ETHICS AND SOCIAL MEDIA:

A GUIDEBOOK FOR ARKANSAS ATTORNEYS

Arkansas Bar Association

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Young Lawyers Section

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We want to give special thanks to the members of the YLS Executive Council for 2014-2015.

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Introduction

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Social media is a fact of life, and we do not stop using it merely because we have graduated law school and passed the bar exam. In fact, social media can be a wonderful tool to connect with your community and with potential clients as you build a practice and reputation as an attorney. It can also, however, be destructive to a legal career if not used carefully, correctly, and in accordance with the strictures of our profession's rules of conduct.

This guidebook is intended to give lawyers, whether new to the profession or a seasoned and experienced attorney, insight into the world of social media and how its use – for both personal and business purposes – intersects and interplays with the Arkansas Rules of Professional Conduct. We hope you find it helpful and informative!

Ethics of Personal Social Media Pages

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Personal Social Media Accounts – Potential Traps for Lawyers

According to a 2013 survey conducted by the Pew Research Center, 72 percent of online U.S. adults used some form of social media as of May 2013.[1] In addition to the well-established mediums of Facebook, Twitter, Instagram, and LinkedIn, the options for socializing online are continually expanding. While there is nothing inherently unethical with an attorney maintaining personal social media accounts and engaging others online, there are several potential traps that should be considered when interacting with others through social media.

One temptation lawyers may have is to use the internet to find damaging information that could be used against parties in lawsuits. At least one bar association has provided that such activity is within the ethical rules.[2] The issue, however, appears to be how attorneys access the data. In one case, an attorney who used a third party to attempt to friend a witness on Facebook and MySpace to gain access to nonpublic personal data was found to violate Rule 8.4(c) of the ABA Rules of Professional Conduct by engaging in deceptive conduct.[3] This activity would likely be seen as a violation of Rules 4.1 and 8.4(c) of the Arkansas Rules of Professional Conduct, which requires truthfulness in statements to others and prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, respectively.

Directly "friending" or "connecting" with a party or witness to a case could also constitute risky behavior by an attorney, as Ark. Rule of Prof. Conduct 4.2 provides that a lawyer

[1] *See* "72% of Online Adults are Social Networking Site Users," Pew Research Center (August 5, 2013), available at http://www.pewinternet.org/2013/08/05/72-of-online-adults-are-social-networking-site-users/.
[2] *See* N.Y. State Bar Ass'n, Comm. on Prof. Ethics, Op. 843 (2010).
[3] *See* Phila. Bar Ass'n Prof. Guidance Comm. Op. 2009-02 (2009).

"shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law." A similar concern arises under Ark. Rule of Prof. Conduct 4.3, which governs a lawyer's contacts with unrepresented persons. In dealing on behalf of a client with a person who is unrepresented, the rule provides that a lawyer should not state or imply that the lawyer is disinterested. Further, the rule requires that when a lawyer "knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."[4] This rule may present issues and require certain disclosures for an attorney who communicates with unrepresented third parties by connecting with them on social media in furtherance of representing his or her client.

By way of example, if you are attempting to collect a debt on behalf of a client and you locate the debtor on Facebook, is it ethical for you to send him a friend request so that you can access his nonpublic information, such as employer or address? The first question you must ask yourself is whether this debtor is represented by counsel with regard to this debt; if he is, then your friend request would undoubtedly be a prohibited communication under Rule 4.2. If he is not, then you must decide whether your friend request provides this person with sufficient information as to who you are, why you are contacting him, and who you represent so as to satisfy Rule 4.3.

You must also consider whether the Fair Debt Collection Practices Act[5] permits this, and the easiest answer to whether you can friend request a debtor to obtain information is "No." Under the FDCPA, a debt collector cannot use any false, deceptive, or misleading means to

[4] *Id.*
[5] 15 U.S.C. § 1692.

collect a debt or information on the debtor. The Federal Trade Commission's Division of Financial Practices has opined that a debt collector may be in violation of FDCPA by "requesting to join debtors' social media networks (for example, by sending a 'friend request' on Facebook), or making any subsequent communications, for the purpose of collecting a debt, without making the disclosures required by Section 807(11) of the FDCPA."[6] However, it should not be an FDCPA violation to merely view a person's public information on his or her Facebook page to collect information. And if you ever do contact a debtor via social media in an attempt to obtain information which will be used to collect the debt, it is vital that you provide the debtor with the required statutory notice language with both your first communication and each subsequent message or exchange thereafter.

Rule 4.4(b) may also provide a potential trap for lawyers engaging parties online. Under the recently modified rule, "a lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender." This could potentially include data inadvertently sent to the lawyer through social media sites, such as Facebook Messenger.

In addition to interacting with clients, parties, or third parties, attorneys should also be aware that communications regarding their services through social media, even including personal social media pages and profiles, are also subject to the Arkansas Rules of Professional Conduct. In communicating with others online about their services, lawyers should ensure their actions would not potentially constitute a violation of Ark. Rules of Prof. Conduct 7.1-7.4. For a more in-depth discussion on this topic, *see infra* "Advertisements via Social Media."

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[6] http://www.ftc.gov/sites/default/files/documents/closing_letters/gary-d.nitzkin-p.c.and-gary-d. nitzkin /110310nitzkincletter.pdf.

Finally, people frequently use social media to voice their opinions, political or otherwise. A lawyer must be mindful of his or her posts or tweets, however, when it comes to commenting on judges or individuals running for the bench. Rule 8.2 prohibits attorneys from making knowingly false statements regarding judges or candidates for judgeship. This includes statements made with a reckless disregard as to their truth. While expressing honest and candid opinions is permissible, is it permissible (ignoring whether doing so is in an attorney's best interest to begin with) to "share" a news article on your Facebook criticizing a judge? It certainly depends on the quality of the news source, but lawyers should be mindful of the "reckless disregard" standard before doing so. It may be incumbent on the attorney to investigate further before sharing or commenting on the article. The Rules also encourage lawyers to defend courts and judges who are unjustly criticized. While this may run afoul of the attorney's personal views, it is their professional responsibility to promote public confidence in the administration of justice.[7]

These are just a few examples of issues involved with personal social media pages which could result in potential violations of the Arkansas Rules of Professional Conduct. Attorneys must be mindful of the rules and consider how their actions might constitute potential violations when interacting with others via social media.

[7] *See* Rule 8.2, Comment 2.

You Be the Judge – Is Social Media Use Proper for Members of the Judiciary?

Attorneys are not the only ones who must be wary of social media – judges are also bound by their own code of ethics, the Arkansas Code of Judicial Conduct. Canon 1 to the Code requires that judges uphold and promote the independence of the judiciary and avoid even the appearance of impropriety.[8] When it comes to social media, the appearance of impropriety may be found, or at least suggested, through something as innocuous as a Facebook "friendship."

A Florida court held that a motion for disqualification should have been granted where the presiding judge sent a Facebook friend request to a litigant.[9] The court noted that the friend request constituted an ex parte communication sufficient to create a "well-founded fear in the mind of a party that he or she will not receive a fair trial." Although the Florida court noted that a Facebook "friend" could constitute an acquaintance or even (and commonly) a stranger, it continued that the motion to disqualify should have been granted. Granting a rehearing regarding a judge and prosecutor's Facebook friendship, another Florida court noted that "[j]udges do not have unfettered social freedom of teenagers. Central to the public's confidence in the courts is the belief that fair decisions are rendered by an impartial tribunal. Maintenance of the appearance of impartiality requires the avoidance of entanglements and relationships that compromise that appearance."[10]

Ex parte communications are another concern. Ark. Code Judicial Ethics R. 2.9 prohibits judges from initiating communications or investigating facts in a matter independently. A social media request to connect, whether through Facebook, LinkedIn, Instagram, or Twitter, is an implicit communication to another person that you want to observe their digital life. These requests, particularly of a litigant before the Court, may run afoul of Rule 2.9.

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[8] *See also* Ark. Code Judicial Ethics R. 1.2.
[9] *See Chace v. Loisel*, Case No. 5D13-449 (Fla. App. Ct. 2014).
[10] *Domville v. State*, 125 So. 3d 178, 179 (Fla. App. Ct. 2013).

It is also worth noting that a judge's social media relationship with an attorney can create the appearance of impropriety, question impartiality and even raise concerns under Ark. Code Judicial Ethics R. 2.4. Pursuant to Rule 2.4, a judge is prohibited from permitting anyone from conveying an impression that he or she is in a position to influence the judge. Social media can present a unique situation where, for instance, an attorney can post a picture of the judge golfing with the attorney, the judge attending a fundraiser for a particular organization which may appear in his or her court, or the attorney supporting a cause which the judge is also known to support. While absolutely innocuous, the social media relationship may leave the impression that the attorney or organization has an "in" with the judge in violation of Rule 2.4.[11]

This does not, necessarily, mean that you cannot be Facebook friends with judges before whom you appear. There will undoubtedly be a time when one of your law school classmates or career peers will be elected or appointed as a judge, and it is probably unreasonable to expect you to "unfriend" that person merely as a result of such election or appointment. Likewise, if you have a relationship with a judge outside of the courtroom (e.g., your children are on the same sports team), it may be acceptable for you to be Facebook friends with that judge. It is crucial in both scenarios, however, that you and the judge both keep a close watch on what is being posted, how you are interacting with one another publicly, and how – to an outsider – your interactions and posts might reflect upon the appearance of the judge's impartiality. These same rules apply equally to other social media forums, such as Twitter and LinkedIn, where public relationships and interactions could cast a doubt as to a judge's fairness.

[11] *See also Domville*, *supra* at 179 ("Unlike face to face social interaction, an electronic blip on a social media site can become eternal in the electronic ether of the internet. Posts on a Facebook page might be of a type that a judge should not consider in a given case. The existence of a judge's Facebook page might exert pressure on lawyers or litigants to take direct or indirect action to curry favor . . . .").

The Risks of Oversharing

One must be aware of the fact that sharing information about current clients and cases on social media may implicate concerns regarding attorney-client privilege and the duty of confidentiality. Rule 1.6(a) generally requires the informed consent of a client before the attorney may reveal any information "by means of public communication" relating to his or her representation of that client. Rule 1.6(c) further provides that an attorney has an affirmative duty to "prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Comment 2 to Rule 1.6 recognizes that the attorney's duty of confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship" and encourages clients "to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." While it is clear that the disclosure of confidential information on social media is wholly prohibited, the attorney must obtain a client's informed consent before publishing even nonconfidential or nonprivileged information about the client or case on social media. Furthermore, Rule 1.9(c) extends the attorney's duty of confidentiality to his or her former clients, though it does not prohibit the use of information that "has become generally known."

With regard to anything funny, frustrating, annoying, exciting, or otherwise that happens to you at work, think twice (or even three times) about whether you should share it with the world via social media. Does it include client information? If so, do you have a professional obligation to keep that information confidential? Even if you do not, should you keep it confidential anyway? A client's trust in you and your discretion is one of very few tradable commodities which you, as an attorney, have, and you are wise to value that trust above any number of likes or retweets which you might get from sharing client information on social media.

Finally, Rule 3.6 should also be consulted prior to posting content on social media about ongoing civil or criminal matters to determine whether it could be construed as a violation of trial publicity rules. Even if a client has given informed consent, the Rule bars extrajudicial statements the attorney "knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." However, Rule 3.6(c) does permit an attorney to "make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." Comment 1 to the rule highlights the difficulty in "strik[ing] a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved."

Ethics of Business Social Media Pages

Blake Pennington – City of Fayetteville

It may seem obvious, but it is worth noting that personal social media pages are not subject to lawyer advertising rules as long as the lawyer does not use the page for any business purpose. A personal Facebook page used solely for keeping in touch with friends and family is not required to comply with Rules 7.1–7.4. It is a question of fact whether a social media page is used for personal or business use, and if there is any blending of personal and legal posts, even on a personal page, it would be wise to ensure compliance with the Rules.

Practitioners must pay close attention to Ark. R. Prof. Conduct Rules 7.1 and 7.4 with respect to content of social media pages. Rule 7.1 states that a "lawyer shall not make a false or misleading communication about the lawyer's services." The Rule goes on to define a false and misleading statement as one that:

"(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

"(b) is likely to create an unjustified expectation about the results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law;

"(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

"(d) contains a testimonial or endorsement."

Past Victories Do Not Necessarily Predict Future Results

As the Comments to Rule 7.1 note, lawyers who create social media profiles that include "the amount of a damage award or the lawyer's record in obtaining favorable verdicts" without providing a factual or legal context may create unjustified expectations about the results a lawyer

can achieve for potential clients. In this circumstance, even truthful statements can be misleading "if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters." The comments further provide guidance to lawyers in avoiding this pitfall in two ways: first, by providing a factual and legal basis for the past results, and second, by including an appropriate disclaimer or qualifying language. Such a disclaimer should inform potential clients that the facts and circumstances in past matters may differ from their case and that every case must be evaluated independently of all others, that all results the lawyer or firm has obtained have not been reported, that reported results may not be representative of results obtained by the lawyer or firm, and that potential clients may not experience the same results.

Areas of Practice and Specialties

Any social media profile must contain only truthful information about the lawyer and the services that are provided, including areas of law in which the lawyer may primarily practice. Rule 7.4 governs the communication about fields of practice and specialization. Rule 7.4(a) permits lawyers to "communicate the fact that the lawyer does or does not practice in particular fields of law." Rule 7.4(b) restricts the use of the designation "Patent Lawyer" or a similar designation to those admitted to engage in patent practice before the United States Patent and Trademark Office. While rare in Arkansas, lawyers engaged in the practice of admiralty law are permitted by Rule 7.4(c) to use a specific designation. Rule 7.4(d) prohibits a lawyer from stating or implying that he or she is a "specialist" in any area of law unless the lawyer has been "certified as a specialist by an organization that has been approved by an appropriate state

authority or that has been accredited by the American Bar Association."[12] The certifying organization must also be clearly identified. Comment 1 to this Rule states that any statements regarding specialties are subject to the "false and misleading standard" set forth in Rule 7.1.

"[A] lawyer should use objective information and language to convey information about the lawyer's experience."[13] A social media profile that truthfully states that a lawyer has practiced law for a particular period of time and has handled a specific number of cases within an area of practice would likely convey objective information about the lawyer.

Some social media networks, like LinkedIn, restrict the ability to control the text of subtitles and headings used to create a profile, which may be cause for concern. LinkedIn provides a "Skills and Endorsements" section within which a lawyer may add his or her relevant skills, including specific areas of practice. This would be permitted under the Rule as long as the lawyer does not claim to be a specialist in any of those areas without the required certification mentioned above. LinkedIn also includes an "Experience" section which allows a lawyer to include narrative information. Facebook provides a great deal of flexibility when creating content for pages – whether personal, business, or a hybrid – but if you are going to provide information about your practice, it would be wise to create an entirely separate Facebook page that you can monitor closely to ensure compliance with the Rules. Twitter and Instagram have substantial constraints on the amount of content which can be included in a lawyer's profile, so the lawyer must be particularly careful to avoid potentially false or misleading statements.

[12] A list of American Bar Association accredited certifying organizations may be found at http://www.americanbar.org/groups/professional_responsibility/committees_commissions/specialization/resources/resources_for_lawyers/sources_of_certification.html.

[13] "Social Media Ethics Guidelines." Prepared by the Commercial and Federal Litigation Section of the New York State Bar Association. https://www.nysba.org/Sections/Commercial_ Federal_ Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html.

ADVERTISING IN SOCIAL MEDIA

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The Arkansas Rules of Professional Conduct governing offline marketing and advertising for attorneys apply equally to marketing and advertising through electronic sources, including social media. Regardless of the medium of advertisement, the same ethical rules must be followed. The Arkansas Rules of Professional Conduct do not define "social media," but the term is commonly understood to include an array of online community websites such as Facebook, LinkedIn, Twitter, Instagram, Pinterest, Google+, and even YouTube.

Communications Concerning a Lawyer's Services

Rule 7.1 governs all communications about a lawyer's services, including communication through social media, and prohibits lawyers from making "false or misleading" communications about the lawyer or the lawyer's services.

Personal versus Professional. Rule 7.1 applies to all communications about a lawyer's services, regardless of whether a lawyer is communicating through a personal or professional social media account.

Favorable Results for Clients. Rule 7.1(b) precludes advertisements about the results obtained on behalf of clients, including damages awarded, number of favorable verdicts, and client endorsements. Such statements "may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances."[14] Lawyers must pay particular attention to Rule 7.1 when announcing favorable results obtained for clients through social media.

Third-Party Statements. If a third-party (including a client) posts information on a lawyer's page that does not comply with Rule 7.1, the lawyer should remove the post.

[14] Rule 7.1, Comment 1.

Advertising

Rule 7.2 governs advertising by lawyers, including advertising through social media. The Rule recognizes that lawyers are allowed to advertise through written or electronic communication, and that "the Internet and other forms of electronic communication are now among the most powerful media for getting information to the public."[15] Although social media provides a less formal and faster-paced method of communicating about a lawyer's services, rules applicable to advertising must still be followed, including the requirement that lawyers keep a copy of any advertisement or communication for five years, along with a record of when and where it was used.

Rule 7.2 also states that "[a]ny communication made pursuant to this Rule shall include the name of at least one lawyer who is licensed in Arkansas and who is responsible for its content, and shall disclose the geographic location of the office or offices of the attorney or the firm in which the lawyer or lawyers who actually perform the services advertised principally practice law." Does this mean that each Facebook post or Twitter tweet which could be perceived as an "advertisement" should include this information? Probably not. It is most likely sufficient to satisfy Rule 7.2 that a reader could view your profile where such information is provided. This has not been specifically addressed in Arkansas, however, so it is an example of how important it is for attorneys to stay current on changes in the law, especially the rules of professional conduct and the rules of procedure.

[15] Rule 7.1, Comment 3.

Solicitation of Clients

Rule 7.3 prohibits lawyers from directly soliciting professional employment by in-person, live telephone, or real-time electronic communication unless an exception applies. Exceptions include solicitation from other lawyers or individuals with whom the attorney has a prior professional, close personal, or familial relationship. Solicitation from individuals who are known to be in need of legal services (and to whom no exception applies) must be conducted in the manner set forth in Rule 7.3(b). The Rule applies equally to social media, prohibiting lawyers from directly contacting an individual for the purpose of obtaining employment, by tweeting, posting on a person's Facebook wall, or sending a private message. The Rule only applies if the communication is targeted to a specific person and offers to provide, or can reasonably be understood as offering to provide, legal services. If the communication is directed to the general public, such as an Internet banner advertisement or a generic and public Facebook post or tweet not directed to any specific person or group of people, it is not a solicitation governed by Rule 7.3 (on social media or elsewhere).

Ethics of Client Posts, Testimonials, and Endorsements

Cory Crawford – Legal Aid of Arkansas

Social media provides ample opportunities for a lawyer's good work to be praised by current and former clients. Be mindful, however, that these recommendations, while they may seem innocuous enough, could lead to some unwanted attention from the Committee on Professional Responsibility.

Arkansas law prohibits a lawyer from using testimonials or endorsements while advertising.[16] Also, clients and former clients may not be used by an attorney in advertisements.[17] This can create a bit of a headache for attorneys on websites, such as Facebook, which allow the public to comment openly.

The Rules do not restrict an organization or person other than the lawyer from advertising or recommending the lawyer's services so long as the lawyer is not paying that person or organization (other than actual, reasonable advertising expenses) to channel professional work to him or her.[18] A lawyer must be vigilant, however, in prescreening recommendations on his social media. Sites like LinkedIn have prescreening tools to steer clear of any Rules violations, but Facebook and Twitter do not have this type of protection. Rule 7.1 is a clear proscription of what cannot be advertised.

The main concerns with social media recommendations are the proscriptions against unjustified expectations about results, comparisons to other lawyer's services, and testimonials or endorsements. Client recommendations that contain language about what the lawyer achieved in the client's case, general statements such as "best attorney in town," or endorsements such as "the only attorney I'd trust with my divorce" should certainly raise a red flag if the lawyer sees

[16] *See* Ark. R. Prof. Conduct Rule 7.1(d).
[17] *See* Rule 7.2(e).
[18] Rule 7.2 Comment 6.

them on the lawyer's social media page. The lawyer should diplomatically ask for a revision before the lawyer allows it to be published or to remain on the lawyer's page. The Rules would not similarly prohibit the client from communicating the same message on his or her personal social media page, but there must be no indication or perception that such a personal post by a client was in any way sought or obtained by the lawyer as a means of getting around the Rules.

A lawyer would also be well advised not to make reciprocating recommendations with other attorneys. While it may seem as though the lawyer is only being considerate, the reciprocal recommendation may be interpreted as channeling professional work to another for the reciprocating recommendation, thus a violation of Rule 7.2.

A lawyer should also be mindful of Rule 7.4 regarding fields of practice and specialization. Rule 7.4(d) prohibits a lawyer from stating or implying that the lawyer is certified as a specialist unless certified by an appropriate state authority or accredited by the American Bar Association. A client's post which states that the lawyer is "a divorce specialist" will likely need to be edited.

While there is nothing in the Rules that prevent Facebook page "likes" or LinkedIn "skill endorsements," lawyers need to maintain a constant watch of client posts on their pages to ensure conformity with the Arkansas Rules of Professional Responsibility.

Ethics of Legal Blogging

Sarah Sparkman – City of Springdale

Legal blogs – online journals where you can post information and articles about the law – have become increasingly popular among attorneys, and it is easy to see why. Maintaining a legal blog has many benefits, including increased traffic to one's website, attention in the legal community, and the ability to get your research "out there" without having to do traditional publication. However, should an attorney decide to put her work online, she should be mindful of her ethical obligations.

Based on the Rules of Professional Conduct in Arkansas, recommendations from the American Bar Association, and case law in other states, there are some guidelines attorneys can follow to avoid ethical conundrums.

(a) Post information and not advice.

(b) Don't give out bad information.

(c) "Don't read the comments!"

(d) Be mindful of hypotheticals submitted to you.

Let's take a look at these one by one:

Post information and not advice.

Historically, broadcasting legal information across various mediums has been scrutinized in many jurisdictions, if not banned in some form.[19] Although there is nothing in Arkansas's rules prohibiting posting legal information online, you are probably limiting your ethical liability if you are posting an informational piece – an update in changes to the law, or comparing laws,

[19] *See* Catherine J. Lanctot, Article, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*," 49 DUKE L.J. 147 (1999).

or analyzing what the impact of what a potential law might be, etc. – as opposed to a piece recommending people act in a certain way.

The American Bar Association has opined that there is no "exact line" between legal information and legal advice, but does say that context is helpful in drawing that line.[20] A lawyer who poses and answers her own hypothetical is often just giving information, whereas a lawyer responding to a question is moving closer to giving advice.

Additionally, the ABA recommends, to avoid any confusion, that you post a statement on your website that all information is general in nature and not intended to be legal advice. Any disclaimers that you post on your website should be on each blog page, as well.

Don't give out bad information.

We have all heard someone talk about something they read about the law on the internet. And we have all heard someone say something incorrect about the law that they read on the internet. Several sources of misinformation exist online – unfortunately, some of these sources are lawyers themselves. It may seem obvious not to post bad information, but what constitutes "bad information" may not be so obvious. The law is constantly changing, and outdated blog posts can linger online for years after the author forgets she even posted it. Because of the changing nature of information online, many readers assume that what they are reading is up-to-date. Furthermore, because the internet is universal, you may have readers who are subject to the laws of other jurisdictions but do not understand the distinction between the various states' or countries' laws.

The up-to-date nature of the internet does not mean that an author has to delete any posts that contain outdated information in their entirety. When posting a blog post, the author should make sure the post is time stamped; that is, it should show the date of publication. That way, the

[20] Amer. Bar Assn. Op. 10-457 (2010).

reader can know how timely the information is. Additionally, if there are any changes in the law, the author may want to consider editing her post with new information or linking to new cases or even new articles posted on her blog that address those changes.

Another thing to keep in mind is that anyone can access your blog – even those who are subject to different laws in different jurisdictions. Even if you are posting information and not advice, bad information can cause a person to take adverse action. Clearly stating that you are only talking about the law in Arkansas, for example, can prevent confusion for the reader.[21] Furthermore, you are reducing the risk of opening yourself up to the regulations of other jurisdictions yourself.

"Don't read the comments!"

My personal motto for using social media is "Don't read the comments." Not the comments to the Rules of Professional Conduct, of course – those are infinitely useful. I am talking about the "add comment" section at the end of some blog posts, where readers post comments, questions, insults – you name it.

As the other authors have demonstrated, an attorney can start to run into trouble when the public starts commenting freely on social media connected to the lawyer. To avoid this, the blog author may want to disable the "add comment" section of his blog or require that all comments have author approval before being posted. If public comment is permitted, do not allow yourself to be pulled into an online argument with a commenter; remain professional at all times and, if necessary, remove a comment or an entire blog post to avoid the appearance that you lack professionalism and maturity.

[21] Many of the recommendations in this section come from the American Bar Association's Elawyering Task Force's 2003 Best Practices Guidelines. The recommendations can be found at http://www.americanbar.org/groups/law_practice/committees/elawyering-best-practices.html.

Be mindful of hypotheticals submitted to you.

If Jimmy Internet posts a hypothetical in your comments section or sends you an email that you know exactly how to answer because you have had 10 cases just like that one and you are a designated expert in that area of law and you think it would be a good blog topic… Be aware there may be unintended consequences. Keep in mind, a person probably is not posing a hypothetical to you just because it is an idea that he came up with on his own, and a person who later looks at your answer to that hypothetical is not "just curious" about the topic. There is a good chance he has a legal issue, googled that legal issue, and wound up at your blog. Once you have answered a hypothetical scenario, you have probably entered the realm of legal advice instead of legal information, and you may have assumed certain legal duties.

While it may seem silly you could have a legal duty to a person who asked you a question on the internet, it is not out of the realm of possibility. Ark. R. Prof. Conduct Rule 1.18 regulates duties to prospective clients, and you may potentially create a legal relationship with this person. Comment 2 to Rule 1.18 states: "[W]hether communications . . . constitute a consultation depends on the circumstances." Unilateral communication in response to an advertisement that provides general legal information would not be considered a consultation under the Rule. From that, we could gather that if you post an information piece and someone posts a comment or sends you an email in response, that alone would not be enough to create a consultation and bring the duties of Rule 1.18 into play; but a detailed, fact-specific answer could bring you into territory that creates duties to the person who asked the question. If the person reading the information relies on it in deciding how to act, you could have a duty to him or her. If the person shows an intent to seek your professional opinion and you respond, you could have a duty.[22]

[22] For examples, *See* Lanctot, *supra*. For examples pre-dating the internet, *see also* Fouke v. Knuck, 784 P.2d 723 (Ariz. App. 1989).

Conclusion

Sarah Sparkman – City of Springdale

This guide is not meant to discourage you from having an online presence; rather, it is meant to point out ethical predicaments so you can find creative ways to have an online presence while you can rest easy knowing that you are working within the Rules of Professional Conduct. The ethics of using social media will certainly evolve in years to come, but in the meantime, you do not want to be the person who is creating case law in this area.

Remember, your safest bet online is to post legal information – not advice – and limit your interaction with internet passersby who may have questions. Though it might seem counterintuitive to not be "social" on social media, you can find other ways to interact with the public that do not involve answering legal questions. I'm a big fan of posting pictures of cats.