advertising.**

Most attorneys wouldn't think to review the advertising rules before social networking. However, these rules address electronic communications. You may not realize it but what you write on a blog or social networking website might be considered advertising or solicitation of clients. The recent changes to Model Rule 7.2 Advertising, allows advertising so long as it complies with Rules 7.1 ("a lawyer shall not make false or misleading statements...") and 7.3 Solicitation of Clients. Rule 7.3 Solicitation of Clients prohibits "in-person, live telephone or real-time electronic contact" to solicit professional employment. Blogging or sending any message back and forth in "realtime" to someone who is not a current client could be considered solicitation. The comments to Rule 7.3 state: "There is a potential for abuse when a solicitation involves direct in-person, live telephone or realtime electronic contact by a lawyer with someone known to need legal services."

Rule 7.2 requires that any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content. Notably, various state Rules of Professional Conduct also include in Rule 7.2 a requirement to maintain a copy or recording of an advertisement or written communication for a specific period of time after its last dissemination along with a record of when and where it was used. In addition, Model Rule 7.2 also states that: "every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words 'Advertising Material' on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communications..."

Attorneys should review the advertising rules and their comments while considering their on-line activity so as to avoid unwittingly violating the rules.

### **Potential clients and potential conflicts.**

Since individuals you communicate with on the internet may not be actual clients yet, Rule 1.18 Duties to Prospective Client is also in play. According to Model Rule 1.18, a lawyer shall not represent a client with interests materially adverse to a prospective client in the same or a substantially related matter. Even when no attorney-client relationship develops, a lawyer who has learned information from a prospective client generally shall not use or reveal that information. As such, the Rules regarding conflicts of interest (1.7-1.12) should be reviewed and considered. Attorneys should establish procedures to verify the identity of any person they are conversing with over the internet and to ensure that conflicts of interest are not created.

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### **Comments about the court.**

Rule 8.2 Judicial and Legal Officials, is another Rule that attorneys may not think about before posting on a social networking site. Before Facebook and Twitter this Rule has been used to reprimand attorneys who made statements in open court and in court documents criticizing judges. For instance, a Kentucky attorney received a six-month suspension for calling a judge a "lying, incompetent asshole" in court documents. An Indiana attorney was publically reprimanded for filing a document calling the court's decision as being "like a bad lawyer joke" and encouraging lawyers to lie. It is relatively rare that attorneys fail to filter themselves in court documents. But the immediacy and informality of a social network make it much more likely that attorneys will act on impulse and make critical statements about the court that could land them and your law firm in an uncomfortable and troublesome ethical situation.

Stating your areas of expertise. Another Rule to be careful about when communicating on the internet is Model Rule 7.4 Communication of Fields of Practice and Specialization. This rule allows an attorney to state an area of practice that he does or does not practice in. However, the rule prohibits a lawyer from stating or implying that he is certified as a specialist in a particular field of law unless he has been certified by an official organization and the name of the certifying organization is clearly identified in the communication. This rule in particular varies quite a bit from state to state so it is imperative that you review your state's Rules of Professional Conduct in order to comply.

### **Confidentiality.**

An essential element of every attorney-client relationship is confidentiality. With few exceptions, Rule 1.6 prohibits a lawyer from revealing information relating to the representation. Therefore, a lawyer should not blog, tweet or post information that can be connected to a client without that client's consent. In 2010, an Illinois public defender learned the hard way when her law license was suspended for 60 days based on two counts of misconduct. One of those counts related to her revealing confidential information about her clients on her blog. Attorneys should be careful to never speak of their clients or cases over any sort of social network or blog even if not identifying them by name. The risk that the public could figure out who you are speaking about is too great. Anytime a case or client information is going to be published on the internet, the law firm should have a process in place to review the information and consult the client prior to printing it on the web. Though some information may be in the public arena and therefore publication would

not technically violate the Rules, it is best practice to consult a client first as the client may not wish further attention to be drawn to their matter. In addition, you should get your clients' permission to include them in a client list in any publication to maintain strong client relations.

### **Third party communications.**

The final issue to be addressed involves contacting third parties via social networking in the course of representing a client. The Model Rules 4.1, 4.2, 4.3, 5.3 and 8.4 intersect when discussing what an attorney and/or his assistants can ethically do. Rule 4.1 requires candor in communications with third parties. Rules 5.3 and 8.4 require attorneys to be accountable for the actions of non-lawyers under their control and to ensure that their conduct complies with the Rules of Professional Conduct. Rule 4.2 prohibits an attorney from communicating with a

person who is represented by another lawyer without the consent of the other lawyer. Rule 4.3 prohibits an attorney from stating or implying that he is disinterested and requires the attorney to clear up any misunderstandings about the attorney's role. As such, an attorney should not use subterfuge to gain access to a third party's non-public information on the internet. Further, an attorney should not enlist someone else to view information otherwise unavailable to the attorney.

As you can see, communicating over the internet implicates many of the Rules of Professional Conduct. And, what appears on the internet can live forever. Rereading your state rules while keeping in mind your online activity is essential to avoid violating the Rules. The comment sections of the Rules should not be overlooked as they are informative and helpful to fully understanding the Rules.

### **We'd like to hear from you**

If you would like to get more details regarding any of the above topics, join the mailing list, access any of our risk management resources, or tell us your suggestions, please click the link to reach us: [Corporate\\_Solutions@SwissRe.com](mailto:Corporate_Solutions@SwissRe.com)

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