

THINK BEFORE YOU TWEET

THINK BEFORE YOU TWEET: PROFESSIONAL RESPONSIBILITY CONSIDERATIONS IN THE SOCIAL MEDIA AGE

By Bryan Garcia

We have all heard of the horrible tweet by Ashton Kutcher in the wake of the Penn State scandal where Ashton reportedly tweeted to his millions of followers, "How do you fire Jo Pa? #insult #noclass as a hawkeye fan I find it in poor taste." Minutes after posting his tweet, Kutcher received numerous responses. Kutcher then deleted his tweet and publicly claimed he merely walked by a television and saw the headline that Joe Paterno was fired without thinking or researching the reason why.

Kutcher's tweet demonstrates the dilemma attorneys have when trying to keep up with the technological age while still complying with professional responsibilities. Much like Kutcher's predicament, social media potentially allows an attorney to speak before thinking, much less researching. Accordingly, while social media may provide an effective way to reach potential clients, it also carries significant risks for ethical violations. While it is important that the communications be true, not deceptive, and not contain material omissions, this by no means guarantees that the attorney is in compliance with the applicable rules governing attorney advertising. Some examples of potential pitfalls in social media include the following:

Claiming You Are a Specialist

California Rules of Professional Conduct Rule 1-400(D) (6) states that an attorney communication shall not state that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization. LinkedIn.com has a section called "Specialties." While this section is somewhat vague, an attorney should not

indicate he/she is specialized in an area unless the attorney is appropriately certified by the California Board of Legal Specialization.

Misleading Domain Names

Section-6158 of the Business and Professions Code states that the "effect in combination of the spoken word, sound, background, action, symbols, visual image, or any other technique employed to create the message" must not be misleading and must be verifiable by a credible source. If an attorney's post comes from a domain name entitled Guaranteedwin.com, this would likely violate the applicable rules governing attorney advertising. (This would also likely violate Rule 1-400 which indicates that communications which contain guarantees are presumed to be in violation of the rule.) Further, if the attorney's domain name is CaliforniaElderLawSpecialist.com and the attorney is not certified by the California Board of Legal Specialization, as set forth above, this would likely violate California Rules of Professional Conduct Rule 1-400 as well.

Testimonials and/or Endorsements

Some legal sites like Avvo.com presumably check certain aspects of an attorney's profile (e.g. License). But what about other sections which address former client testimonials or peer endorsements? California Rules of Professional Conduct Rule 1-400 states that if an attorney publishes a testimonial, it must provide a disclaimer. Further, communications which contain warranties, testimonials, or endorsements are presumed to be in violation of Rule 1-400. This poses something of an issue with Avvo.com, as both



Bryan Garcia

former clients and professional colleagues are able to post recommendations without permission from the attorney. While it currently appears unclear how this rule applies to recommendations to legal sites like Avvo.com, it is wise to routinely monitor the representations made on your profile on Avvo.com and any other networked sites where you may be listed. You must also provide the requisite disclaimer language set forth in Rule 1-400, if appropriate.

Retention of Posts for Two Years

California Rules of Professional Conduct Rule 1-400(F) mandates that advertisements be retained for two years. Thus, although some aspects of social media advertising may not fall within this requirement of the Rules of Professional Conduct, prudence would suggest the attorney should comply with this rule.

By no means is the list above exhaustive of the potential pitfalls that exist in today's social media world. Rather, the moral of this story is to remind attorneys to think before using social media so that they do not fall into the same predicament as Mr.

Kutcher. Recognize that while the law does not evolve at the same speed as technology, this does not mean that the rules governing attorney advertising cannot, or will not, apply to something you post via social media. So, think before you tweet. Recognize that your posts and/or presence on social media sites must comply with the applicable rules of professional conduct.

Bryan Garcia is a Senior Attorney with Callahan & Blaine. Bryan Garcia has been a civil litigator since passing the California Bar exam in 2001, the Arizona Bar in 2005 and the Nevada Bar exam in 2005. Mr. Garcia received his undergraduate degree in Political Science from U.C. Berkeley, and his J.D. from U.C. Hastings. Mr. Garcia has been selected by SuperLawyers Magazine as a Rising Star and has also been selected by The Best Lawyers in America. Mr. Garcia is currently on the board of the State Bar's Law Practice Management & Technology section and has previously served as the elected Los Angeles representative of the State Bar, California Young Lawyers Association. Mr. Garcia has also previously been active in his community, serving as a board member of the Neighborhood Council of Westchester/Playa helping to help, inform and resolve various issues in his community.

www.calbar.ca.gov/lpmt

To access the LPMT **Members Only** section of the site, you need to first register at the "My State Bar Profile" page:

(<https://members.calbar.ca.gov/register.aspx?>)

After you have registered, you can visit the **Members Only** section of the site by **entering your State Bar number** and the **password** that you created.