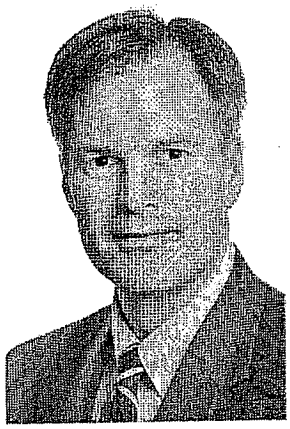
Dane S. Ciolino

Dane S. Ciolino serves as the Alvin R. Christovich Distinguished Professor of Law at Loyola University New Orleans College of Law. His current scholarly and teaching interests at Loyola include Professional Responsibility, Evidence, Advocacy and Criminal Law.



Professor Ciolino graduated *cum laude* from Rhodes College in 1985, and *magna cum laude* from Tulane Law School in 1988, where he was inducted into Order of the Coif and selected as Editor in Chief of the *Tulane Law Review*. After graduation, he clerked for the United States District Court, Eastern District of Louisiana, and practiced law at Cravath, Swaine & Moore LLP in New York City, and Stone Pigman Walther Wittmann LLC, in New Orleans.

He has served as reporter to the Louisiana State Bar Association Ethics 2000 Committee, as chairperson of a Louisiana Attorney Disciplinary Board Hearing Committee, as Chair of the Lawyer Disciplinary Committee of the United States District Court for the Eastern District of Louisiana and as a member of various Louisiana State Bar Association committees including the Professionalism Committee, the Lawyer & Judicial Codes of Conduct Committee, and the Ethics Advisory Service Committee. His weblog, Louisiana Legal Ethics, is located at www.lalegalethics.org.

Professor Ciolino engages in a limited law practice and in law-related consulting, principally in the areas of legal ethics, lawyer discipline, judicial discipline and federal criminal law. He represents clients in disciplinary matters before the Louisiana Supreme Court, the Louisiana Attorney Disciplinary Board and the Louisiana Judiciary Commission. He also handles legal malpractice cases, lawyer disqualification motions and lawyer fee disputes. He also consults and serves as an expert witness in the fields of legal ethics, legal fees and the standards of conduct governing lawyers.

Professor Ciolino's book, *Louisiana Legal Ethics: Standards and Commentary* (2013), is available for purchase at www.lalegalethics.org and at Amazon.com.

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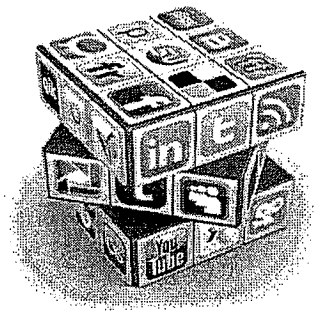
May a Lawyer Advise a Client to Take Down Harmful Facebook Posts?

Mike
Boyd



In Formal Ethics Opinion 5, (July 25, 2014), the North Carolina State Bar addressed a lawyer's obligation to advise a civil client about social media use. It concludes that a lawyer must provide advice about information on social media if the postings are relevant to the client's representation. Further, it permits a lawyer to advise a client to take down information on social media—but only if removal does not amount to spoliation of evidence and is not otherwise illegal. The opinion answers the following principal questions.

First, may a lawyer advise a client about the legal implications of the social media postings and coach the client on what should and should not be shared on social media? Model Rules of Professional Conduct 1.1 and 1.3, which require a lawyer to provide competent and diligent representation, suggest that a lawyer must have knowledge of social media and an understanding of how it may impact the client's case. As a result, a lawyer should advise the lawyer's client, both before and after the suit is filed, of the legal ramifications of existing posts, future posts, and third-party comments.

Second, may a lawyer instruct a client to remove postings on social media either before or after the filing of a suit? Model Rule 1.2(d) prohibits a lawyer from counseling or assisting a client to engage in conduct that the lawyer knows is criminal or fraudulent. Considering this, a lawyer must consult the law of spoliation and obstruction of justice before counseling a client to take down social media posts. If removal of posts does not constitute spoliation and is not otherwise illegal, the lawyer may instruct the client to remove existing posts. When there is potential that removal of the posts would constitute spoliation, the lawyer must advise the client to preserve the posts on a memory device, and the lawyer may take possession of the material to ensure its preservation.

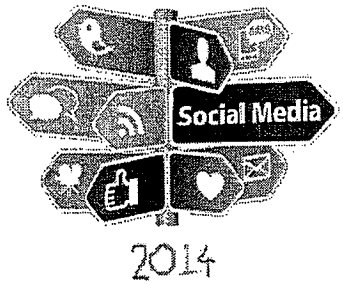
Third, may a lawyer instruct a client to change security and privacy settings on social media pages to the highest level of restricted access? The opinion concludes that, if such advice is not in violation of a law or court order, the lawyer may instruct the client to change these settings both before and after the suit is filed.

Louisiana Rules of Professional Conduct 1.1, 1.3, and 1.2(d) are substantially similar to the corresponding ABA Model Rules. As a result, this North Carolina opinion should provide helpful guidance to lawyers in Louisiana.

"Facebook Friends, This Lawyer is The Best"

lalegalethics.org/lawyers-best/

Dane S. Ciolino



If your client posts a favorable review or comment about you on a social media platform that you control, must you take it down if it does not comply with the Louisiana Rules of Professional Conduct? A recent Pennsylvania Bar Association formal opinion addressed this and other issues facing lawyers using social media. *See* Pa. Formal Op. 2014-300 (2014).

Although social media sites like Facebook, LinkedIn, and Twitter are exempt from the filing and review process applicable to most Louisiana advertisements, *see* Rule 7.8(g), a lawyer's postings still must comply with the Louisiana Rules of Professional Conduct. Among others, advertising regulations in Rules 7.2, 7.6(b), and 7.9 are fully applicable. As a result, a lawyer's social media site must include certain required information such as the name of at least one responsible lawyer; the location of all jurisdictions in which the lawyer is licensed to practice; the location of the lawyer's office; and any intent to refer client matters out to another law firm. *See* Rules 7.2, 7.6 and 7.9(c). Moreover, a lawyer's site cannot include any "false" or "misleading" information, *see* Rule 7.2(c)(1)(C), cannot compare the lawyer's services with other lawyers' services (unless the comparison can be factually substantiated), *see* Rule 7.2(c)(1)(G); cannot promise results, and cannot include undisclosed paid endorsements, *see* Rule 7.2(c)(1). Furthermore, the Rules prohibit a lawyer from using the words "specialize," "specialist," "certified," or "expert." *See* Rule 7.2(c)(5).

But what if the *you* don't post the questionable information, but *someone else* does? Many social and professional networking sites allow the general public to review, rate or otherwise comment on a lawyer's abilities. For example, LinkedIn allows other members to "endorse" a lawyer for having certain skills. Avvo allows the public to rate a lawyer on a scale of 1-5 for "experience," "industry recognition," and "professional conduct." A lawyer must make reasonable efforts to assure that any such posts by others comply with the Louisiana Rules of Professional Conduct. According to the Pennsylvania Bar Association:

> *Although an attorney is not responsible for the content that other persons, who are not agents of the attorney, post on the attorney's social networking websites, an attorney (1) should monitor his or her social networking websites, (2) has a duty to verify the accuracy of any information posted, and (3) has a duty to remove or correct any inaccurate endorsements. . . . This obligation exists regardless of whether the information was posted by the attorney, by a client, or by a third party. In addition, an attorney may be obligated to remove endorsements or other postings posted on sites that the attorney controls that refer to skills or expertise that the attorney does not possess.*

The North Carolina State Bar Association has made similar recommendations. *See* N.C. Formal Op. 2012-08 (Oct. 26, 2102).

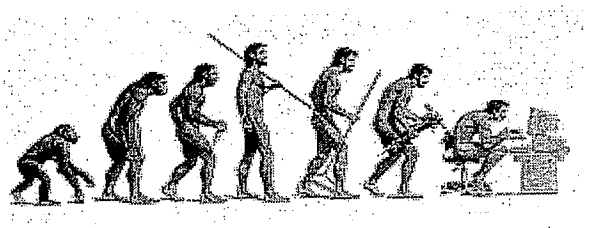
Louisiana lawyers with professional social media sites should heed this advice. Even though your client may think you're "the best," it's a comparison that cannot be factually substantiated. As a result, it likely violates the rules. Although you may like it and your Facebook friends may "Like" it even more, QDC

may not. Take it down.

Remaining Competent in Lawyering's Digital Age

lalegalethics.org/remaining-competent-lawyerings-digital-age/

Dane S. Ciolino



Last year, the ABA adopted an amendment to ABA Model Rule of Professional Responsibility 1.1, comment 8, providing that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ." *See* ABA, Commission on Ethics 20/20 Resolution 105A (August 2012). This was the first effort by the ABA to address in the Model Rules the importance of technological competence in providing legal services.

Andrew Perlman, a law professor at Suffolk University Law School and a member of the new ABA Commission on the Future of Legal Services, has written a brief piece in the ABA's *Professional Lawyer* in which he summarizes the skills and knowledge that modern lawyers need to remain competent in the digital age. In his article, entitled *The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence*, The Professional Lawyer, Vol. 22, No. 4 (2014), Prof. Perlman discusses the following five essential technological competencies.

1. Cybersecurity

Lawyers must understand the risks to confidentiality associated with storing information in the cloud and with using the internet for communication. Among other things, lawyers should know the benefits of using strong passwords; they should understand and consider using encryption; they should understand and consider using multi-factor authentication; they should know how to avoid phishing and other Internet scams; and, they should understand the nature of information stored in file metadata.

2. E-Discovery

Lawyers must understand the that they need to investigate and preserve electronically stored information (ESI) for purposes of discovery. They should understand that ESI includes not only email communication, electronic document files and data, but also information posted by parties on social media sites like Facebook, LinkedIn and others. Finally, lawyers should educate themselves sufficiently to know what they don't know so that they can engage assistance in such areas from ESI professionals.

3. Internet Fact Investigations

Lawyers must understand that using traditional means to investigate and discover information relating to their matters is no longer sufficient. Now, lawyers should investigate jurors, opponents, and clients through using Google and other search engines, and through searching popular social media sites. What lawyers don't know about what's on the Internet can hurt their clients and help their opponents. Of course, lawyers need to be mindful about their ethical obligations in this regard, including the obligation to avoid spoliation of evidence, and to avoid communicating with represented persons.

4. Internet Marketing

Lawyers must understand the disciplinary rules governing firm websites, the use of social media, posting on blogs, and more sophisticated marketing techniques such as key-word advertising, pay-per-lead and pay-per-click advertising. They also need to appreciate the risk of engaging in the unauthorized practice of law through using Internet advertising, and the risk of inadvertently forming a lawyer-client relationship.

5. Leveraging Technology

Lawyers must leverage "New Law," that is, "technology and other innovations that facilitate the delivery of legal services in entirely new ways." For example, lawyers should understand automated document assembly, legal analytics, virtual legal services, and cloud-based law practice management using services such as Clio and Rocket Matter.

Conclusion

Prof. Perlman concludes with this cogent thought:

> *The seemingly minor change to a Comment to Rule 1.1 captures an important shift in thinking about competent twenty-first century lawyering. Technology is playing an ever more important role, and lawyers who fail to keep abreast of new developments face a heightened risk of discipline or malpractice as well as formidable new challenges in an increasingly crowded and competitive legal marketplace.*

LADB Hearing Committee Recommends Permanent Disbarment of Former Congressman William J. Jefferson

Dane S. Ciolino

November 26, 2014

On November 14, 2014, Louisiana Attorney Disciplinary Board Hearing Committee No. 22 recommended that the Louisiana Supreme Court permanently disbar former congressman William J. Jefferson. *See In re William J. Jefferson*, LADB No. 11-DB-116, Recommendation of Hearing Committee No. 22 (filed Nov. 14, 2014). Mr. Jefferson was convicted in federal court on August 5, 2009 on felony corruption charges, and sentenced to 13 years in prison. His crimes arose out of using his official position as a congressman to facilitate business deals in Africa for personal gain. Mr. Jefferson submitted a memorandum to the committee in which he argued that eight mitigating factors justified a sanction less than permanent disbarment. The committee was not persuaded:

> *[Mr. Jefferson's] failure to adhere to his own personal accomplishments, maintain his reputation, the damage occasioned upon his constituents, as well as our profession, has resulted in immeasurable damage, destruction, and division among us all.*

How Busy is the Office of Disciplinary Counsel?

Dane S. Ciolino

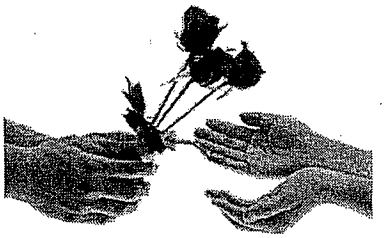
December 22, 2014

In 2014 to date, Louisiana lawyers were the subject of more than 2,900 complaints filed with the Louisiana Attorney Disciplinary Board's Office of Disciplinary Counsel. As of this week, ODC has received 2,922 complaints, mostly from disgruntled clients. Of these, it opened 1,479 (51%) files for further investigation. (This investigation process typically involves, at a minimum, sending the complaint to the lawyer and requesting a written response.) What is interesting is that 42% of the complaints were summarily dismissed because they did not allege a prima facie violation of the Rules of Professional Conduct, or because they were not within ODC's jurisdiction (for example, because the complaints were lodged against judges). As to the remainder, ODC referred 285 to the LSBA to mediate a lawyer-client dispute (often, a fee dispute), sent 5 to diversion, and conducted 203 lawyer trust account reviews. Pretty busy.

Sex With Clients is Verboten. What About Sex with Former Clients and Prospective Clients?

Mike Boyd

December 23, 2014



On December 9, 2014, the Supreme Court of Louisiana considered the propriety of sexual relationships involving a lawyer and various present, current and former clients. *See In re Randy J. Fuerst*, No. 2014-B-0647 (La. Dec. 9, 2014). The court held that lawyers are *not* prohibited from engaging in consensual sexual relationships with *former* and *prospective* clients—but cannot engage in such relationships with *present* clients.

Lake Charles lawyer Randy J. Fuerst engaged in multiple consensual sexual relationships with women who had retained him to handle their divorces. The court found that all but one of the relationships were permissible because they did not occur during the existence of an attorney-client relationship. Said the court:

> *[T]he ODC ... argues that the ethical prohibitions against attorney-client sexual relationships should be extended to former clients, and should likewise apply in instances in which the lawyer has been consulted by a prospective client but no attorney-client relationship is ultimately formed. We find no support for this position in the Rules of Professional Conduct.*

The court did find that one of the relationships, which took place during the mandatory six-month waiting period to confirm the woman's divorce, violated Rules 1.7(a)(2) and 8.4(d) because the woman was technically still Fuerst's client. The court suspended Mr. Fuerst for six months, with all but three months deferred. Two judges concurred and noted that they would have found Fuerst's relationships with his former clients to be in violation of the Rules of Professional Conduct as well.

The takeaway? Although presented with the opportunity to do so, the court in *Fuerst* refused to extend the prohibition against lawyer-client sexual relationships to former clients and prospective clients.[1]

1. Note that in 2004, the court followed the recommendation of the LSBA Ethics 2000 Committee and declined to adopt the ABA's per se prohibition against lawyer-client sexual relationships. That rule, Model Rule 1.8(j), provides as follows:

> *(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.*

Those members of the LSBA Ethics 2000 Committee who voted against adopting Rule 1.8(j) did so for the following reasons: (1) they felt that the court's existing case law adequately addresses the complex and variable issues associated with "unethical" sexual conduct; (2) they felt that a bright-line rule could serve as a safe harbor sheltering lawyers engaged in sexual conduct that is inappropriate, but that comports with the letter of Rule 1.8(j); and, (3) they felt that there may be situations in which sexual conduct should not be treated as per se sanctionable.

On the other hand, those committee members who voted for adopting ABA Model Rule 1.8(j) did so for the following reasons: (1) they felt that a refusal to adopt Rule 1.8(j) could be misconstrued by the bar and the public as indicating that Louisiana has opted for a more permissive attitude with respect to sexual relations with clients, when that is clearly not the case; (2) they felt that the proposed rule is not inconsistent with existing jurisprudence in Louisiana; and (3) they felt that even if a sexual relationship predates the representation–and thus is not covered by the proposed rule–the lawyer is nonetheless constrained by other rules, including Rule 1.7(b), which the court already has interpreted to prohibit sexual misconduct adversely affecting the client. ↩

Lawyers Have a First Amendment Right to Advertise "Past Results"

Dane S. Ciolino

December 29, 2014

Yet another federal court has struck down a ban on advertisements containing information about "past results." *See Rubenstein v. The Fla. Bar*, No. 14-CIV-20786-BLOOM/VALLE (S.D. Fla. Dec. 8, 2014). The Florida rules of professional conduct provide that "[a] lawyer may not engage in deceptive or inherently misleading advertising . . . . Deceptive or inherently misleading advertisements include . . . . *references to past results unless such information is objectively verifiable . . . .*" *See* Rule 4-7.13, Rules Reg. Fla. Bar (2013). In adopting the prohibition, the Florida bar was purportedly attempting: "to protect the public from misleading or deceptive attorney advertising; to promote attorney advertising that is positively informative to potential clients; and to prevent attorney advertising that contributes to disrespect for the legal system and thereby degrades the administration of justice."

The court was not persuaded: "The Bar has failed to demonstrate that its restrictions advance the governmental interests at play. For that reason alone, the Rules regarding the use of past results in attorney advertising as interpreted by the Guidelines are unconstitutional."[1] But the court when further:

> *The Guidelines amount to a blanket restriction on the use of past results in attorney advertising on indoor and outdoor display, television and radio media. The Bar has not demonstrated that the prohibition's breadth was necessary to achieve the interest advanced, or that lesser restrictions – e.g., including a disclaimer, or required language – would not have been sufficient. The Bar has failed to meet its burden under this prong as well.*

The United States Fifth Circuit Court of Appeals in 2011 struck down Louisiana's nearly-identical advertising restriction (Louisiana Rule 7.2(c)(1)(D)). *See Public Citizen Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011).

1. The court noted that the Bar's evidence actually helped the challengers: "Rather than proving that its rules on the use of past results are necessary to protect consumers, the record evidence accumulated by the Bar actually undermines its position. The data collected between 1995 and 1997 toward the 1997 Task Force Report – to the extent probative – showed that consumers wanted more 'useful' and 'factual' information to help them chose an attorney. The supporting survey results explain that large majorities of consumers were interested in attorney 'qualifications,' 'experience,' 'competence' and 'professional record (i.e., wins/losses).' They also revealed that negative attitudes about legal system and lawyers consistently declined over the relevant survey period, despite the increase in quantity and breadth of attorney advertising." ↩

Prosecutor Wraps Herself in Wrong Flag

Dane S. Ciolino

December 30, 2014

It's not uncommon for a prosecutor to metaphorically wrap herself in the flag, but the CSA Battle Flag is a bad choice. In *Idaho v. Kirk*, No. 41236 (Dec. 19, 2014), the Idaho Court of Appeals found that the state's lawyer committed prosecutorial misconduct in her closing argument by quoting *Dixie*, a song the court called "an anthem of the Confederacy." Said the prosecutor:

> *Ladies and gentlemen, when I was a kid we used to like to sing songs a lot. I always think of this one song. Some people know it. It's the Dixie song. Right? Oh, I wish I was in the land of cotton. Good times not forgotten. Look away. Look away. Look away. And isn't that really what you've kind of been asked to do? Look away from the two eyewitnesses. Look away from the two victims. Look away from the nurse in her medical opinion. Look away. Look away. Look away.*

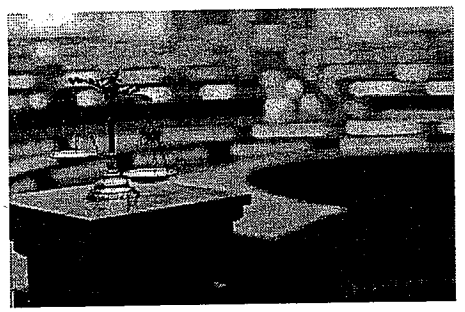
See id. at p. 3. The state argued that "the prosecutor acted with innocent intent, presenting 'simply a personal story of singing in her youth' to make a legitimate point that Kirk's closing argument asked the jury to 'look away' from the prosecution's evidence." The problem, however, was that Kirk was an African-American man charged with committing sex crimes against two white girls:

> *While there may be other cases where a prosecutorial remark with racial overtones would be harmless error, given the nature of this particular case, and considering the totality of the evidence and trial proceedings, we conclude that Kirk has demonstrated a reasonable possibility (or likelihood) that the error affected the outcome of the trial. Kirk is therefore entitled to a new trial.*

"Of Counsel" Lawyers Are Associated With Law Firm for Purposes of Conflicts

Mike Boyd

December 31, 2014



A law firm can designate one or more lawyers as having an "Of Counsel" relationship with the firm. While the use of the term can vary from firm to firm, the "core characteristic properly denoted by the title 'counsel' is . . . a 'close, regular, personal relationship'; but a relationship which is neither that of a partner (or its equivalent, a principal of a professional corporation), with the shared liability and/or managerial responsibility implied by that term; nor, on the other hand, the status ordinarily conveyed by the term 'associate,' which is to say a junior non-partner lawyer, regularly employed by the firm." *See* ABA Formal Op. 90-357 (May 10, 1990). The ABA has opined that "of counsel" relationships do not include "a relationship involving only an individual case," a relationship of "forwarder or receiver of legal business," a relationship "involving only occasional collaborative efforts among otherwise unrelated lawyers or firms," and the relationship of "an outside consultant." However, the ABA has noted that there is no prohibition against a law firm being "of counsel" to another law firm.

The Louisiana Supreme Court recently held that a lawyer who is associated with a law firm in an "Of Counsel" capacity is treated like any other lawyer associated with the firm for purposes of imputation of conflicts of interest. In In re Randy J. Fuerst, No. 2014-B-0647 (La. Dec. 9, 2014), the court stated that "[a] lawyer who is 'Of Counsel' to a law firm is considered to be a member of the firm for purposes of analyzing imputed disqualification questions." Therefore, the Louisiana Rules of Professional Conduct generally require that a lawyer loosely associated with a firm in an "of counsel" capacity be treated no differently from any other firm lawyer.

Top Ten National Legal Ethics Stories of 2014

lalegalethics.org/top-ten-national-legal-ethics-stories-2014/

Dane S. Ciolino

In its annual post, *Legal Ethics Forum* has collected the top ten legal ethics stories of 2014. Among the ten are the following:

- Waivers of ineffective assistance of counsel held unethical.
- DAs in Ferguson and Garner homicides under scrutiny.
- Judicial nominee blocked because of past controversial client.
- Bar passage rates take "ominous" dip.
- California rejects adoption of ABA Model Rules of Professional Conduct.
- In-house lawyers at GM scrutinized for roles in non-recall.
- South Carolina declares that Legal Zoom not engaged in unauthorized practice of law.
- Torture report questions role of lawyers.

When Is "Blogging" By a Lawyer Subject to the Rules of Professional Conduct?

lalegalethics.org/blogging-lawyer-subject-rules-professional-conduct/

Mike Boyd

Under what circumstances is "blogging" by a lawyer subject to the requirements and restrictions of the Louisiana Rules of Professional Conduct? A recent formal opinion by the California State Bar Standing Committee on Professional Responsibility and Conduct addressed this issue. *See* State Bar of California, Formal Opinion Interim No. 12-0006. A "blog" is "a website containing a writer's own experiences, observations, or opinions, often with images and links to other websites." *See* Dictionary.com. As blogging becomes more common, it is important for lawyers to recognize their professional responsibilities related to this activity. While most lawyer blogs are created to enhance the authoring lawyer's professional reputation and visibility, not all are subject to the Rules of Professional Conduct according to the California formal opinion:

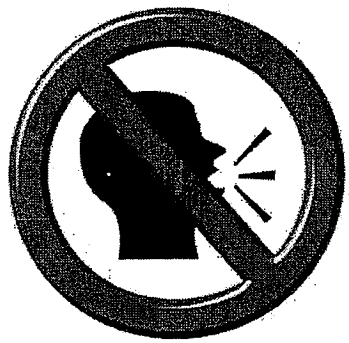
> *Attorney blogs are subject to the requirements and restrictions of [the Rules of Professional Conduct] if the blog expresses the attorney's availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly through a description of the attorney's legal practices and successes in such a manner that the attorney's availability for professional employment is evident. A blog that is a part of an attorney's or law firm's professional website is subject to the rules regulating attorney advertising to the same extent as the website of which it is a part. A non-legal blog by an attorney is not necessarily subject to the rules or statutes regulating attorney advertising because it includes a hyperlink to the attorney's professional web page.*

A Louisiana lawyer who uses a blog to offer the lawyer's services or as a component of a firm website is subject to Louisiana Rule 7.6 regarding computer-accessed communications. Computer-accessed communications include "information regarding a lawyer's or law firm's services that is read, viewed, or heard directly through the use of a computer." Under this rule, web pages and blogs promoting legal services: (1) must disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law; (2) must disclose one or more bona fide office locations or, in the absence of a bona fide office, the city or town of the lawyer's primary registration statement address; and (3) are considered to be information provided upon request and, therefore, are otherwise governed by the requirements of Louisiana Rule 7.9.

Should a Lawyer Who Uses Racially Offensive Language be Subject to Discipline?

Dane S.
Ciolino

January 26, 2015



At least two complaints lodged with the Louisiana Office of Disciplinary over the last few months allege misconduct arising out of lawyers' use of the "N-word" or some variation of it. In one complaint, a lawyer used the "N-word" in discussing the racial composition of juries in Orleans Parish. *See, e.g.*, Complaint to Bar Association Prompts Negative Campaign Attacks in North Shore DA Race, New Orleans Times-Picayune (Oct. 24, 2014). In another, a lawyer used the word "negro" to refer to an African-American at a meeting. While the ODC has yet to file formal charges in either case, the complaints highlight the difficulties associated with attempting to police lawyer speech.

In the mid-1990s, various ABA committees proposed and withdrew amendments to ABA Model Rule 8.4 to address the issue. For example, in 1994, the ABA Standing Committee on Ethics and Professional Responsibility proposed and later withdrew an amendment prohibiting a lawyer from manifesting "by words or conduct, in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status." *See* ABA Center for Professional Responsibility, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct 1982-2013* at 855 (2013). In the same year, the ABA Young Lawyers Division proposed and later withdrew an amendment prohibiting a lawyer from committing "a discriminatory act prohibited by law or to harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or marital status, where the act of discrimination or harassment is committed in connection with the lawyer's professional activities." *See id.* at 854. Finally, in 1998, The ABA Criminal Justice Section proposed and later withdrew an amendment prohibiting a lawyer from committing in the course of representation "any verbal or physical discriminatory act, on account of race, ethnicity or gender, if intended to abuse litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, or to gain a tactical advantage." *See id.* at 857.

Ultimately, the ABA in 1998 addressed offensive lawyer "words or conduct" manifesting "bias or prejudice" through amending the comments to Model Rule 8.4 rather than the black-letter rule. That comment currently provides as follows:

> *[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.*

ABA Model Rule 8.4, cmt. 3.

Some states have incorporated language from either the failed ABA proposals or the current comment into their versions of Rule 8.4. Minnesota, for example, prohibits a lawyer from harassing "a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status in connection with the

lawyer's professional activities." *See* Mn. Rules of Prof'l Cond. R. 8.4(g); *In re Woroby*, 779 N.W.2d 825 (Min. 2010) (finding misconduct arising out of harassment on the basis of religion). Indiana prohibits a lawyer from engaging "in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors" but notes that "[l]egitimate advocacy respecting the foregoing factors does not violate this subsection," nor does "[a] trial judge's finding that preemptory challenges were exercised on a discriminatory basis . . . ." *See* Ind. Rules of Prof'l Cond. R. 8.4(g); *In re Barker*, 55S00-1008-DI-429 (Ind. Sep. 6, 2013) (suspending lawyer for 30 days for calling a party "an illegal alien"). Colorado, Florida, Ohio, Michigan, and Rhode Island have likewise adopted similar rules. *See* Co. Rules of Prof'l Cond. R. 8.4(g); Fl. Rules of Prof'l Cond. R. 4-8.4(d); Ohio Rules of Prof'l Cond. R. 8.4(g); Mich. Rules of Prof'l Cond. R. 6.5(a); R.I. Rules of Prof'l Cond. R. 8.4(d).

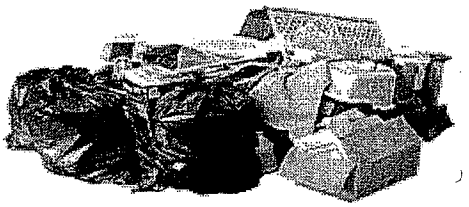
Louisiana has no disciplinary rule, comment or other authority prohibiting the use of racially-offense language by a lawyer. Nor is it necessary. Comment 3 to ABA Model Rule 8.4 is a vacuous, feel-good statement that simply sets forth the truism that offensive words or conduct will violate Model Rule 8.4(d) "when such actions are prejudicial to the administration of justice." Of course. Any words or conduct that are "prejudicial to the administration of justice" violate the model rule and would also violate Louisiana Rule 8.4(d).[1] Enough said.

1. A racial comment that likely would violate Louisiana Rule 8.4(d) would be a remark about "race, religion, color or national origin" made by a lawyer within earshot of a jury causing a mandatory mistrial under Louisiana Code of Criminal Procedure article 770. ↩

Should Louisiana's Labyrinthian Lawyer Advertising Rules be Junked?

Dane S.
Ciolino

January 27, 2015



In 2008, the Louisiana Supreme Court adopted some of the most complex and indecipherable advertising rules in the country. Have these rules, which were the subject of costly federal litigation ultimately funded by us (Louisiana lawyers), proven to be worth it? To rip off an old campaign speech, it might be well if we would ask ourselves this: Are we better off now than we were seven years ago? Are clients better informed? Are lawyers advertisements "better"? Are lawyers more respected?

The ABA Commission on the Future of Legal Services is now critically evaluating the manner in which legal services are delivered in the United States. In response to the Commission's "Issues Paper" calling for suggestions for improvement, Avvo.com—a leading online legal services marketplace—submitted some remarkably cogent thoughts. In a December 2014 memorandum, Avvo argues that the American legal profession is not effectively delivering legal services for two fundamental reasons, "one stemming from a lack of lawyer training and one stemming from over-regulation." *See* Avvo, Comments Submitted in Response to Issues Paper on the Future of Legal Services (Dec. 20, 2014).

As to "over-regulation," Avvo contends that the ABA Model Rules on lawyer advertising—which are significantly simpler and shorter than Louisiana's convoluted rules—are "confusing" and have "a chilling effect on the ability of attorneys to communicate freely with potential clients, each other and the public at large." Those rules, Avvo says, obfuscate "what should be the overarching goal of the attorney advertising rules: ensuring that consumers aren't being deceived or misled by members of the bar. That end isn't achieved by trying to ensure technical compliance with an increasingly lengthy set of rules." The solution? Simple prohibitions against false and misleading communications and in-person solicitation. And nothing more:

> *This would leave as the centerpiece of the rules the simple prohibition against false and misleading advertising. It would also preserve the prohibition against what has long been regarded as the single most offensive and oppressive legal marketing tactic: in-person pressure and harassment. But it would eliminate all of the extraneous "noise" that confuses practitioners and regulators alike when trying to apply the rules to new forms of communication and marketing, and allow for clearer focus on those communications that are actually misleading consumers.*

Well said Avvo.

Can a Lawyer Respond to a Client's On-Line Criticism?

Dane S. Ciolino

January 28, 2015

Two recent bar association advisory opinions address whether a lawyer can disclose confidential information when responding to a client's on-line criticism. *See* New York State Bar Assoc. Ethics Op. 1032 (Oct. 30, 2014); San Francisco Bar Assoc. Op. 2014-1 (Jan. 2014). The California opinion concluded:

> *Attorney is not barred from responding generally to an online review by a former client where the former client's matter has concluded. Although the residual duty of loyalty owed to the former client does not prohibit a response, Attorney's ongoing duty of confidentiality prohibits Attorney from disclosing any confidential information about the prior representation absent the former client's informed consent or a waiver of confidentiality. California's statutory self-defense exception, as interpreted by California case law, has been limited in application to claims by a client (against or about an attorney), or by an attorney against a client, in the context of a formal or imminent legal proceeding.*

The New York opinion's conclusion was the same but more concise: "A lawyer may not disclose client confidential information solely to respond to a former client's criticism of the lawyer posted on a website that includes client reviews of lawyers."

This is good advice. The Louisiana Rules of Professional Conduct allow a lawyer to disclose confidential information in self-defense. However, such a disclosure must not only be "reasonably . . . necessary," but also attendant to an ongoing or imminent formal "proceeding":

> *(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . .*
>
> *(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client . . . .*

See La. Rules of Prof'l Conduct Rule 1.6(b)(5). Note that at least one lawyer outside of Louisiana has been formally disciplined for making such a disclosure. In *In re Tsamis*, an Illinois lawyer was publicly reprimanded for improperly disclosing confidential information in responding to an unfavorable Avvo.com post by her client. *See In re Tsamis*, Commission No. 2013PR00095, Illinois Disciplinary Commission (Jan. 15, 2014).

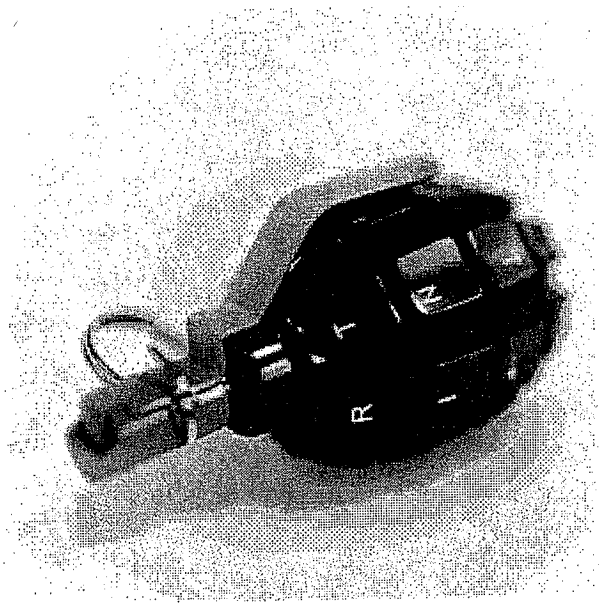
So, calm down. Wait a few days. And if you really must respond, do not disclose any client confidential information.

Is it Unethical to Call Another Lawyer Unethical?

Dane S. Ciolino

January 29, 2015

This Iowa State Bar Association addressed this question in a recent ethics opinion. *See* Iowa Ethics Op. 14-02 (Oct. 24, 2014).[1] The committee noted that making unfounded allegations of misconduct is tantamount to conduct involving "dishonesty, fraud, deceit or misrepresentation." Furthermore, it observed that lawyers alternatively "employ a tactic of 'warning' opposing counsel of the 'potential' for ethical conduct" in order to both avoid a to report it and to "influence or coerce opposing counsel" with an "ulterior motive." The Iowa opinion found both tactics unprofessional:



> *Wrongfully accusing a fellow lawyer of unethical conduct, fraud, dishonesty or deceit to gain advantage is the antithesis of professionalism.*

The answer to the question is significantly more straightforward in Louisiana. Louisiana Rule of Professional Conduct 8.4(g) expressly addresses the issue and provides that a lawyer may not "[t]hreaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter." *See also In re Ruffin*, 54 So. 3d 645, 648 (La. 2011). In addition to being professional misconduct, such threats may constitute extortion under the Louisiana Criminal Code depending, of course, on the context. *See* La. Rev. Stat. Ann. § 14:66(2) (stating that a "threat to accuse" a person "of any crime" can be "sufficient to constitute extortion").

1. For an ABA opinion addressing the propriety of threatening to file a disciplinary complaint against another lawyer in order to gain an advantage in a civil matter, see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-383 (1994). ↩