

# REEL FAMILY LAW ETHICS

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# New and Emerging Ethics Issues

1. Proposed New California Rules of Professional Conduct: Update
2. Confidentiality: What may a lawyer ethically disclose?
3. Social Media: What are the ethical limitations?
4. Conflicts, sex with clients, truthfulness





# Proposed New CA Rules

- Rules revision process (latest round) began November 2014 by order of the Supreme Court
- Extensive revision process by a blue-chip commission
- Multiple rounds of public comment
- Complete package of new rules submitted to the Supreme Court March 2017
- No specific timetable for Supreme Court review or approval

# Highlights of New Rules

- Follow ABA Model Rules numbering system
- A blend of the existing CA rules and Model Rules
- Some of the changes:
  - Conflicts re current clients 1.7
  - Imputation of conflicts 1.10
  - Diligence 1.3
  - Discrimination 8.4.1
  - Fee sharing 1.2
  - Dealing with unrepresented persons 4.3
  - Fees 1.5







# Duty of Confidentiality

- Current rule: 3-100, Bus. & Prof. Code 6068(e)
- Duty to protect client confidences and secrets
- Includes:
  - Information client has requested be kept confidential
  - Information which if disclosed would cause embarrassment or be detrimental to the client
- Limited exceptions to rule: prevent criminal act likely to cause significant bodily harm or death
- We all understand the rule, but how does it apply to specific situations?

## Scenarios

- Lawyer forwards to friends an unfavorable blog posting concerning a new client she obtained.
- Lawyer writes to Wall Street Journal editor after an article critical of a former client; letter says Lawyer did a “great job” in settling former client’s case for seven figures
- In discussion with opposing counsel, Lawyer – in an effort to be candid and build trust – admits client’s failure to comply with parties’ agreement.
- In a motion to withdraw, Lawyer discloses “breakdown of the attorney-client relationship”; court orders Lawyer to disclose specific details, and Lawyer discloses *in camera* that client committed fraud.

Cal. Formal Opin. 2016-195; 2015-192; Rule 3-100; B&P 6068(e)

# Why Do Lawyers Get in Ethical Trouble Using Social Media?

- Ease and frequency of use
- Instant communication with large numbers of people
- A lasting and (often or mostly) public record
- Lack of understanding of the technology
- Carelessness, negligence
- Casualness of the form of communication

# Ethical Duty of Technological Competence

Comment [8] to Model Rule 1.1:

“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the risks and benefits associated with relevant technology . . .”

## Question 1

Lawyers need to use care when using social media for anything relating to a client representation, including compliance with ethical rules, but those rules do not apply when lawyers use social media for other purposes.

- a) True
- b) False



## Answer 1: B) False

- “Client representation” is too narrow a limitation: ethical rules apply far more broadly, including non-lawyer activities.
- Lawyers frequently get into trouble when using social media in their personal capacity
- Experts advise lawyers to use their personal social media to feature their professional activities; potentially creates issues

## For What Purposes Do Lawyers Use Social Media?

- Advertise: Reach new clients
- Communicate with clients, potential clients and friends
- Connect with professional colleagues including by posting links to articles and professional announcements
- Research (witnesses and jurors)
- Obtain evidence



# What Social Media Do Lawyers Use?

ABA 2015 Legal Technology survey finds:


- Over 90% of all attorneys use LinkedIn
- Solos use Facebook more than other lawyers
- Larger firms use Twitter
- 8% of lawyers have a legal blog
- 24% of law firms have a blog


## Question 2

A lawyer's profile on LinkedIn is not subject to rules governing attorney advertising as long as everything stated there is accurate and truthful.

- A) True
- B) False

# LinkedIn





**Aaron Silberman**

San Francisco Bay Area | Law Practice

500+ connections

Recommendations 15 people have recommended Aaron

Volunteer Experience & Causes

**Member, Leadership Council**

Justice & Diversity Center (Bar Ass'n of San Francisco) (fka Volunteer Legal Services Project)

November 2012 – Present (2 years 9 months)

The Justice & Diversity Center (JDC), formerly the Volunteer Legal Services Program (VLSP), has been making meaningful change in people's lives, using its unique blend of legal services and social work, since 1977. Volunteer attorneys, paralegals, law students and others work alongside staff to

- Ensure the safety and stability of families and children through our Family Law Project
- Keep individuals, families and children safely housed and off the streets, through our Eviction Prevention Project
- Enhance the capacity of nonprofit organizations through our Community Organization Representation Project
- Prevent debt from pushing people into poverty through our Consumer Debt Defense and Education Clinics
- Mobilize the resources needed to move people who are homeless into housing, through our Homeless Advocacy Project

Last year, VLSP staff and over 1,800 VLSP volunteers, assisted nearly 8,000 clients with legal consultation and representation in nearly every area of civil law.

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**Volunteer Attorney**

Federal Pro Bono Project (U.S. District Court, Northern Dist. of Cal.)

January 2004 – Present (11 years 7 months)

Volunteer attorneys, trained in advanced mediation techniques, represent in pro per plaintiffs in employment and other disputes in the Northern District as special mediation counsel. After appointment by the court, the volunteer reviews the case file, meets with the plaintiff, investigates the facts and law relevant to the dispute, prepares the plaintiff for mediation, represents the plaintiff at mediation, and assists with documenting any settlement.

## Answer 2: B) False

NY County Bar Assoc. Opin. No. 748 (2015) says:

- Lawyers should exclude inaccurate statements or arguments
- Should not describe their services as “specialties” unless they are certified specialists
- LinkedIn profile subject to rules governing attorney advertising under certain conditions
- If the profile includes testimonials or makes comparisons, it may need to include disclaimer: “Prior results do not guarantee a specific outcome.”





# Advertising Rules

- Rules pertaining to lawyer advertising are set forth in Model Rules 7.1 through 7.5; Cal. Rule 1-400
- Important issues to be aware of:
  - What content/formats are subject to advertising rules?
  - Are client or other testimonials allowed?
  - What disclaimers are necessary, and under what circumstances?
  - Are there screening requirements?
  - Notice requirement: “THIS IS AN ADVERTISEMENT”

## Difficulty of Applying Advertising Rules to Social Media

- Much criticism of regulators' attempts to apply attorney advertising rules; movement urging reform
- Social media unlike other media: interactive; opportunities for user feedback, "likes", endorsements
- Ability to link to other media
- Risks to the consumer?



# Advertising rules: Potentially tricky issues

- How to fit a required disclaimer into a 140-character post
- Obligation to take any action with regard to inaccurate information posted by a third party?
- May an attorney ethically ask a client for an “endorsement” on social media?
- Is it permissible to take actions to “boost” your online rating?



## What's Wrong With These Photos?

## Question 3

It is ethical for an attorney to post information about a client as long as the attorney does not identify that client.

- A) True
- B) False



## Answer 3: B) False

### **DUTY OF CONFIDENTIALITY:**

- Broad duty; larger in scope than attorney-client privilege. MR 1.6; CA Rule 3-100, B&P Code section 6068(e)
- “All information related to client representation”
- Some (but not all) jurisdictions: an exception for generally known information

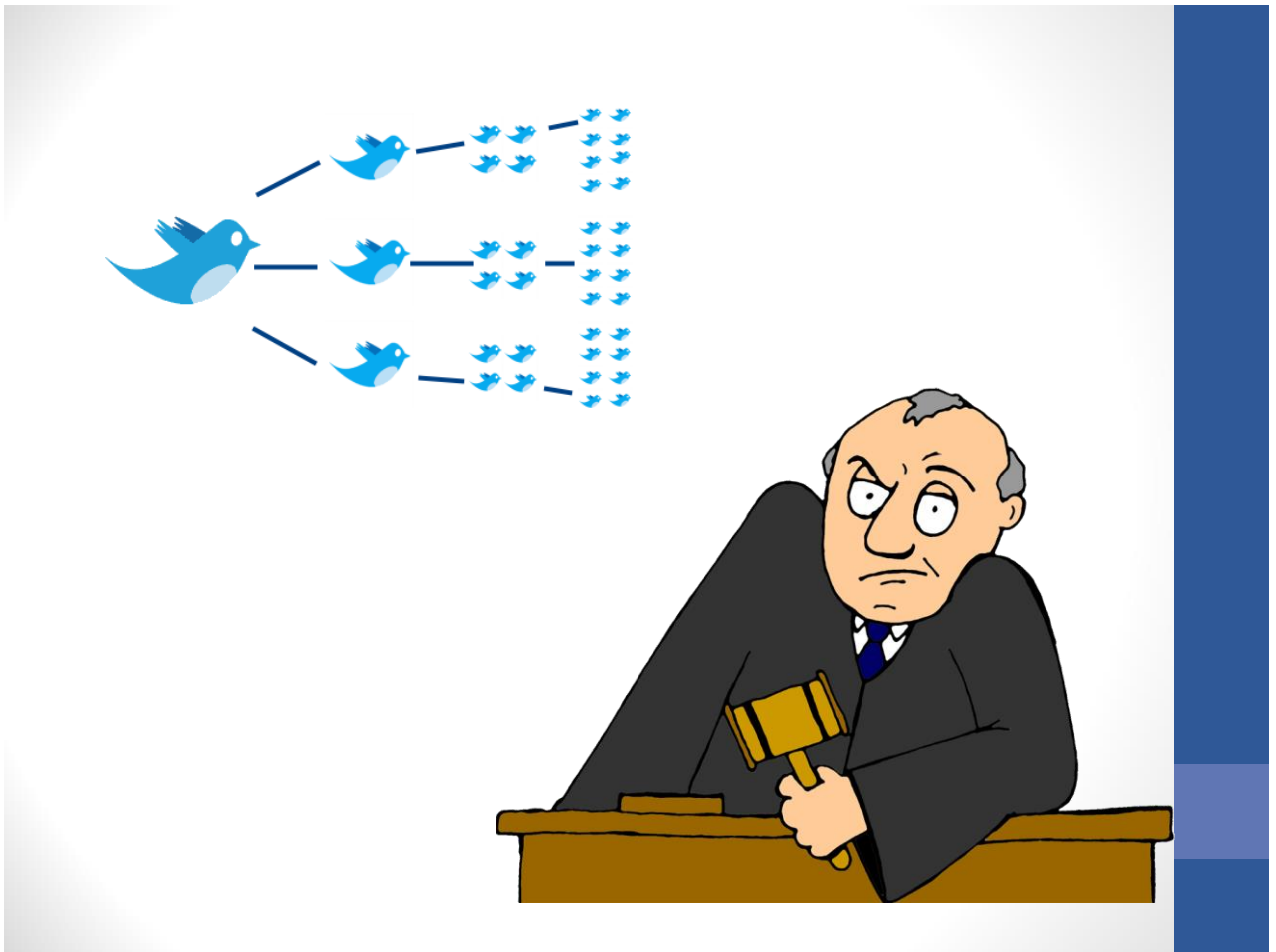
## Where Do Attorneys Go Wrong?

- Leopard print underwear
- “My client’s drug dealing dirtbag brother”
- “Naughty, naughty boy”

## Question 4

It is ethically appropriate for lawyers to vent on social media about judges they believe are unfair or incompetent.

- A) True
- B) False
- C) Depends





## Answer 4: C) Depends

- Freedom of speech: certain discussion allowable
- What crosses the line: calling a judge an “unfair evil witch”
- *McCool* case: lawyer disbarred for social media campaign urging people to contact judges and making false statements (among other things)

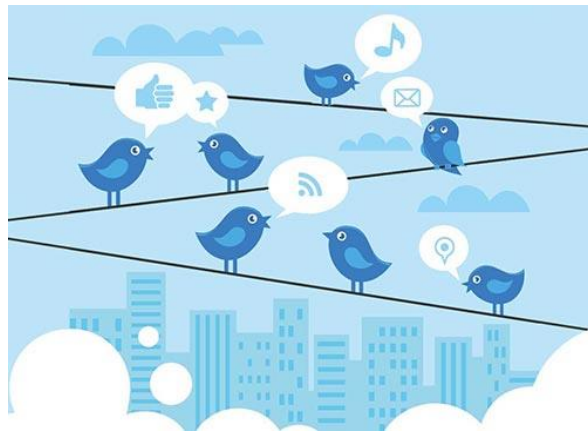




## Question 5

It is ethically appropriate for a lawyer to respond to a former client's negative online review as long as the lawyer does not reveal confidential information and is truthful.

- A) True
- B) False



## Answer 5: A) True

- Los Angeles Cnty Bar Ass'n, Formal Op No. 525
- Bar Ass'n San Francisco Opin. 2014-1
- Penn. Bar Ass'n Ethics Opin. 2014-300
- Consensus: Lawyers may respond publicly to a negative online review or comment by a former client as long as the lawyer does not disclose any confidential information and it is truthful.

## Question 6

A lawyer may advise a client to delete damaging information contained on the client's social media accounts as long as there is no pending lawsuit to which that information would be relevant.

- A) True
- B) False



To quote further from people's exhibit A, your Twitter feed,  
"@holdupguy I'm in the getaway vehicle with  
the money and hostages. Where R U?"



# Lawyers Advising Clients About Social Media Use

- Ethical to advise:
  - What content may be maintained or made private
  - How to manage security settings
  - What content may (lawfully) be taken down
- Not ethical to advise:
  - Remove content client otherwise must preserve
  - Take any action that would constitute spoliation of evidence
  - Post false information to help case

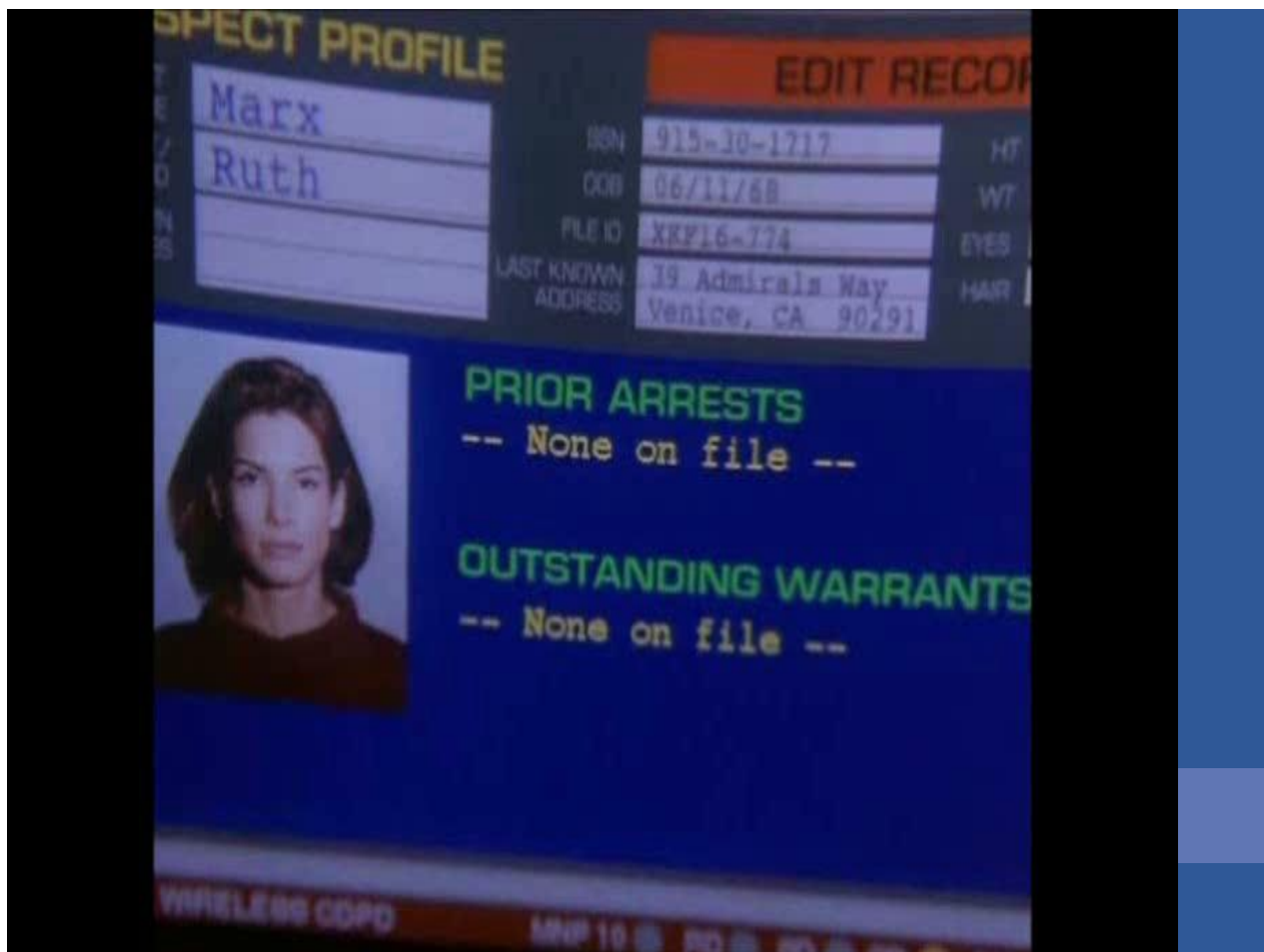
Florida Proposed Advisory Opin. 14-1 (Jan. 2015)

NYSBA Social Media Ethics Guidelines (June 2015)

# Research Using Social Media

## Researching jurors

- ABA Formal Opin. 14-466  
“Friending” witnesses or opposing parties
- NYCBA Formal Opin. 2010-2
- Mass. Bar Ass’n Comm. On Prof’. Ethics  
Op. 2014-5
- San Diego Bar Ass’n Legal Ethics Comm.,  
Op. 2011-2
- Philadelphia Bar Ass’n, Op. 2009-2



# Practical Tips for Using Social Media Ethically

- Adopt a social media policy and stick to it.
- Be truthful and accurate
- Realize that you are in a public forum
- Use caution in engaging with potential clients online
- Keep copies of client social media communications
- Avoid communications with represented parties
- Do not use deceptive means
- Understand the rules for “friending” judges
- Know the advertising rules





## Last, but not least

- Proposed rule barring sex with clients: Rule 1.8.10
- Conflicts: how do the new rules differ in practical terms from the existing rules?
- Ethical walls
- Any questions?





# Thank you!

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