

GENERAL SESSION (ETHICS)

ARE YOU DOING YOUR ETHICAL DUE DILIGENCE

By: Crystal S. Carlisle, Esq.
The Crocker Law Firm, P.A.

Bio for Crystal S. Carlisle
Brocker Law Firm, P.A.

Crystal S. Carlisle is an associate in The Brocker Law Firm, P.A. She concentrates her practice in professional ethics, licensing and disciplinary matters, including representing various professionals in disciplinary matters before their respective licensing boards. Before becoming an associate with The Brocker Law Firm, Crystal practiced law in Michigan, predominantly representing plaintiffs in personal injury matters. She serves on the NCBA and WCBA Professionalism Committees.

THE BROCKER LAW FIRM, P.A.

Are You Doing Your
Ethical Due Diligence?



Crystal S. Carlisle
crystal@brockerlawfirm.com
919-424-6334

Ethics & Social Media

Social MEdia



www.jonathan1.com/press.com © John Atkinson, Wrong Words

Issues Presented by the Use of
Social Media

- Talking About Work on the Web
 - Asking for Advice
 - Venting on Social Media
 - How to instruct clients regarding social media.
- Protecting the Firm's Reputation

Talking About Work on the Web

- How to properly ask for advice in a public forum – i.e. ListServ or other discussion forums online.
 - Be careful regarding the level of detail provided.
 - Consider what information is “confidential.”

Know What Information is Confidential

- Confidential information under Rule 1.6 includes considerably more than just privileged communications between attorney and client, encompassing all “information acquired during the professional relationship”, regardless of the source.
- Even a client’s identity is confidential.
- Confidential information does not lose its confidential nature simply because it is a matter of public record.
- The duty of confidentiality continues after representation is terminated.

Use Hypotheticals

- ListSers and other discussion forums can be a great way to get advice.
- You can use them, just ensure to use a hypothetical scenario that masks the identity of the client and the case.

Social Media - Venting

- Consider a scenario where an attorney is upset regarding how things are going for him/her at trial. The lawyer posts the following on his Facebook page:
- "Judge Judy is clearly a moron or is getting paid off. Between her clearly biased rulings and those twelve imbeciles on the jury, it's no wonder my client couldn't get justice today."
- What Rules are implicated here?
 - Rule 8.2(a) prohibits making statements about the qualifications or integrity of a judge with reckless disregard as to their truth or falsity
 - Rule 8.4(d) prohibits conduct prejudicial to the administration of justice

Social Media - Venting

- Lawyer's initial post about the case, was read and "liked" by at least 25 people who are not part of the legal community.
- What Rule(s) does this implicate?
 - Rule 8.2 states "unrestrained and intemperate statements [by lawyers] tend to lessen public confidence in our legal system. Comment 4.

Social Media - Venting

- The posting attorney's Facebook friend, Larry Litigator, comments on the post stating, "Agreed, Judge Judy is clearly not qualified to be on the bench, and I think she's a drunk. My clients never get a fair shake in her courtroom."
- Barry Barrister comments, "I know trial work is frustrating, but losing is a part of the job for all of us.
- Polly Paralegal comments, "The jury system is broken, who wants to be judged by people that aren't clever enough to get out of jury duty."

Social Media - Venting

- In light of professionalism considerations, what should a legal professional say on Facebook, Twitter, etc. about professional frustrations and disappointments?

Dos and Don'ts

- Client matters make for good stories but resist the temptation to share!
- Don't talk about client matters or with clients about their matters on social media.
- An attorney should advise the client not to discuss their matters with others via social media.



How should you advise clients regarding their use of social media?

- It depends...
 - Be aware of Spoliation Issues
 - See Ethics Opinion 2014 FEO 5

Social Media:

Facebook and Spollation



- *Lester v. Allied Concrete Company*
- Advice to turn off or deactivate so the Attorney can deny the existence of such an account violates Rule 3.3 (a)(1) (false statements to a tribunal) and Rule 8.4(c) (conduct involving dishonesty or misrepresentation).
- Even a casual statement to a client to “clean up” their social media profiles, whether discovery is pending, is insufficient direction to a client.

2014 FEO 5

Adopted July 25, 2014

- Prior to filing suit, may a lawyer give a client advice about the legal implications of postings on social media websites and coach the client on what should and should not be shared on social media?
- Can a lawyer give the same advice after a lawsuit is filed?

2014 FEO 5

Adopted July 25, 2014

- Yes. Lawyers must provide competent and diligent representation to clients. Rule 1.1 and Rule 1.3. To the extent relevant and material to a client's legal matter, competent representation includes knowledge of social media and an understanding of how it will impact the client's case including the client's credibility. If a client's postings on social media might impact the client's legal matter, the lawyer must advise the client of the legal ramifications of existing postings, future postings, and third party comments. Advice should be given before and after the law suit is filed.

2014 FEO 5
Adopted July 25, 2014

- May a lawyer instruct a client to remove existing postings on social media?
- After a lawsuit is filed, may the lawyer give the client such advice?

2014 FEO 5
Adopted July 25, 2014

No, in general, relevant social media postings must be preserved.

The NC Bar agreed with the New York State Bar that a lawyer may advise a client about posting on a social media website and may review and discuss the client's posts, including what posts may be removed, if the lawyer complies with the rules and law on preservation and spoliation of evidence. NY State Bar, Ethics Op. 745 (2013). We agree.

2014 FEO 5
Adopted July 25, 2014

- May a lawyer instruct the client to change the security and privacy settings on social media pages to the highest level of restricted access?
- May the lawyer give the same advice after a lawsuit is filed?

2014 FEO 5

Adopted July 25, 2014

Yes, if such advice is not a violation of law or a court order. Advice should be given before and after the lawsuit is filed.

Protecting the Firm's Reputation

- A very unhappy client posts the following online...
- "I hired this bozo to handle a simple matter, and he completely dropped the ball. Either he doesn't know how to try a case, or he was in cahoots with the lawyer on the other side—I actually saw them at happy hour together just 2 days after he lost my case!! He wasn't worth the money I had to spend for ZERO results. Take your business elsewhere!"

Social Media:

Best Practices for Handling Online Reviews

- Request that happy clients post reviews. By encouraging positive reviews, they will outnumber any negative ones.
- Be proactive and communicate often with your clients to increase the number of happy clients.
- Regularly review all online client feedback.
- Respond to any negative client reviews by apologizing for their dissatisfaction and offering to personally speak with him/her to find a resolution to the matter.
- Stay away from reviews-for-hire.
- Never respond to a negative client review by breaching client confidentiality.



Protecting the Firm's Reputation

- Non-disparagement clauses –
Can an attorney include a non-disparagement clause such as the following in an engagement agreement?

Non-Disparagement Clause Example

- **Non-disparagement.** In consideration of the benefits of representation to be provided to Client pursuant to this Agreement, and the mutual benefit to the parties, Client and Lawyer agree that neither shall communicate to third parties, directly or indirectly, negative, critical or disparaging statements or comments, express or implied, about the other, their involvement in any matter in which Lawyer represents or has represented Client, the business or employment practices, reputation, or integrity of the other. For clarity, disparagement shall also include negative or critical statements about family members of Client and as to Lawyer, his law firm, its partners, officers, shareholders, managers, employees, customers and/or vendors. Direct or indirect communications restricted by this Paragraph shall include, but are not limited to, any oral or written communications with past, present or prospective clients of Lawyer, postings on any internet site which reviews and distributes information on the performance of individuals or businesses, and posting to semi-public web sites such as Facebook, LinkedIn and the like. In the event of violation of this Paragraph, the parties agree that actual damages from such communication(s) are difficult to assess. Therefore, as liquidated damages, but not as a penalty, the parties agree that liquidated damages shall be an amount equal to 3 times the amount paid in fees paid to Lawyer during the period of representation. This Paragraph shall not be construed to prevent or inhibit Client in any way from asserting a valid professional liability claim against Lawyer or reporting any violations of Lawyer's professional obligations to appropriate authorities or licensing boards, but any such claims or reports shall be communicated only to such persons or entities necessary to process such claims or reports.

Non-Disparagement Clauses

- Should Lawyer include this paragraph in his contract with Client?
- Is including this type of term in the initial contract different than including a non-disparagement clause in the settlement of a post-representation dispute with a client?
- Lawyers are ethically obligated not to disclose information acquired in the course of the professional relationship with a client, so a non-disclosure/non-disparagement clause does not impose significant additional burdens on the lawyer. Is a clause intended to benefit only the attorney inconsistent with the fiduciary relationship?
- Does the proposed contract clause adequately demonstrate that the lawyer is not attempting to prospectively limit liability or preclude the client from making a report to the State Bar? (See Rule 1.8(h) and RPC 84) See Rule 1.8h that prospective limitation on the liability is only permissible if the client is independently represented in making that agreement.

Non-Disparagement Clauses

- A detailed engagement letter including non-disparagement language is one way to avoid client-attorney conflicts.
- The State Bar has no opinions on the issue but any potential non-disparagement clause would have to exclude truthful reports to the State Bar or other authorities and could not limit a potential claim against the lawyer.

Social Media: Facebook and Friend Requests

What about sending a “friend” request to an opposing party to get information on them? To a third party? Directing another to send the request?



Social Media: Office Policies

Adopt a Social Media Policy at work applicable to all staff; reduce risk that someone will use the firm domain to engage in social media networking without authorization.

fears about privacy and confidentiality,



PS: Dear Boss, I know you are reading...
I'm so I would just like to say... STOP...
SPYING ON ME AND GET BACK TO WORK!

http://www.wangmao.net/this-cartoon-privacy_email.jpg

Advertising and Marketing: Ethics Rules

Advertising rules apply to ANY communication, electronic or otherwise, in which you are making your services known.




Advertising and Marketing: Rule 7.1

Rule 7.1 prohibits *false or misleading* communications - includes potentially misleading statements in advertisements.



Ten Dirty Words in Advertising



Top 10 Due Diligence Issues in Attorney Marketing

- 10. Keeping old or stale info on website
- 9. Getting “too creative”

Bully Lawyers



*Yeah, that's right, we got a settlement for a dog.
Imagine what we'll do for you.*



Injured and asked us for help. We arranged for
for our insurance to pay for a wheelchair cart.
Three weeks after being out of his leg this tough
little guy walked proudly.

Yeah, that's right, we got a settlement for a dog.
Imagine what we'll do for you.

Click on Wicket's picture to learn more!

Top 10 Due Diligence Issues in Attorney Marketing

- 10. Keeping old or stale info on website
- 9. Getting “too creative”
- 8. Posting videos without sufficiently screening content

Top 10 Due Diligence Issues in Attorney Marketing

- 10. Keeping old or stale info on website
- 9. Getting “too creative”
- 8. Posting videos without sufficiently screening content
- 7. Failing to register URL names as trade names with the State Bar

Advertising and Marketing: Ethics Rules and Domain Names



Advertising and Marketing: NC Registered Trade Names

- | | |
|--------------------------|------------------------------|
| ➤ Druginjury.com | ➤ lawyersforchrist.com |
| ➤ NCworkinjury.com | ➤ Attorneysyoucancounton.com |
| ➤ DruginjuryWatch.com | ➤ askthelawguy.com |
| ➤ Carolinainjurylaw.com | ➤ besmartlawyers.com |
| ➤ Lawfortheaged.com | ➤ dealerlawyer.com |
| ➤ MyNCWill.com | ➤ ABOGADOSNC.com |
| ➤ bankruptcy-answers.com | ➤ Ewillonline.com |
| ➤ Debtreliefattorney.com | ➤ E-Lawyer.com |
| ➤ billsbills.com | ➤ cyberlawattorney.com |

Top 10 Due Diligence Issues in Attorney Marketing

- 10. Keeping old or stale info on website
- 9. Getting “too creative”
- 8. Posting videos without sufficiently screening content
- 7. Failing to register URL names as trade names with the State Bar
- 6. Posting testimonials that violate the Rules

Advertising and Marketing: Testimonials

- Effective way to advertise
- NC permits attorneys to use testimonials on their advertising materials with certain conditions.
- Soft endorsements are ethical and no disclaimer language is required.
Examples: “The service was prompt.”
 “*They treated me with respect.*”
- Endorsements that refer to results, even generally, must include disclaimer language. *2012 FEO 1.*
Examples: “I was happy with the result.”
 “*They helped me settle my case.*”

Advertising and Marketing: Testimonials

- Disclaimer language:
“The testimonials listed are not all the feedback the firm has received. Each case is unique and must be evaluated on its individual merits. Prior results do not guarantee a similar outcome.”
- The testimonials may not include references to specific \$ amounts under any circumstances.
- You may also request that clients post testimonials or endorsements on third party sites, but if you can or do exercise control over the post, then the testimonial must comply with the above rules and may not be misleading under Rule 7.1. *2012 FEO 8.*

Top 10 Due Diligence Issues in Attorney Marketing

- 5. Lack of disclaimers

Use of Disclaimers on Websites

- To avoid creating unjustified expectations:
"Each case is different and must be evaluated on its individual merits. Prior results do not guarantee a similar outcome..."
- To avoid running afoul of UPL laws:
"The attorneys are licensed only in North Carolina..."
- To avoid creating an attorney client relationship:
"No attorney-client relationship is created by submitting your information through this website..."
- To avoid liability for contents:
"Nothing herein is intended as specific legal advice..."

Advertising and Marketing: Caveats

- You will be held responsible for a violation of the advertising rules in electronic communications if you exercise ANY kind of control over the communication.
- Lawyers have a higher obligation to maintain current and accurate information on websites. Update your website regularly and invest time in it.
- If you want to advertise via the internet, and your proposed ad/website is clever, eye-catching, novel, effective, or just plain cute, run it by the Bar first.
- The State Bar will not review entire websites for compliance issues; you may submit a few web pages.

Top 10 Due Diligence Issues in Attorney Marketing

- 5. Lack of disclaimers
- 4. Failing to monitor social media posts

Social Media: Risks



- Loss of control of content
- Running afoul of the advertising Rules
- Blurring the lines between professional and personal
- Inadvertently creating an attorney-client relationship

Top 10 Due Diligence Issues in Attorney Marketing

- 5. Lack of disclaimers
- 4. Failing to monitor social media posts
- 3. Disclosing client info without consent

Social Media:

Inadvertent Attorney-Client Relationship

Don't provide specific online advice.

- You have not done conflicts checks.
- You may inadvertently engage in UPL.
- You have not obtained enough information to give competent advice.
- Include disclaimers on blog/website.
- Distinguish online advice from online information.

Top 10 Due Diligence Issues in Attorney Marketing

- 5. Lack of disclaimers
- 4. Failing to monitor social media posts
- 3. Disclosing client info without consent
- 2. Failing to monitor your connections on LinkedIn

Social Media:

"Friending" and "Linking"



Think before you "Friend" or "Link"

- Opposing party, counsel or a judge
- Ex parte communication
- Conflict of Interest Issues



Top 10 Due Diligence Issues in Attorney Marketing

- 5. Lack of disclaimers
- 4. Failing to monitor social media posts
- 3. Disclosing client info without consent
- 2. Failing to monitor your connections on LinkedIn
- 1. Not knowing the current Rules on advertising

Trust Account Due Diligence: Top 10 tips for Safeguarding your Trust Account

- 10. Always be vigilant.
- 9. Follow sound accounting principles.
- 8. Although permitted, non-lawyers should not be signatories.
- 7. Monthly and Quarterly required reconciliations.
- 6. Implement a cross-checking system.



Trust Account Due Diligence: Top 10 Tips for Safeguarding your Trust Account

- 5. An attorney needs to review reconciliations; spot check the source documents.
- 4. Consider Positive Pay.
- 3. Take funds remaining in trust account only if the funds can be conclusively documented as the lawyer's money.
- 2. Have a process in place to determine which funds should be escheated.
- 1. Know the Rules



Recent Disciplinary Developments



The State Bar now takes the position if you supervise non-lawyers you must review reconciliations and spot check source documents although this is not in the Rules of Professional Conduct.

What to do if you discover a mistake in your trust account

- Correct it
- Document how it happened
- Implement measures to help ensure that a similar mistake does not happen again
- You are not required to report it to the State Bar



Responding to or Defending a Grievance before the North Carolina State Bar

No attorney ever wants to get a complaint from the State Bar. If you receive a letter from the State Bar on one of the local bars regarding a grievance, you may be concerned about what to do next. What are the procedures and what are the possible results?

You may be trying to decide whether or not to respond, and what to do if you are not responding or if you are responding and defending a grievance. Our firm can help you understand the process. But you are responsible for responding to and defending a grievance. If you are not responding, the grievance will be resolved by the State Bar. If you are responding, the grievance will be resolved by the State Bar. If you are not responding, the grievance will be resolved by the State Bar. If you are responding, the grievance will be resolved by the State Bar.

Grievance
 your complaint
 our best interest
 Ethics

"I thank you again for all the help you have given me in my matter with the National Commission on Ethics and Governmental Transparency." — J. J. Clark, Esq., J. J. Clark & Associates, P.A.
