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# **Using Social Media Under the Rules of Professional Responsibility**

**Andrew M. Jaffe, Esq.**

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February 9, 2018

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**Social Media is NOT a Billboard**



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### What is Social Media?

#### Social Media is About YOU

It is your connection to the world. Be authentic and be real.  
Using Social Media is no different from attending a Kiwanis meeting, serving on your church board, or coaching your child's soccer team.  
People see how you present yourself and decide if you are someone they can trust with their most intimate secrets.  
When you are using social media you should present yourself in the same way as you would in any of the situations above.

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### User Expectations

- Users expect to be informed.
- Users expect to be engaged
- Users expect to be enlightened
- Users expect to be entertained
- Millennials expect your site to be mobile friendly

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### Why Lawyers Should Use Social Media

Users are in the process of a considered purchase – A lawyers legal services.  
They want as much information as possible – And they will use Social Media to get it.  
A lawyer can expect to be searched by Google and his website to be examined closely.  
Both your personal and business Facebook listing as well as your LinkedIn profile will be reviewed.

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**Most Popular Services**

This is a list of the leading social networks based on number of active user accounts as of August 2017.

- Facebook: 2,047,000,000 users
- YouTube: 1,500,000,000 users
- WhatsApp: 1,200,000,000 users
- Facebook Messenger: 1,200,000,000 users
- Instagram: 700,000,000 users
- Tumblr: 357,000,000 users
- Twitter: 328,000,000 users

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**The Communications Decency Act  
Section 230**

The law that makes the Internet Work

The liability concerning a post is the responsibility of the poster, not that of the web site owner.

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**Social Media Content Users Do Not Want To  
See From You**

- No Selling
- No Pitch or Call to Action
- No Solicitation
- No Bragging
- No Misrepresentation or Lies

**If You Are Using Social Media Correctly You Shouldn't Need To Worry  
About Ethical Rules**

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**Social Media Changes The Medium, Not The Message**

The same familiar ethics rules that guide your offline marketing and advertising will guide your online conduct. Unethical conduct is unethical conduct, regardless of the medium through which it is broadcast.

A communication that would be considered unethical in traditional marketing doesn't become acceptable when posted as a tweet or status update.

Likewise, a blog post explaining a recent case or the process for filing bankruptcy doesn't come under scrutiny by the bar association just because it was published online.

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**OHIO RULES OF PROFESSIONAL CONDUCT**

**VII. INFORMATION ABOUT LEGAL SERVICES**

- 7.1: Communications Concerning a Lawyer's Services
- 7.2: Advertising and Recommendation of Professional Employment
- 7.3: Direct Contact with Prospective Clients
- 7.4: Communication of Fields of Practice and Specialization
- 7.5: Firm Names and Letterheads

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**Bates v. State Bar of Arizona**

From Wikipedia, the free encyclopedia

**Bates v. State Bar of Arizona**, 433 U.S. 350 (1977), was a United States Supreme Court case in which the Court upheld the right of lawyers to advertise their services.

In holding that lawyer advertising was commercial speech entitled to protection under the First Amendment (incorporated against the States through the Fourteenth Amendment), the Court upset the tradition against advertising by lawyers, rejecting it as an antiquated rule of etiquette.

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**COMMERCIAL SPEECH RESTRICTIONS**

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* 1976 The Court defined commercial speech as speech that "proposes a commercial transaction," and held for the first time that it warranted some First Amendment protection.

- First Amendment protection was warranted for commercial speech because the advertiser, the consumer, and society at large each had a "strong interest in the free flow of information."
- However, the Court held that commercial speech doesn't warrant as much protection as other types of speech (like political speech) for two reasons.
  - First, commercial speech is "hardier," or more resilient. Advertisers' motivation to make a profit will cause commercial speech to weather more restrictions than other types of speech can.
  - Second, commercial speech is generally more objective than, say, political speech. Claims made in advertising can be verified or disproven.

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In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* (1980), the Court established a standard of review of regulations of commercial speech. The 4-part test is something like intermediate scrutiny.

- Justice Powell, writing for the Court, outlined a four-part test to determine whether government regulation of commercial speech violates the First Amendment. Courts must ask:
- Whether the commercial speech eligible for First Amendment protection at all. This step asks whether the speech is accurate (not false or misleading), and advertises lawful activity.
  - Whether the asserted government interest in regulating the speech is "substantial." This is a lower threshold than a strict scrutiny test, which would require the interest to be compelling.
  - Whether the regulation "directly advances" the government interest. Again, this is a lower threshold than a strict scrutiny test, which would require the regulation to be *necessary* to advance the government interest.
  - Whether the regulation is no more restrictive than necessary (narrowly tailored) to advance the government interest.

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**THE STATE BAR OF CALIFORNIA  
FORMAL OPINION NO. 2012-186**

**ISSUE:** Under what circumstances would an attorney's postings on social media websites be subject to professional responsibility rules and standards governing attorney advertising?

**DIGEST:** Material 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 (Advertising and Solicitation) of the Rules of Professional Conduct of the State Bar of California; or (2) "advertising by electronic media" within the meaning of Article 9.5 (Legal Advertising) of the State Bar Act. **The restrictions imposed by the professional responsibility rules and standards governing attorney advertising are not relaxed merely because such compliance might be more difficult or awkward in a social media setting.**

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**If you are using social media correctly you should not be engaged in commercial speech**

The State Bar Of California - formal opinion no. 2012-186 Examples from Facebook posts:

- "Case finally over. Unanimous verdict! Celebrating tonight." – OK
- "Another great victory in court today! My client is delighted. Who wants to be next?" – Not OK – (solicitation)
- "Won a million dollar verdict. Tell your friends and check out my website." – Not OK - (client expectations)
- "Won another personal injury case. Call me for a free consultation." – Not OK (client expectations)
- "Just published an article on wage and hour breaks. Let me know if you would like a copy." - OK

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**Prohibited Commercial Speech = An Active Quest for Clients**

Lawyer advertising rules are the same as always:

- Truth is OK and Lies are an ethical violation
- Websites must adhere to rules as if they were brochures
- Jaffe & Associates – If no associates = ethical violation
- False & Misleading Advertising is subject to disciplinary rules.

Lawyer solicitation rules are the same as always:

- Trolling support chat rooms (e.g. divorce, death, etc.) for clients is an ethical violation
- Using coercion or duress to lure clients is an ethical violation

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**Your Person to Person Reputation is a Valuable Marketing Tool**

However, now more and more people use Social Media instead of face to face meetings to accomplish the same goal.

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5.3 Responsibilities Regarding Nonlawyer Assistants

a lawyer having direct supervisory authority over the nonlawyer shall make *reasonable* efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

Ad agencies, PR firms, IT professionals, Webmasters, SEO professionals, etc.

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Responding to Negative Reviews

Beware responses that reveal confidential client information.

The barriers to foolish behavior on your part is very small.

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Friending a Judge

While jurisdictions are split, in Ohio it is acceptable.

Other jurisdictions are more restrictive.

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**Twitter is a News Service**

The user is following what is happening in their world.  
Following someone on Twitter does not equal a "like."

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**Endorsements & Online Recommendations**

A client cannot say something about you that you could not say yourself (e.g. She is the best divorce lawyer in town.)

Especially true if you have the ability to accept or reject the endorsement.

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