

High-touch Legal Services® for Startup and Early-stage Companies

Lawyers, Social Media and Disclaimers: What, Where, When and Why

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I was encouraged to prepare this document in connection with the Alameda County Bar Association program Social Networking: Flash in the Pan or Here to Stay? Although I was not on the panel, the program organizer knew that I was actively promoting my practice via social networking and that I was using certain protective disclaimers in connection with those activities.

I have since updated this document for my participation on a State Bar panel discussion on Social Media for Lawyers.

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I see three areas (the first two of which sometimes overlap) where I need to be careful: Making sure that no reader assumes that a post has created an attorney-client relationship, protecting confidential information, and complying with rules governing attorney advertising.

Avoiding the Accidental Client

I don't want anyone who reads a post to believe that we have created an attorney-client relationship or that s/he can rely on information in the post as legal advice.

To some extent, my concern is fairly obvious and broadly shared, but there also is a practical basis: My professional liability insurance application asks, each year, whether I send non-engagement letters when declining representation. In effect, I want to decline representation preemptively when posting on social media. (Of course, ultimately I want readers of my posts to become clients, but that process will happen after I restate the disclaimer in my reply to the prospect's first e-mail inquiry and, when appropriate, send out an engagement letter.)

Each of my posts on LinkedIn, Avvo, and other third-party sites that has legal content includes the following notice:

Disclaimer: This post does not constitute legal advice and does not establish an attorney-client relationship.

On my blog, I use a slightly longer notice:

This blog does not provide legal advice and does not create an attorney-client relationship. If you need legal advice, please contact an attorney directly.

I include the second sentence in this longer form to be more helpful (and less abrupt) and to plant the idea that the reader can contact me (or any other attorney). I include this notice on every page of the blog and at the end of every post. That probably is overkill (I suspect that once on each page suffices), but the belt-and-suspenders approach makes me feel more comfortable.

Please note that Avvo (the only legal-specific site in which I routinely participate) provides help in this regard. Section 9 (No Attorney-Client Relationship) of Avvo's Terms of Service (<http://www.avvo.com/support/terms>) says, in relevant part:

Information posted or made available on or through the Site, including without limitation any responses to legal questions posted on Avvo Answers, information provided in Avvo Legal Guides, and any other comments, opinions, recommendations, answers, analysis, references, referrals or legally related content or information (collectively "Legal Information") is not intended to create an attorney-client relationship between you and any attorney. Such Legal Information is intended for general informational purposes only and should be used only as a starting point for addressing your legal issues. It is not a substitute for an in-person or telephone consultation with an attorney licensed to practice in your jurisdiction about your specific legal issue, and you should not rely upon such Legal Information.

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You understand that questions and answers or other postings to the Site are not confidential and are not subject to attorney-client privilege.

Protecting Confidential Information

Whereas the prior section of this document focuses on my outbound communications, this section focuses on my explicit solicitation of communications from potential clients.

As is normal on a lawyer's website, mine includes a page that specifies several ways that people may contact me. While I want to make communication easy, I also want to avoid any obligation to protect the confidentiality of information that is provided to me.

Business and Professions Code Section 6068(e)(1) obligates an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2003-161 addresses the circumstances under which a communication in a non-office setting by a person seeking legal services or advice from an attorney may be entitled to protection as confidential client information. The opinion states that an obligation to preserve the confidentiality of a communication may exist "*even if no attorney-client relationship is formed, [if] the attorney's words or actions induce in the speaker a reasonable belief that the speaker is consulting the attorney, in confidence, in his professional capacity to retain the attorney or to obtain legal services or advice.*" [Emphasis added.]

The opinion goes on to discuss several ways in which circumstances may affect whether the communication to the attorney is confidential (if it is not, then the attorney has no obligation maintain confidentiality). One such circumstance is the actions the attorney took, if any, to communicate to the speaker that the conversation is not appropriate or is not confidential. On my "Contact Dana" page, I include the following text (with emphasis) to convey they idea that there should be no expectation of confidentiality in any information that is sent to me:

Please be aware that visiting this Website or contacting me (I'm in the San Francisco, California, Bay Area) will *not* create an attorney-client relationship. Until that relationship is created (typically via a signed engagement letter), ***neither the attorney-client privilege nor any obligation of confidentiality will apply to any communications.*** Please limit anything you write to the general nature of the matter that you would like to discuss.

This topic is discussed in greater detail in the California Bar Journal's June 2010 MCLE self-study column, "[With 'Friends' like these: Social networking and lawyering don't always mix](#)" by Wendy L. Patrick.

Complying with Rules Governing Attorney Advertising

California attorneys are subject to [Rule of Professional Conduct 1-400 \(Advertising and Solicitation\) and the Board of Governors Standards formulated pursuant thereto.](#)

The Rule and Standards, together, are too lengthy (more than 1,500 words) to discuss in detail here, so I will focus on their application to the one aspect of my blog (and LinkedIn profile) that is most directly in the nature of advertising and, thus, comes under the Rule and Standards: Client testimonials.

Rule 1-400(A) says, in relevant part, that:

"communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client....

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Standard (2) says that communications that are presumed to violate Rule 1-400 include:

A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

Not wanting to violate that rule (and not wanting to appear too stodgy to the naïve reader), I have included the following text immediately before client testimonials on my blog and on LinkedIn:

The following testimonials do not constitute a guarantee, warranty, or prediction regarding the outcome of any client's legal matter. (Just in case you are wondering, Board of Governors Standard (2) adopted pursuant to CA Rule of Professional Conduct 1-400(E) requires that I provide a disclaimer.)

Please note that the situation on Avvo is different, in that (to the best of my knowledge) there is no way to include a testimonial disclaimer, and the Avvo Terms of Service do not address the issue. However, Avvo client testimonials are not placed by lawyers or under their control. They are collected and posted by Avvo, somewhat like Yelp reviews, to benefit consumers of legal services. Accordingly, I would argue that Avvo testimonials are not made "by or on behalf of" the lawyer and, thus, they do not come under Rule 1-400.

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