

Ethical Communication in the Digital Age: The Benefits and Risks of Social Media

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Dallas Bar Association
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“With great power comes great responsibility.”

Spiderman’s uncle.

What is Social Media

A collection of services that offer new ways to communicate.

Similar to print:

- Can send to people you know or people you don't.

- They can redistribute.

- Can be used as evidence.

Very different from print:

- Easy to post or publish—to thousands, even millions.

- Instantaneous delivery.

- Multimedia – text, images, videos, audio, art, schematics, anything

- Posting can grant rights and licensing



Barack Obama

2nd fluencer

President of the United States of America

Washington D.C. Metro Area | Government Administration

Current United States of America

Previous US Senate (IL-D), Illinois State Senate, University of Chicago Law School

Education Harvard University

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1,856,301
followers

<https://www.linkedin.com/in/barackobama>

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"Our journey is not complete."

January 22, 2013



Welcome to Organizing for Action

January 18, 2013



Restoring fairness to our tax system

January 7, 2013

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Background



Summary

"You, the American people, reminded us that while our road has been hard, while our journey has been long, we have picked ourselves up, we have fought our way back, and we know in our hearts that for the United States of America the best is yet to come."

Read President Obama's plan for his second term:

<http://www.barackobama.com/plans>

Win with Social Media! - Message (HTML)

File Message Adobe PDF

Ignore X Delete Reply Reply All Forward

MDL/AAGeneral MDL/Bowser MDL/Falvey

Rules OneNote Actions

Mark Unread Categorize Follow Up

Translate Zoom

Add to Evernote 5

Show/Hide EM Toolbar

Save Attachments Where Filed Properties


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From: ABA Government and Public Sector Lawyers Division <GPSLSD@americanbar.org> Sent: Thu 4/30/2015 10:00 AM
To: Steve Thomas
Cc:
Subject: Win with Social Media!

Like Us, Follow Us, Link with Us, Win!



Want to stay up to date on all the events and programs offered by the ABA's Government and Public Sector Lawyers Division? Want to enter to win a \$25 gift card? Just like us on Facebook, follow us on Twitter, or link with us on LinkedIn and then enter to win! Enter today by emailing Alison Hill at alison.hill@americanbar.org and inform her that you have liked, followed, or linked with us. Entry deadline is May 31, 2015. Limit of one entry per person per social media site.

No purchase necessary. All current ABA lawyer, associate and law student members who are age 18 or older or of the majority in their jurisdiction are eligible to participate in this contest. A member may alternatively enter by mail. See official rules for instructions. Entrants must be legal residents of the US. ABA employees are excluded from participating in this contest. Sponsored by the American Bar Association's Government and Public Sector Lawyers Division. [Official Rules](#).

Virtually every facet of the economy is embracing social media because of its power to communicate with so many so easily.

Social Media is Very Popular

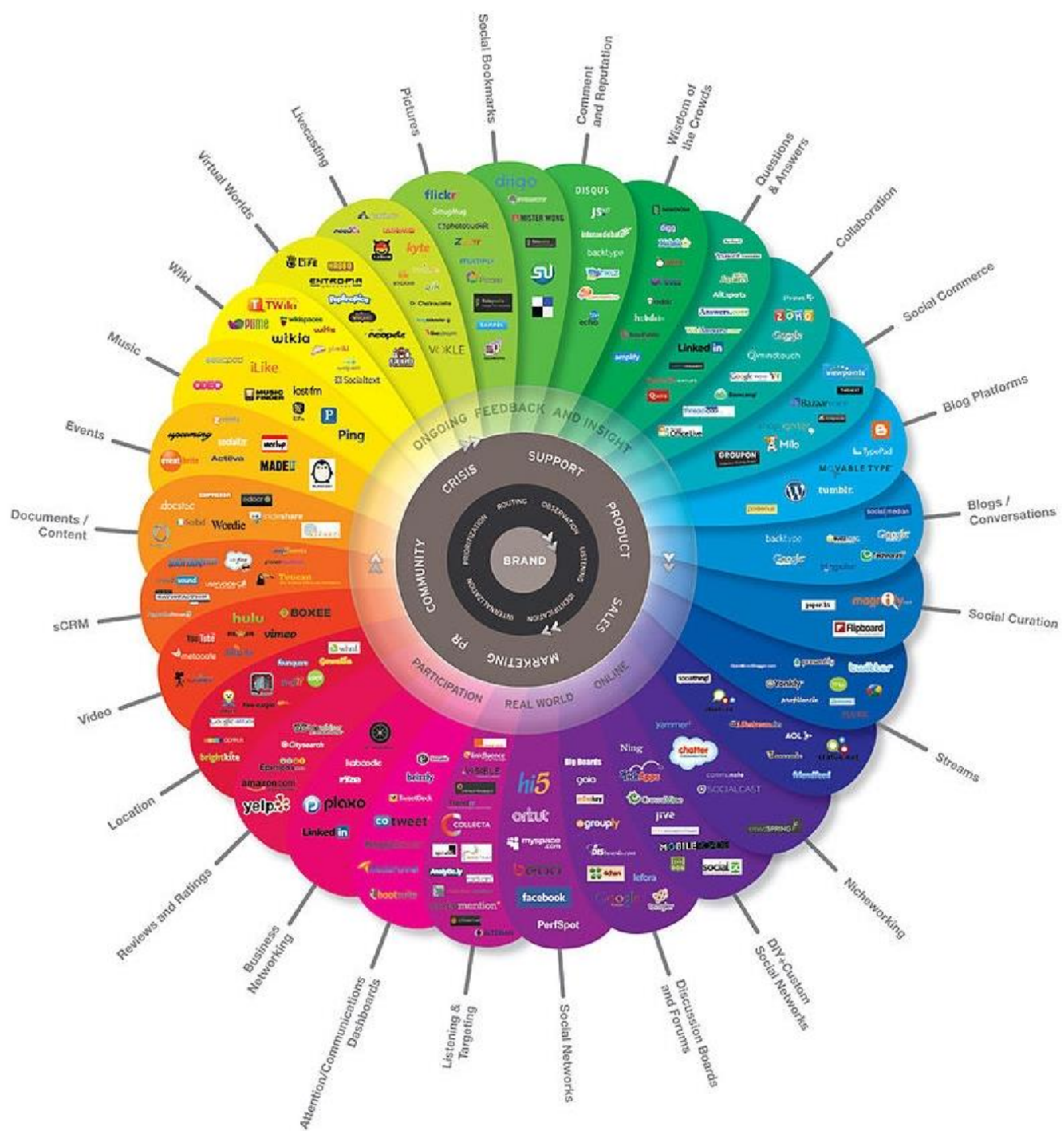
Wikipedia's list of social networking websites includes 211 entries and states that the list is not exhaustive, but is "limited to notable, well-known sites."

Major Social Media Sites:

<u>Media</u>	<u>Launched</u>	<u>Active Users</u>
Tumblr	February 2007	225 Million blogs
Twitter	July 15, 2006	284 Million
Google+	June 28, 2011	300 Million
Instagram	October 6, 2010	300 Million
LinkedIn	May 5, 2003	347 Million
Facebook	February 4, 2004	1.39 Billion

John Locallo, President of the Illinois State Bar Association
President's page, September 2011 Illinois Bar Journal:

"If Facebook were a nation, it would be the third largest in the world. Do I have your attention yet?"



There are more social media sites, methods, channels, and formats than we could discuss in a week.

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Important Recent Case For Bankruptcy Lawyers

In Re CTLI, LLC, 2015 WL 15880858, *5 (Bankr.S.D.Tex. April 3, 2015)
Opinion by J. Bohm, Chief Judge.

“Given the above-referenced holdings, and with one eye cocked on the broad scope of § 541, this Court finds that business social media accounts are property interests. Like subscriber lists, business social media accounts provide valuable access to customers and potential customers. The fact that those customers and potential customers can opt out from future contact does not deprive the present access of value. Just as Facebook Users can “unlike” a Page at any time, subscribers to email lists can also, by federal law, opt out at any time.”

Court held that Business Social Media accounts are property of the estate.

This opinion also distinguishes between “business” social media accounts and “individual” social media accounts.

General Considerations in Using Social Media

(or, said differently, think before you click.)

Be careful about sharing confidential information or proprietary material:

December 29, 2014 – Delaware Bankruptcy Court found in copyright infringement action:

“Once an image is posted on a social media page, third parties can do anything with it, including downloading it and sharing it with others, and there is no protective measure to keep third parties from using the image.”

“Along the same lines, when a Facebook user “likes” an image, that image then becomes a part of that user’s profile and would be there forever unless taken down.”

“Under Facebook’s policy, when images are posted on Facebook, Facebook automatically receives a license to use the images.”

“Under Google’s policy, when images are posted on Google+ pages, not only does Google automatically receive a license to use the images, but so do other companies with whom Google may have a relationship.”

In re SuperMedia, Inc., et al., 2014 WL 7403448, *10 (Bankr.D.Del. **December 29, 2014**) (holding that debtor committed multiple pre-petition breaches of its image licenses and committed copyright infringement, partly by posting licensed images on social media where control over the image was lost).

General Considerations in Using Social Media

(or, said differently, think before you click.)

Be careful about what you say on social media, and how you use it:

Galveston: Lawyer friended judge on Facebook, posted a string of updates about drinking and partying, and then told judge in court that the Lawyer's father had passed away so she needed a continuance. (Continuance denied.)

North Carolina: Judge friended defense counsel in a child custody case, and they discussed aspects of the case on Facebook (ex parte communication).

San Francisco: Prosecutor was disqualified for blogging about a pending case, including calling his opposing counsel "chicken" for requesting a continuance and mentioning evidence that had not been ruled admissible at trial.

Philadelphia Bar Association Advisory Opinion: Lawyer asked whether he could have a third party "friend" a witness so the Lawyer could secretly gain information to use for impeachment. PBA said that would be unethical.

Florida: The Florida Supreme Court corrected an attorney who claimed his comments were protected free speech when he blogged that a particular judge was an "evil, unfair witch."

General Considerations in Using Social Media

(or, said differently, think before you click.)

April 27, 2015

Online Edition of *Texas Lawyer*

Judge Gets Discipline After Violating Own Facebook Order

Judge told the jurors: Don't talk to anyone about the case during the trial by email, "on the phone or Facebook."

The very first day of testimony, the Judge posted on Facebook:

Information about evidence the jury had not yet seen.

Referred to the case by its media name (the "boy in the box" case).

Included a link to a Reuters article about the case.

Judge was removed from the case.

A visiting judge then granted a motion for mistrial.

Defendant was later acquitted.

In Re Zuniga, 332 B.R. 760 (Bankr.S.D.Tex 2005) (J. Bohm, Judge)

“Attorneys who practice before a bankruptcy court must not only concern themselves with the obligations set forth in the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure . . . but also with the application of state ethical rules.”

The court went on to list the rules governing the conduct of bankruptcy attorneys:

1. Bankruptcy Code and Bankruptcy Rules;
2. Local Rules of the US Bankruptcy Court (here, SD Texas);
3. Local Rules of the US District Court (here, SD Texas);
4. Texas Disciplinary Rules of Professional Conduct.

In discussing the Texas attorney who was representing the debtor (purportedly as local counsel), and just before ordering that he disgorge all fees plus pay an extra \$5,000 to the court, the SD Texas stated:

“[The attorney’s] conduct and behavior in this matter have been unprofessional in almost every way imaginable.”

In Re Zuniga, 332 B.R. 760 (Bankr.S.D.Tex 2005) (J. Bohm, Judge)

For our purposes, the attorney's website included two representations that the Court considered to be in violation of the attorney's ethical duties:

1. The website said the attorney had experience in the practice of Bankruptcy law (he had handled only two small cases as local counsel).

2. Website also stated:

"Here at our firm, we strive to make your experience a positive one. We are a full-service firm with many experienced attorneys who specialize in a variety of areas. We are here to help you with a wide range of legal needs. We've included information on this site about our firm's history, our lawyers, and our fees. We look forward to working with you." (Emphasis added by Court.)

The attorney was a solo practitioner.

Ethical Duties Relating to Social Media

Part 7 of the Texas Disciplinary Rules of Professional Conduct

- Rule 7.01. Firm Names & Letterhead
- Rule 7.02. Communications Concerning a Lawyer's Services
- Rule 7.03. Prohibited Solicitations & Payments
- Rule 7.04. Advertisements in the Public Media
- Rule 7.05. Prohibited Written, Electronic, or Digital Solicitations
- Rule 7.06. Prohibited Employment
- Rule 7.07. Filing Requirements for Public Advertisements & Written, Recorded, Electronic, or Other Digital Solicitations

Let's hit the highlights:

False or Misleading Statements (Rule 7.02(a))

7.02(a)(1) material misrepresentations or omissions.

7.02(a)(2) Any reference to past success or results obtained – be careful.

7.02(a)(3) Creating an unjustified expectation about the results you can achieve.

7.02(a)(4) Comparing services with those of other lawyers

Must be able to substantiate with “verifiable, objective data.”

Watch out for recommendations on LinkedIn

7.02(a)(5) Suggesting that you have special influence over judges or officials.

7.02(a)(6) Don't mention any practice area unless you have competence in that area.

Outright Bans

Trade names, even in URLs (Rule 7.01)

Claims of being a “specialist” (Rule 7.04)

You can say that you have experience in a particular area if you do.

Can't say that you are certified as a specialist unless you are Board Certified

Note the “Specialties” field on LinkedIn company page

Prohibited “live” solicitations (Rule 7.03)

Approval and Retention Requirements

Landing pages for websites and social media sites are “advertisements”

Advertising Review Committee Interpretive Comments:

“1. Public Media Advertisement (Nov. 1995) A public media advertisement is an advertisement broadcast or made available to the general public, such as telephone Yellow Pages, newspapers or other periodicals, outdoor display, the Internet, radio or television. Publications or information disseminated primarily to lawyers, such as legal newspapers, legal directories, firm brochures mailed to other lawyers, and on-line services provided to lawyers are not considered to be in the public media.” (Emphasis supplied.)

17(A): “A website on the Internet that describes a lawyer, law firm or legal services rendered by them is an advertisement in the public media.”

17(C): “Landing pages such as those on Facebook, Twitter, LinkedIn, etc. where the landing page is generally available to the public are advertisements.”

Approval and Retention Requirements

Rule 7.04(b):

“A lawyer who advertises in the public media . . . shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement.”

Interpretive Comment 6:

“Lawyer Responsible for Content of Advertising (Nov. 1995) It is presumed that a lawyer or law firm whose name is published in an advertisement is responsible for the content of the advertisement and therefore meets the requirements of Section 7.04(b)(1). It is not necessary that the advertisement include a specific statement or tag line identifying a particular lawyer as having reviewed the content of the advertisement.”

Rule 7.04 (e) and (f):

“All advertisements in the public media for a lawyer or firm must be reviewed and approved in writing by the lawyer or a lawyer in the firm”

AND

“A copy or recording of each advertisement in the public media and relevant approval referred to in paragraph (e), and a record of when and where the advertisement was used, shall be kept by the lawyer or firm for four years after its last dissemination.”

Do I have to mark it as an “ADVERTISEMENT”?

The Marking Safe Harbor – Rule 7.05(f)

Rule 7.05(b) and (c) require that certain solicitations be marked prominently as an “ADVERTISEMENT.”

But 7.05(f) states:

The provisions of paragraphs (b) and (c) of this Rule do not apply to a written, audio, audiovisual, digital media, recorded telephone message, or other form, of electronic solicitation communication:

(1) directed to a family member or a person with whom the lawyer had or has an attorney client relationship;

(2) that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client’s specific existing legal problem of which the lawyer is aware;

(3) if the lawyer’s use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or

(4) that is requested by the prospective client.

Do I have to file it with the State Bar?

The Filing Safe Harbor – Rule 7.07(e)

Rule 7.07 establishes the filing requirements for:

Any “solicitation communication” (7.07(a));

Any “advertisements in the public media” (7.07(b)); and

Any “lawyer’s or lawyer’s firm’s website” (7.07(c)).

But 7.07(e) states:

“The filing requirements of paragraphs (a), (b), and (c) do not extend to any of the following materials, provided those materials comply with Rule 7.02(a) through (c) [i.e., not misleading] and, where applicable, Rule 7.04(a) through (c) [generally, claims of specialization]:”

Eight listed categories of materials that don’t need to be filed—most things you do fit here, but you need to check. If it is a communication to the general public that mentions in any way your legal services, and it doesn’t fit under any of the categories of 7.07(e), FILE IT.

Where can I get help?

State Bar of Texas Ethics Helpline:

800-532-3947

Not binding, but they will answer questions.

Where can I get help?

State Bar of Texas Website

“For Lawyers” section

Click the link at the bottom for “Advertising Review”

Provides Advertising Review Rules, interpretive comments, Mandatory Submission steps for submitting advertisements, and a description of what types of advertisements must be submitted.

Call or write to the Advertising Review committee:

adreview@texasbar.com

800-566-4616

Where can I get help?

Get an advisory opinion from the Professional Ethics Committee of the state bar.

The Professional Ethics Committee (PEC) of the State Bar of Texas is a committee appointed by the Texas Supreme Court. It issues ethics opinions responding to ethics-related questions. Only members of the State Bar of Texas may request a PEC opinion.

First, check to see if the PEC already has issued an ethics opinion on your subject using the searchable database at: www.legalethicstexas.com

You can find the address and other information about submitting a written request on the State Bar website (www.texasbar.com) under the “For Lawyers” section, at the “Grievance and Ethics Info” tab, and then click the link for “Professional Ethics Committee Opinions.”

Now

GO GET SOCIAL!

And thanks for listening.