

From Facebook to Tinder: Ethics for Lawyers A Talk with Nicole Hyland

I. Facebook

- A. Myth of the privacy bubble
 - 1. Professional uses of social media include networking, advertising, and creating content related to their practice.
 - 2. Even when attorneys are using their social media accounts for private purposes, as long as that use is visible to others, there is no real expectation or protection of privacy.
 - 3. Attorneys may be disciplined for both private and professional use.
- B. Disparaging one's own client
 - 1. A Florida public defender was fired after she posted a photo of a client's leopard print underwear on her personal Facebook page. In the caption of the photo, she expressed dismay that her client's family thought it was, "proper attire for a trial." The judge in the case also declared a mistrial in the case.¹
 - 2. Here, the public defender's conduct undermined the attorney-client relationship, and may violate ethical rules of some jurisdictions regarding duty of confidentiality, duty of loyalty, zealous representation, and maintaining the integrity of the profession.
- C. Facebook posts and advertisement
 - 1. Whether a Facebook post about a recent win at trial constitutes attorney advertisement may depend on the jurisdiction. Different ethics committees have different opinions on when a Facebook post crosses the line into advertisement.
 - 2. The State Bar of California Standing Committee on Professional Responsibility and Conduct issued an opinion in 2012 analyzing five different generic statements a lawyer could post to their Facebook account and whether or not those statements were seen as advertising under the Rules of Professional Conduct of the State Bar of California Rule 1-400, which outlines rules for lawyer's advertisements. They concluded that any statement mentioning the availability to hire the lawyer or offering the lawyer's services was an advertisement.²
 - a. E.g. "I won." does not constitute advertisement.
 - b. E.g. "I won. Who's next? Give me a call for a free consult." constitutes advertisement.
- D. Facebook friend requests with a represented party
 - 1. In New York and other states, the no-contact rule prohibits a lawyer from communicating with a represented party.
 - 2. A lawyer who sends a Facebook friend request to a represented party would run afoul of this rule.
 - a. Two New Jersey defense lawyers instructed a paralegal to submit a friend request to

¹ Neil, Martha. Lawyer Puts Photo of Client's Leopard-Print Undies on Facebook; Murder Mistrial; loss of Job Result. ABA Journal, September 13, 2012. http://www.abajournal.com/news/article/lawyer_puts_photo_of_clients_leopard-print_undies_on_facebook_murder_mistri/

² The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2012-186 [http://ethics.calbar.ca.gov/portals/9/documents/opinions/cal%202012-186%20\(12-21-12\).pdf](http://ethics.calbar.ca.gov/portals/9/documents/opinions/cal%202012-186%20(12-21-12).pdf)



a personal injury plaintiff and gained access to materials that could be used to impeach him. The paralegal used her real name to send the friend request but did not disclose that she was employed by the two defense lawyers. An ethics grievance was filed with the District Ethics Committee who declined to docket it. The plaintiff's lawyer wrote to the state Office of Attorney Ethics (OAE) who investigated the matter and filed its own formal complaint. The OAE charged the two attorneys with multiple violations of the ethics rules, including the no-contact rule and conduct involving dishonesty, fraud, deceit, and misrepresentation.³

E. Facebook "friending" a judge

1. Ex parte communications with a judge
 - a. The ABA Model Code of Judicial Conduct generally prohibits a judge from initiating or permitting ex parte communications concerning a pending or impending matter (see Appendix A).
 - b. New York applies a similar rule with regard to ex parte communications with a judge (see Appendix B).
2. Sending a Facebook "friend" request
 - a. The New York Advisory Committee on Judicial Ethics opined that the "mere status of being a 'Facebook friend,' without more, is an insufficient basis to require recusal."⁴
 - b. The American Bar Association cautioned that judges may use social networking but should avoid contacts that would undermine their independence, integrity, or impartiality, or that would create an appearance of impropriety.⁵
3. Examples
 - a. A Florida judge presiding over a divorce proceeding was disqualified for sending a Facebook "friend" request to the wife litigant that the woman did not accept. The wife's lawyer filed a complaint alleging that the judge retaliated for the rejected request by saddling her with most of the marital debt and giving the husband an excessive alimony award.⁶
 - b. A North Carolina judge was publicly reprimanded for communicating ex parte with a lawyer who was in trial before the judge. The lawyer wrote on Facebook, "I hope I'm in my last day of trial." The judge answered, "You are in your last day of trial." In re Terry, No. 08-234 (N.C. Judicial Standards Comm. April 1, 2009).
4. Best practice in general for lawyers is to not send Facebook friend requests to judges or to de-friend if the lawyer is appearing before that judge.

³ Gallagher, Mary Pat. Ethics Case Over Facebook "Friending" Can Proceed. New Jersey Law Journal, February 3, 2015. <http://www.njlawjournal.com/id=1202716889095/Ethics-Case-Over-Facebook-Friending-Can-Proceed?slreturn=20150530174849>

⁴ New York Advisory Committee on Judicial Ethics Opinion 13-30 (May 28, 2013): <http://www.nycourts.gov/ip/judicialethics/opinions/13-39.htm>

⁵ American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 462, Judge's Use of Electronic Social Networking Media (February 21, 2013): http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf

⁶ Ward, Stephanie Francis. Judge removed from divorce case after sending one party a Facebook friend request. ABA Journal, January 29, 2014. http://www.abajournal.com/news/article/judge_removed_from_divorce_case_after_party_rebuffs_facebook_friend_request/

- F. Inadvertently creating an attorney-client relationship
 - 1. Dispensing legal advice on social media will create an attorney-client relationship.
 - 2. For example, commenting with advice on a specific legal question in a Facebook post may constitute legal advice. Even if the lawyer uses appropriate and adequate disclaimers, the disclaimer will not override the substance of the communication itself.

II. Twitter

- A. Advertising and Solicitation
 - 1. Tweets particularly can cross the lines into advertising and solicitation because it functions like a public forum. Twitter is more open than the other social media platforms.
 - 2. The 140-character limit on Twitter can be challenging for lawyers to include the required disclaimer requirements for advertisements.
 - 3. The disclaimer may be a link.
- B. Disclaimers
 - 1. On advertising: New York’s Rules of Professional Conduct Rule 7.1(f) requires that every advertising be labeled, “Attorney Advertising” on the first page or on the home page if a website (see Appendix C).
 - 2. On legal advice: as mentioned previously, an otherwise adequate disclaimer will not undo the creation of an attorney-client relationship via online communications.

III. LinkedIn

- A. Of all the social media platforms, LinkedIn is used most often for professional networking purposes.
- B. Attorney advertisements
 - 1. When a LinkedIn profile contains information such as biographical information, education, work history, areas of practice, skills and recommendations written by other users, it may not be advertising.
 - 2. If the profile includes specific skills or endorsements, it may be considered attorney advertising, triggering ethics rules.
- C. Endorsements feature
 - 1. LinkedIn allows other users to endorse a person for certain skills.
 - 2. Where this feature may cross legal ethics lines is if another person endorses an attorney for skills that the attorney may not have. For example, a LinkedIn user may endorse an attorney for litigation when the attorney is actually a transactional lawyer.
 - 3. The lawyer should remain vigilant of what is on their LinkedIn profile. She should make sure that she actually possesses all the “skills” for which she is endorsed and to delete any inaccurate endorsements. She may also opt-out of endorsements all together.
- D. Skills feature
 - 1. LinkedIn allows the user to choose from a number of skills to list on the user’s LinkedIn profile.
 - 2. New York County Lawyers Association Professional Ethics Committee issued an opinion that advises, “if any attorney chooses to include information such as practice areas, skills, endorsements or recommendations, the attorney must treat his or her

LinkedIn profile as attorney advertising and include appropriate disclaimers pursuant to Rule 7.1.”⁷

- a. The opinion advises lawyers to continuously monitor their “Skills” sections at reasonable intervals and remove any items that are incorrect or endorsements that are wrong or misleading. Using the “Skills” section is allowed so long as the lawyer does not use the word “specialist.”

⁷ New York County Lawyers Association Professional Ethics Committee Formal Opinion 748 (March 10, 2015): http://www.nycla.org/siteFiles/Publications/Publications1748_0.pdf



Appendix:

- A. ABA Model Code of Judicial Conduct Rule 2.9: Ex Parte Communications. (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter...”
http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_9expartecommunications.html
- B. New York’s Administrative Rules of the United Court System & Uniform Rules of the Trial Courts § 100.3(B)(6) provides in part, “A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceedings...”
<https://www.nycourts.gov/rules/chiefadmin/100.shtml>.
- C. New York Rules of Professional Conduct Rule 7.1: Advertising. (f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web site related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled “Attorney Advertising” on the first page, or on the home page in the case of a website. If the communication is in the form of a self-mailing brochure or postcard, the words “Attorney Advertising” shall appear therein. In the case of electronic mail, the subject line shall contain the notation “ATTORNEY ADVERTISING.” <http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf>