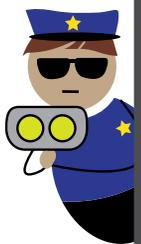


AVOIDING ETHICS SPEED TRAPS ON THE INTERNET HIGHWAY

Alison Buchanan and David King Keller



In what may be the first case of its type involving legal ethics and social media, a Virginia lawyer was sanctioned \$522,000 in a spoliation case for instructing his client to destroy evidence on Facebook. (See *Lester v. Allied Concrete Company*, 80 Va. Cir. 454 (2010).) Destruction of evidence can subject a lawyer to potential discipline (see, for example, California Rule of Professional Conduct (CRPC) 5-220, prohibiting suppression of evidence), and even a claim of malpractice. The *Lester* case is just one example of the many ethical risks lawyers face when they deal with evolving technologies.

It is important for lawyers to understand the risks associated with using the Internet and to be familiar with authorities and resources that provide guidance in avoiding such risks. “There are many applicable rules of professional conduct that apply when using the Internet,” notes William Balin, past chair of The Bar Association of San Francisco’s (BASF) Legal Ethics Committee. “Publication 250, which can be found on the California State Bar website, is a selective compilation of that authority. It includes the California Rules of Professional Conduct, the judicial article of the California Constitution (Article VI), California Rules of Court, sections of the Business & Professions Code (B&PC) known as the ‘State Bar Act,’ and other relevant statutes.”¹

The following is a BASF Legal Ethics Committee discussion of some of the online and social media ethics “traps” lawyers should look out for while traveling the Internet highway.



TRAP 1

RECEIVING EMAIL COMMUNICATIONS THROUGH YOUR WEBSITE

Avoid creating a duty of confidentiality or an attorney-client relationship that could create a subsequent conflict of interest.

“When it comes to inviting communications from the public via a lawyer’s website,” warns Drew Dilworth, the current chair of the BASF Legal Ethics Committee and a partner with Cooper, White & Cooper, “lawyers need to ask themselves whether they intend to take on a duty of confidentiality to the party making the inquiry.” The duty of confidentiality embodied in CRPC 3-100 and B&PC section 6068(e) can apply with regard to prospective clients, even if the potential client ultimately does not hire the lawyer. “Inviting legal inquiries via a website, without qualification,” notes Dilworth, “runs the risk of taking on unintended obligations to third parties and can create conflicts of interest issues, as well.”

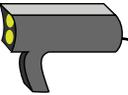
Lawyers can minimize this risk by ensuring that their website contains an appropriate disclaimer advising the visitor that communication through the website will not create an attorney-client relationship and that the visitor should not submit confidential information because it will not be treated as such. Dilworth cautions, however, that in order to be effective, the disclaimer “must contain sufficiently plain terms that would defeat a visitor’s

reasonable belief that the lawyer is being consulted in a confidential manner.”

The preferred method is to require the visitor to click an “acceptance” of the disclaimer language before he or she can submit any information. It is also prudent, he notes, “to ask the visitor to provide only limited information for purposes of conducting a conflicts check before any substantive information is exchanged.”

Location of the disclaimer is also important. Lawyers often bury the disclaimer in fine print or in a “terms and conditions” page of the website that may never be seen by the user. To maximize its effectiveness, Dilworth says, “a disclaimer should be prominently located and in a font that is consistent with that utilized on the website. Consideration of these issues is important for all lawyers who maintain an electronic presence but is of particular importance for practices that rely heavily on use of the Internet to generate client interest, such as in multiplaintiff litigation.”

TRAP 2



WEBSITE AND LINKEDIN – *Make sure your testimonials and recommendations are compliant with communication and advertising rules.*

A website testimonial or a LinkedIn recommendation could implicate a number of ethical issues. Absent an appropriate disclaimer, testimonials and recommendations could be viewed as implying “similar results,” thereby creating unjustified client expectations and potentially running afoul of rules prohibiting false, misleading, or deceptive communications, like CRPC 1-400, B&PC section 6157.1, and MRPC 4.1. Lawyers also need to be cautious with LinkedIn’s “specialties” section, or letting other indi-

viduals call them a “specialist,” because the state bar may interpret such statements to violate CRPC 1-400(D)(6) if the lawyer does not have the requisite state bar certification. Understanding how these technologies operate is critical to monitoring them for ethical compliance. The California State Bar’s Committee on Professional Responsibility and Conduct (COPRAC) has noted that “ignorance of how to work with a technology you are using is no excuse.” (COPRAC Op. 2010-179.)



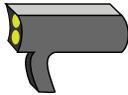
TRAP 3

ONLINE CHATS – *Avoid communications that would impose an affirmative duty to provide legal advice.*

When chatting online keep CRPC 3-110(C), “Failing to Act Competently,” in mind. If the chat creates a prospective or actual attorney-client relationship, the lawyer could have an obligation to provide affirmative advice on legal issues. A sober example of the potential ramifications of failing to inform, where such a duty exists, occurred in *Togstad v. Vesely*, 291 N.W.2d 686 (Minn. 1980), where a law firm was subject to a \$650,000 malpractice verdict for not providing advice about the statute of limitations in

a case involving a single online communication. Similar caution should apply to listserv chats and other online forums. Pamela Phillips, a lawyer with Arnold & Porter, whose practice includes defending lawyers in malpractice cases, advises that “[i]n the last twenty years the most frequent claim against lawyers is, ‘I didn’t know there was a risk of ‘x.’” Make sure you know whom you have a duty to inform.

TRAP 4



LINKEDIN AND AVVO – *Make sure your profiles are factually and legally accurate.*

Lawyers also need to keep in mind the ethical restrictions on lawyer advertising when using electronic services such as LinkedIn and Avvo. Once a lawyer creates or “adopts” a profile in this type of service, he or she is ethically responsible for the veracity of the information contained therein. While it may not be likely a lawyer would be disciplined for an inaccurate statement on a site or service he or she has not endorsed, once the lawyer has control over the content, he or she will almost certainly be held account-

able for its accuracy. Make sure such profiles cannot be construed as false, misleading, or deceptive.



TRAP 5

ONLINE – *Consider confidentiality implications before discussing a client’s case.*

“The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source. . . .” (CRPC 3-100, Disc. [2].) Recently, an attorney blogger was accused by a client of breaching attorney-client confidentiality after blogging about the case. Client information, even if it may be found in the public domain, and even if the case is settled, can still be subject to a duty of confidentiality, absent client authorization to disclose such information. Attorney John Steele, a former member of COPRAC, whose practice focuses

on legal ethics, states, “[c]onfidences are far broader than most lawyers think. It’s a client confidence if: (1) it’s information relating to the representation, in the broadest sense; and (2) its use or disclosure could be embarrassing or detrimental to the client (which also includes information your client doesn’t know).”

Steele offers two solutions: only discuss published cases other than your own, or have clear and direct informed client consent before discussing a client matter.

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TRAP 6

BLOGS – *There are at least four ways to blog your way into a potential ethics issue.*

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

2. Unintentional provision of legal advice: The provision of legal advice can create an implied attorney-client relationship, even in the absence of a formal agreement between lawyer and client. Ask yourself, “would a reader of the blog have the objectively reasonable impression she is being given legal advice upon which to rely?” If the answer is yes, you could be creating a professional relationship or obligations that could prevent future representation of a client you actually want to represent. To minimize this possibility, have an appropriate disclaimer and tailor the content of your communications on the blog accordingly.

3. A “communication”: A blog is a website and therefore subject to the same restrictions regarding attorney communications and advertising. COPRAC Op. 186 (2012) states: “[m]aterial posted by an attorney on a social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a ‘communication’ within the meaning of rule 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 considered a “communication” under CRPC 1-400. So provide a disclaimer and contact information for the person responsible for its content as required under the rule. Also, in considering the applicability of the rules, keep in mind the distinction between political speech and commercial speech, “which is speech that beckons business,” to quote American Bar Association Staff Counsel Will Hornsby. If your intent is publicity and goodwill, yet the “content” does not beckon business, then the blog may not fall within the definition of a “communication.”

4. Legal advice outside your jurisdiction: Make sure you comply with applicable rules on the unauthorized practice of law. Absent certain exceptions, lawyers are generally prohibited from giving legal advice in a jurisdiction in which they are not licensed. In California, doing so is not only a disciplinary violation, it is a misdemeanor. (See B&PC section 6126.) Aiding and abetting the unauthorized practice of law can also subject a lawyer to discipline. (See CRPC 1-300(A).) A law firm that sponsors a lawyer’s blog through its website must therefore be sensitive to this issue. To militate against such a risk, make sure the jurisdiction or jurisdictions in which you are admitted to practice are referenced prominently in your blog disclaimer and do not inadvertently engage in communications that constitute the provision of legal advice to individuals outside your licensed jurisdiction.

TRAP 7

EMAILS – *Take reasonable steps to ensure confidentiality.*

“Does the name ‘General Petraeus’ ring a bell?” asks BASF Ethics Committee Member Andrew Dimitriou. “It’s not a perfect analogy, but it’s important to note that a CIA director was not able to secure the total confidentiality of his emails.” Dimitriou advises that “to avoid a run-in with CRPC 3-100, ‘Confidentiality of Information in a Client-Lawyer Relationship,’ you must take reasonable measures to ensure that client confidential information is actually kept confidential, and, if necessary, be able to

demonstrate your email security protocols to a trial judge.” This could include using appropriate disclaimers advising of the confidentiality of the communication, requesting notification and deletion of an email if it is inadvertently received, as well as taking reasonable steps to protect and secure the communications. (See COPRAC Ops. 2010-179 and 2012-186; see also San Diego Bar Association Legal Ethics Committee Op. 2012-1.)

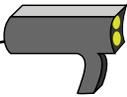
TRAP 8



EMAILS – Make sure your client is communicating with you through privileged channels.

John Steele advises that the recent decision in *Holmes v. Petrovich Development Co.* 191 Cal. App. 4th 1047 (2011) provides a cautionary note on this issue. In *Petrovich*, a client's email communications with her attorney were held to not be privileged because she used her employer's computer system to send them. The company had a written policy providing that it could read all emails sent or received on the company's email system. Arguably, a lawyer's duty of competence requires advising clients in such

situations of the danger of communicating with counsel on work-provided equipment. (See ABA Formal Op. 11-459.) Failure to render such advice could also carry a liability risk; it is not hard to imagine a client in such a situation criticizing a lawyer for not warning of a potential loss of privilege. Steele recommends putting a social media and email warning in the client fee agreement at the outset of the attorney-client relationship.



TRAP 9

EMAILS – Handle inadvertently disclosed transmissions appropriately to avoid disqualification and sanctions.

Most of us have had the experience of accidentally hitting "reply all" or typing in the first two letters of a recipient's email address and hitting "send" only to discover that auto-fill sent our email to the incorrect recipient; and also of receiving an email involving opposing counsel or the other side and wondering if they had made the same mistake. If you receive a communication that appears to be a privileged

and inadvertent disclosure, California case law generally requires you to stop reading the communication and notify the other side to try and resolve the issue. (See *Rico vs. Mitsubishi Motors Corp.*, 42 Cal. 4th 807 (2007).) Failure to abide by the requirements of *Rico* can result in a range of consequences, including disqualification and sanctions.

TRAP 10



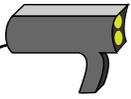
THE CLOUD – Take measures to view and store documents in a manner that will reasonably protect their confidentiality.

Cloud technology allows you to have electronic files available with just an Internet connection and a computer, tablet, or smartphone. Not having to carry large files around is valuable, but there are ethical considerations when you use cloud storage servers. One of the primary issues is confidentiality. This can be affected by the level of security you have in place when you use a third-party server to store, view, and transfer confidential client information.

It would be prudent, for example, to ask yourself if client confidentiality is sufficiently protected if one accesses a client file on a cloud server through a public Wi-Fi service such as might be offered at Starbucks or an airport. Lawyers also need to ensure that their conduct is compliant with state bar jurisdictions that have issued opinions

about cloud services. Consult COPRAC Op. 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 the rules of professional conduct, for guidance on these issues.

One way to try to mitigate confidentiality concerns is to use encryption software for your data before placing it in the cloud. Another option is to use the "double security verification process" offered by services such as Dropbox, where once you enter your first password the service will instantly send a second one-time-only required password through text to the mobile phone you have registered with them.



WEBSITES – *Make sure your website complies with communication and advertising restrictions.*

A lawyer website providing information about availability for professional employment is a “communication” under CRPC 1-400(A) and an “advertisement” under B&PC sections 6157–6158.3. (See COPRAC Op. 2001-155.) It is therefore subject to the ethical prohibitions on false, misleading, or deceptive communications and other attorney advertising restrictions. A website is not, however, a “solicitation” under CRPC 1-400(B), even if it permits direct communication to and from a lawyer by email, because the communication is not delivered “in person” or by “telephone.” (See CRPC 1-400(B).) California lawyers should make sure they are familiar with state bar communication and advertising rules and guide their web designers accordingly.

The following are among the website features that should be considered:

Stock photos: “Website photos cannot mislead in any way,” states lawyer David Wolf, a member of the BASF Legal Ethics Committee whose practice focuses on employment law. Wolf points out that “a law firm showing an image of women and minorities on the firm’s career page when, in fact, the firm has no female or minority associates or partners might be considered a false and misleading communication, although potentially intended as an expression of the firm’s desire to attract women and minorities.” Likewise, a photo showing a group of professionals without a proper description on a solo practitioner’s home page could be considered misleading, depending on issues such as the makeup or nature of the firm and its resources.

Multijurisdiction compliance: Your website must comply with the applicable rules of professional conduct in every state in which you practice. Potential traps can include, among others, noncompliant testimonials, misleading domain names, noncompliant URL registration (not required in California), not listing all states where you practice, and not providing a person’s name with contact information as required in some state’s lawyer advertising rules.

Prior version retention: CRPC 1-400(F) states a member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Consider how your website will comply with this requirement. Some lawyers use SnagIt or screen shots to stay in compliance.

Contingency fees: Many states have requirements regarding statements about contingency fees. If your website states that “[a]ll injury cases are handled on a contingency fee basis...” you may want to be clear about whether that includes legal expenses. B&PC section 6147 sets forth statutory requirements for a valid California contingency fee contract. The state bar’s website also provides sample forms for such agreements. You should ensure that your website is not making assertions that run afoul of the statutory requirements or restrictions regarding such agreements. Making assertions that don’t comply with the statutory requirements could be viewed as misleading. What’s more, a client could try to take issue with a fee agreement whose terms vary from those advertised on the website.

Contact person: A law firm’s website, blog, or firm Facebook page is generally considered an “advertisement” under B&PC sections 6157 to 6158.3 and ABA Model Rule 7.2(c). Such communications should “include the name and office address of at least one lawyer or law firm responsible for its content.” (See, for example, CRPC 1-400, Std. (12); MRPC 7.2(c).)

Turnkey websites: Some lawyers have employed turnkey websites that utilize ghostwritten content. Such sites may be permissible if the communication complies with CRPC 1-400; nonetheless, a lawyer remains responsible for the content of the site. (See, for example, COPRAC Op. 2010-179 (a lawyer is responsible for website content regardless of who else was involved).) A number of jurisdictions have issued ethics opinions on the topic of ghostwriting, which can serve as helpful resources in considering this issue. (See, for example, Los Angeles Bar Association Professional Responsibility & Ethics Committee Ops. 483 and 502.)

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2010-2012 HIGHLIGHTS

2011 Minority-Owned Law Firm Client Service Award, presented by the California Minority Counsel Program

Trials

- Whistleblower & Retaliation
(Defense Verdict)
- Sexual Harassment & Retaliation with 3 Plaintiffs
(Defense Verdict)
- Age Discrimination
(Judgment as a Matter of Law)
- Disability Discrimination
(Nonsuit)
- Securities
(Dismissal at Trial)
- Non-compete
(Successfully opposed Requests for Temporary Restraining Order & Preliminary Injunction; Blocked attempt to raise to judgment in CA)

Appeals

- Age Discrimination
(Affirmed Judgment as a Matter of Law for Defendant, 8th Cir.)
- Age Discrimination
(Affirmed Nonsuit for Defendant)
- Disability Discrimination
(Affirmed Judgment for Defendant)
- Age Discrimination
(Affirmed Judgment for Defendant - Reeves v. MV Transportation, Inc., 188 Cal.App.4th 868 (2010))
- ERISA Litigation
(Affirmed Judgment for Defendant - Alvia v. AT&T, 377 Fed. Appx. 673 (8th Cir. 2010))

Class Actions

- Misclassification
(Petition for Class Certification Denied)

Summary Judgments

- Wrongful Termination with 8 Plaintiffs
- Racial Discrimination, Harassment & Retaliation
- Retaliatory Refusal to Rehire

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TRAP 12

SOCIAL MEDIA OUTLETS AND WEBSITES – *Consider investigating social media outlet and website use by your client, opposing parties, and witnesses.*

Given the prevalence of social media, lawyer competency could require investigating evidence that may reside on social media services, at least in some circumstances. Lawyer Claude Stern, cochair of Quinn Emanuel’s intellectual property litigation practice and past president of the Northern California Association of Business Trial Lawyers, tells a story where counsel defending a corporation discovered on the plaintiff firm’s website that a partner at that firm had, at one point, represented the defendant corporation in a related matter. Could a lawyer in a similar situation who never bothered to look at the

other counsel’s website be criticized for not investigating or uncovering such information and forgoing a potential disqualification opportunity? What about potentially incriminating information that might be on an opposing party’s Facebook page, or information that might go to the credibility of a party or witness? As technology evolves, the ability to review and consider such technologies from an evidentiary standpoint may help define the concept of “competence” in a given situation, as well as the potential standard of care.

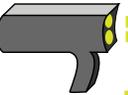
TRAP 13



SOCIAL MEDIA OUTLETS – *Consider any ethical limitations on investigation techniques.*

When a lawyer does investigate social media outlets he or she has to consider potential ethical limitations on how that investigation is carried out. Can you, for example, create online relationships with opposing parties already represented by counsel? (See CRPC 2-100.) If your family law client’s ex-wife is on Match.com, can you hire an investigator to go on Match.com to create a pretextual relationship in order to seek out damaging evidence on the wife? Such actions can implicate issues of deception, violation of the “no-contact” rule, and other ethical considerations. The San Diego Bar Association’s Ethics Committee issued a recent opinion stating that such activity could violate the no-contact rule if the party being “friended” is

known by the lawyer already to be represented by counsel. (See San Diego Bar Association Legal Ethics Committee Op. 2011-2.) The opinion also concludes that such conduct could be deceptive and, depending on the facts, violate B&PC section 6068(d), which requires a lawyer to use “means consistent with the truth,” as well as California case law, regarding a lawyer’s duty not to deceive. Some ethics committees have suggested, however, that merely “viewing” an opposing party’s or witnesses’ public website, or social media page, does not implicate such issues. You need to know where the line falls between permissible and impermissible investigation techniques when using online media.



TRAP 14

TWITTER – *Make sure your “tweet” complies with communication and advertising restrictions.*

A lawyer who “tweets” about obtaining a favorable case result could violate a prohibition against advertising specific case results because the 140-character limitation on a tweet makes it virtually impossible to include the required “advertisement” disclaimer. (See CRPC 1-400, Std. (5).) One possible solution: with client approval, provide a

compliant teaser tweet followed by a link to the news on your website, which has the proper disclosure statements. (See COPRAC Op. 2012-186 for guidance and five statement examples.) Also, consider putting a disclaimer in your Twitter profile.

TRAP 15



SOCIAL MEDIA OUTLETS – Consider advising your client on limitations related to the use of social media..

Lawyers also need to consider whether there are ethical obligations, such as competence, that require them to advise clients about how they potentially use social media. For example, the U.S. Securities and Exchange Commission (SEC) recently took action against the CEO of Netflix for posting key company information on Facebook only. (See Chris Isidore and David Goldman, “Netflix Faces SEC Probe Over Facebook Post,” CNN Money

Tech., December 2012). The CEO allegedly thought it was in the public domain, like a press release to all media. The SEC concluded otherwise. Even with 200,000 followers, the SEC ruled it was “selective disclosure” and not a publicly available communication. Would a lawyer who was consulted to provide advice in such a scenario have an obligation to advise the client that disclosure through certain media sources would not be compliant?

In summary, by familiarizing yourself with the ethical “speed traps” that can be involved in using the Internet, and spending time learning the “rules of the road,” you will go a long way to avoiding an ethical speeding ticket.

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Note

1. The majority of states have adopted some version of the ABA Model Rules of Professional Conduct (MRPC). The State Bar of California has recommended a number of revisions to California’s Rules of Professional Conduct (CRPC) seeking, in part, to bring California’s rules more in line with those of MRPC. Adoption of the proposed revisions is pending before the California Supreme Court. Notwithstanding any proposed revisions, MRPC may serve as guidelines in California, especially where CRPC is silent on an issue, and is therefore referenced at times in this article. (See CRPC 1-100(A); *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 37 Cal. 4th 839, 852.)



This article has been reviewed by The Bar Association of San Francisco Legal Ethics Committee, contains input from some of the Legal Ethics Committee members, and was approved for publication with the following disclaimer: Points of view or opinions expressed in this article are those of its two authors, Keller and Buchanan, and have not been formally adopted or endorsed by the State Bar of California’s Board of Trustees or the Bar Association of San Francisco, or

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