

Ethics in the Social Media Age

The electronic/social media age is all around us. As lawyers we need to reflect on how our conduct is affected by our ethical responsibilities as lawyers to comply with the Louisiana Rules of Professional Conduct. What do we mean by social media? A broad definition of social media may include email, blogs, websites, as well as, networking sites such as Facebook, Twitter, and Linked In. How do lawyers use these types of media? Some examples include marketing and communication with clients and witnesses. The tools are also sometimes used in research and preparing for a case. Ethical issues that may be implicated include but are not limited to:

(1) Competence and Diligence

- Pursuant to Rules 1.1 and 1.3 lawyers need to be aware of technological advances and any repercussions stemming from the use or lack of use of same.

(2) The Formation of the Attorney-Client Relationship

- Do not unintentionally create the lawyer-client relationship and consider Rule 1.18. Case law suggests the lawyer-client relationship begins at the reasonable belief of client. Do not make it reasonable if that is not your intent.

(3) Conflicts

- Conflicts depend on the specific facts of each situation. Consider Rules 1.7, 1.9, 1.10 et. seq.

(4) Confidentiality

- Consider obligations pursuant to Rule 1.6 to protect confidential information.

(5) The Unauthorized Practice of Law

- Be aware of jurisdictional limitations, and Rule 5.5.

(6) Advertising and Solicitation

- Be careful how you promote/market yourself and consider Rules 7.2, 7.5, and 7.6

(7) Improper Contact

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Eric K. Barefield, Ethics Counsel

Louisiana State Bar Association

- Lawyers have limitations on communication whether based on social media or other traditional types of communication. Consider Rules 7.4, 4.2(a), 4.3, 3.5 and 8.4(e) and (f)

(8) The Duty of Candor

- Lawyers have to be careful and aware of the content of all communications being aware of Rules 3.3, 4.1 and 8.4(c)

Numerous Louisiana Rules of Professional Conduct to be considered includes Rules 1.1, 1.2(c), 1.3, 1.6(a), 1.7, 1.8(b), 1.18, 3.3, 3.5, 3.7, 4.1(a), 4.2(a), 4.3, 5.3, 5.5(a), 7.2(c)(1) and (13), 7.4, 7.5, 7.6, 7.8 and 8.4(c),(e) and (f).

Rule 1.1(a) of the Louisiana Rules of Professional Conduct, in pertinent part, provides:

... A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2(c) of the Louisiana Rules of Professional Conduct, provides:

A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Rule 1.3 of the Louisiana Rules of Professional Conduct, provides:

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.6 of the Louisiana Rules of Professional Conduct provides:

...(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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Rule 1.7 of the Louisiana Rules of Professional Conduct states:

...(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:...(1) the representation of one client will be directly adverse to another client; or...(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:...(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;...(2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (3) each affected client gives informed consent confirmed in writing.

Rule 1.18(a) and (b) of the Louisiana Rules of Professional Conduct provide:

*(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client...*

Rule 3.3(a) of the Louisiana Rules of Professional Conduct, in pertinent part, provides:

... A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to a tribunal by the lawyer;...

Rule 3.5 of the Louisiana Rules of Professional Conduct states:

A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order; (c) communicate with a juror or prospective juror after discharge of the jury if: (1)

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the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment; or (d) engage in conduct intended to disrupt a tribunal.

Rule 3.7 of the Louisiana Rules of Professional Conduct states:

(a) A lawyer shall not act as advocate at trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client
(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9

Rule 4.1(a) of the Louisiana Rules of Professional Conduct, provides:

In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material law or fact or law to a third person;...

Rule 4.2(a) of the Louisiana Rules of Professional Conduct, provides:

Unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order, a lawyer in representing a client shall not communicate about the subject of the representation with: (a) a person the lawyer knows to be represented by another lawyer in the matter;...

Rule 4.3 of the Louisiana Rules of Professional Conduct states:

...In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in a matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client...

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Rule 4.4(a) of the Louisiana Rules of Professional Conduct, provides:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person;...

Rule 5.5 of the Louisiana Rules of Professional Conduct provides:

...(a) A lawyer shall not practice law in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

Rule 7.2(c)(1) and (13) of the Louisiana Rules of Professional Conduct provides, in pertinent parts:

(1) Statements About legal Services. A lawyer shall not make or permit to be made a false, misleading or deceptive communication about the lawyer, the lawyer's services or the law firm services...(13) Payment for Recommendations; Lawyer Referral Service Fees. A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written or recorded communication permitted by these Rules, and may pay the usual charges of a lawyer referral service or other legal service organization only as follows: (A) A lawyer may pay the usual, reasonable and customary charges of a lawyer referral service operated by the Louisiana State Bar Association, any local bar association, or any other not-for-profit organization, provided the lawyer referral service: (i) refers all persons who request legal services to a participating lawyer; (ii) prohibits lawyers from increasing their fee to a client to compensate for the referral service charges; and (iii) fairly and equitably distributes referral cases among the participating lawyers, within their area of practice, by random allotment or by rotation.

Rule 7.4(a) of the Louisiana Rules of Professional Conduct states:

...(a) Solicitation. Except as provided in subdivision (b) of this Rule, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior lawyer-client relationship, in person, by person to person verbal telephone contact, through others acting at the lawyer's request or

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on the lawyer's behalf or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this Rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this Rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of Rule 7.6. For the purposes of this Rule 7.4, the phrase "prior lawyer-client relationship" shall not include relationships in which the client was an unnamed member of a class action.

Rule 8.4(c), (e) and (f) of the Louisiana Rules of Professional Conduct provides:

It is professional misconduct for a lawyer to:...(c) Engage in conduct involving, dishonesty, fraud, deceit or misrepresentation; (e) State or imply an ability to influence improperly a judge, judicial officer, governmental agency or official...(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law;...

I. Scenarios to consider:

- 1) After many years as a solo practitioner Bob has decided it is time to take more steps to market his practice and create a website. Can Bob just leave the project to one of his younger legal assistants? Does the website have to be filed with the LSBA as most other types of advertising? Bob's "technology advisor" has indicated he will get a monthly report of every email address and internet protocol address that visits the website. Can Bob reach out to those folks with a direct email telling them more about his practice?
- 2) Bob's website is not generating the traffic he would like so Bob decides to spice it up with ringing endorsements from some of his clients. For their trouble Bob pays them is that ok? What if Bob just makes up the content with some generalities like "Bob was a straight shooter and always returned my calls" or "Bob won my case so he will win yours

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too”? Bob remembers that he was listed in “Greatest Lawyer” glossy magazines a couple of years ago. Can Bob put on the website that he is the “Greatest lawyer” in his town?

- 3) Bob is excited to check out his website so he Google’s his name. Bob just can’t get a break. To Bob’s chagrin the first thing that comes up is a disgruntled crazy client’s diatribe of how Bob allegedly mishandled his case. Bob is dying to post a response. What do you think about that course of conduct? Could and or should Bob simply post that this former client is on medication for psychological issues?
- 4) John Carson has a nice practice doing criminal defense work. While looking for his new client whom he met on a chat page John gets mugged and his smart phone and laptop are taken. Does Carson have confidential client communications and information on those devices? Has John Carson violated Rules 1.1, 1.3, and 1.6 of the Louisiana Rules of Professional Conduct?
- 5) Ellen has a nice practice doing estate planning. Like Bob she decides a website will help promote her business, especially with family members looking to assist older family members with estate planning. Ellen receives an email from Carl explaining his family estate planning goals and troublesome family dynamics. Has the attorney-client relationship been formed? What obligations are owed to Carl if any? Can Ellen rely on what she heard from another lawyer that no formal relationship or obligations begin until Ellen receives money for her attorney’s fees?
- 6) George has been asked by a national magazine to have a weekly “legal blog” Ask the Legal Eagle. The plan is for George to search through emails received and respond to a few each week providing advice. Does George need to worry about jurisdictional limitations? Is there a difference between legal advice and information? Has George created a lawyer-client relationship between himself and the people requesting information when he responds to their questions?
- 7) Robin & Associates legal practice encompasses a large number of family law cases. To make the numbers work the firm has a large volume of open cases. Robin’s associate Eric begins an email or telephone dialogue with a prospective client Mindy about the possibilities of representation in a divorce. After Mindy comes in the office to formally sign a contract and pay the initial advanced deposit Robin realizes that Mindy is wife

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number three of a former client Andy whom he represented ten years ago in divorce number one. Is this a problem? As it was more than ten years ago are there any duties owed to the former client? Can the firm take on Mindy as a client?

- 8) Louie “The Animal” Anderson’s practice includes a lot of trial work encompassing the defense of personal injury cases, high-end domestic matters and high-profile criminal cases. Louie’s nephew, Paul, who is in college has been helping out in the office and suggested he use the internet to get dirt on the opposition. Louie finds some juicy pictures that while not really relevant might be embarrassing for the other side at a deposition. Can Louie use them?
- 9) Louie figures that the best place to get compromising pictures is the plaintiff’s social networking page showing that the plaintiff really isn’t hurt. The information is freely accessible by anyone doing a search. Is the plaintiff’s social networking page a good source for content? Any ramifications?
- 10) In a domestic case Louie thinks the ex is cheating. What if the only way of accessing the photographs and information is making a request? How about “fake friending” someone or using a pseudonym in an email to gather information? If Louie uses a truthful identity is it ok? What if the person is represented? Is there any issue if Louie does it himself? What if Louie asks his nephew Paul to do it?
- 11) How about social media and jurors?
- 12) Wanda’s law firm has been all over her to promote herself more in the community. Wanda decides to join a professional social network to get her name out there. Wanda decides to tell everyone she has years of experience in pharmaceutical litigation which is not the case but she is hoping to become a rainmaker. Is that a problem? What if she truly has the experience, can Wanda call herself an expert in mass pharmaceutical torts litigation?
- 13) Larry, a public defender is in a criminal trial that has lasted for several days and his client is being a nightmare. Larry tweets out that he has updates from the trial on his blog.

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When you go to Larry's blog he hints that his client may have lied under oath. Is this an issue?

- 14) You went to law school and have remained friends with a lawyer who has finally been elected to "traffic court". In fact you donated the max and put up signs all over town for her before the election. Prior to her election she was a Facebook friend. Do you now need to change that status? Does it make a difference if you practice regularly in that court?
- 15) George is tired of simply answering questions on "Ask the Legal Eagle". George figures with some more dramatic content he can generate more publicity. George decides to put commentary and opinion on his blog including that a judge in the community is an "unfair witch". What do you think? Good idea?
- 16) Bob loves the internet so much now he is now all over it promoting his firm with banners and blogs etc. An internet company has recently called him indicating they have leads and would be happy to provide them to him every month for a monthly fee. The company guarantees at least five new referrals per month or his fee for that month will be returned. What do you think?
- 17) Carla is known as the QDRO master as she has done so many of them. Can Carla send out a letter or email to all the lawyers in her area that she is an expert in that area of law and is willing to assist other lawyers as potential co-counsel or doing some contract work?
- 18) William has received an email from Mary in Canada asking him to help collect a judgment she has against an ex-husband Boomer. Within a couple of weeks William received a certified check from Boomer and deposits it in his trust account. A day or two later Mary is asking for her share the funds to be wired. Of course William can keep his generous fees. Any red flags?

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