

When Using Social Media, Even Legal Minds Need To Err On The Side Of Caution

■ By **BRANDON FERGUSON**
Staff Writer

The world of social media is littered with embarrassing horror stories – many of them involving youthful indiscretions, regrettably posted and transmitted across a worldwide medium. Surprisingly, though, even highly educated professionals need to be mindful of their web postings – and lawyers are no exception.

At the American Bar Association's (ABA) 40th Annual Conference on Professional Responsibility, which was held on May 30 at Hyatt The Pike in Long Beach, Seattle attorney Bruce E.H. Johnson told the Business Journal, "Lawyers are increasingly using social media as a marketing tool, and many of them are running afoul of lawyers' ethics rules." Johnson moderated a panel that explored the legal ethics of using social media sites such as Facebook, Twitter and LinkedIn. While some of the panelists presented extreme examples, others illustrated how the rapid evolution of technology has left legal ethicists scrambling to figure out how ethics rules apply in the digital age.

In a paper titled "It's Complicated: How To Walk the Fine Ethical Line in the Age of Social Media," panelist and attorney John Browning discussed one case that involved a public defender from Miami-Dade, Florida, who posted to Facebook a photo of her client's underpants. Browning's article explained that as a result the attorney was fired.

"Unfortunately, poor judgment plagues lawyers just like anybody else," wrote Browning. "And social networking sites have provided a wider audience than ever [before] for such lapses." Although such a case is likely to garner the public's attention, attorneys can also find themselves in trouble over less public matters.

In California in 2012, the Standing Committee on Professional Responsibility and Conduct (COPRAC) issued an opinion arguing that a seemingly innocuous statement by an attorney on a personal Facebook page can qualify as an advertisement and is therefore subject to certain rules and regulations. The statement could be as simple as "Another great victory in court today! My client is delighted. Who wants to be next?"

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The partners at Demler, Armstrong & Rowland wish to extend their congratulations to our partner, Terry A. Rowland, for his successful verdict in the San Diego case of *Berry v. Hicks*. After several weeks of trial, the plaintiff asked the jury for a verdict of \$42 million. After rejecting the defense offer of \$4 million, the jury returned a verdict of \$1,287,028.82. This victory caps a "winning streak" of 15 consecutive successful jury trials. Congratulations are also in order for his recognition, for the ninth consecutive year, as a Southern California "Super Lawyer" (top 5%) by the publishers of Los Angeles Magazine.

For over 30 years, Demler, Armstrong & Rowland has provided the Long Beach business community, homeowners and individuals with legal assistance in all aspects of insurance, business, contract, casualty and construction litigation. The firm also has significant experience in anti-SLAPP proceedings, recovering substantial attorney fee awards in response to frivolous lawsuits. In over 150 jury trials for both defendants and plaintiffs, the firm has a track record of success exceeding 90% in lawsuits throughout California. Demler, Armstrong & Rowland has consistently been awarded the highest possible rating ("A-V") in both ethics and competence by Martindale-Hubbell and our trial lawyers have repeatedly been recognized as Southern California "Super Lawyers" (top 5%) in peer rating reviews published in Los Angeles Magazine.

Paragon v. Weber-Madgwick Condominium insurer paid \$2 million in flood damages to the owners and then sought reimbursement, claiming that the defendant's grading operations on the project created an artificial dam which flooded after being filled with rainwater. Judgment for defendant plus an award of attorney's fees.

Niguel Summit v. Sanderson Owners of apartment complex sued contractors for structural construction defects on the property on theories of negligence, breach of warranty, breach of contract and express indemnity. Defense verdict.

DeArmand v. Shanfeld Plaintiffs sought \$400,000 in compensatory and punitive damages, claiming multiple violations of the Santa Monica Rent Stabilization Ordinance. Defense verdict.

Leakos v. Westwood Center Plaintiff sought \$800,000 in damages after suffering injuries during an attempted sexual assault in defendant's office building. Plaintiff alleged that the defendant provided inadequate security despite a history of criminal activity in the building. Defense verdict.

Mo Hotta Mo Betta v. Lotta Hotta DAR represented the plaintiff in a lawsuit for trademark and copyright infringement, alleging that the defendant adopted a similar-sounding name and produced a catalog which was deceptively similar to the plaintiff's after the plaintiff refused the defendant's proposal to franchise its operations. Defendant agreed to a stipulated judgment, company name change and payment of attorney's fees.

Bubonic v. Safeco Plaintiffs sued their insurance company for breach of contract and insurance bad faith, claiming that the carrier refused to pay them for the loss of over \$300,000 worth of jewelry allegedly stolen from them while they were staying at the Ritz Carlton Hotel in Rancho Mirage. After removing the matter to federal court, DAR obtained a verdict in favor of the defendant and an award of attorney's fees against the plaintiffs.

Silva v. Paul Frank Industries Plaintiff contended that he had created the "Julius" monkey cartoon character and sued the defendant for copyright violations. DAR contended that Paul Frank Industries, Inc. was the owner of the copyright and the lawsuit was resolved via a successful motion for summary judgment by the defense.

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According to Los Angeles-based attorney Wendy Chang, violation of these advertising rules can have many consequences, ranging from a simple reprimand to the loss of one's license, depending on the severity of the violation. To protect against such repercussions, "Attorneys just need to recognize that the normal rules that encompass attorney advertising are implicated when you are using social media platforms," Chang said.

Complicating matters is the lag time between rules that have been on the books for years and the rapid evolution of computer technology. For example, in the California Business and Professions Code, which regulates attorney advertising, the wording makes no mention of social media platforms.

"The rules have existed for some time. [But] technology moves as quickly as you can blink. So there's always a bit of a gap," Chang said, adding, "but the rules are, if you take it down to the core, applicable."

Nicole Hyland, a New York attorney and panelist, added, "The rules themselves don't expressly talk about social media. You're starting to see ethics opinions interpreting the rules and attempting to apply the rules to social media."

Some common pitfalls attorneys may encounter when using social media include violation of attorney-client privilege, unintentionally creating attorney-client relationships, and in the case of communica-

tions occurring across state lines, engaging in the unauthorized practice of law.



Attorney Nicole Hyland

According to Hyland, the informal nature of some social media platforms can make it easy for some lawyers to forget that the rules governing the practice of law still apply.

Hyland also referred to what she called the "myth of the privacy bubble," stating "When they're communicating with their friends and their family, [some lawyers] just don't think about the fact that the rules still apply to their conduct. In fact, their conduct is still public even though they're primarily interacting with their close associates and friends."

But while the potential for trouble exists, Hyland added that social media provides attorneys with important tools necessary to remain competitive and to best serve their clients.

"I wouldn't say you have to be worried all the time or you have to be overly cautious about what you do on social media. Use common sense, familiarize yourself with the opinions that are out there," Hyland said,

Added E.H. Johnson, "Educate yourself on the technology. Under the American Bar Association rules, lawyers now have an ethical duty to understand the technology they're using." ■

For Those Going Into Business, Consulting A Lawyer Is A Prudent Move

■ By **BRANDON FERGUSON**
Staff Writer

According to U.S. Small Business Administration (SBA) statistics, in 2011 the nation was home to 28.2 million small businesses. In the wake of the Great Recession, small firms (businesses having fewer than 500 employees) accounted for 60 percent of net new jobs. While these numbers may be heartening, entrepreneurs should remember that the process of starting a business entails more than choosing a snappy name and working flexible hours.

According to Long Beach attorney John Romundstad, it's prudent for people who are starting a business to consult a lawyer as well as a certified professional accountant (CPA). "Every situation's a little different. You need to have all of [the] information laid out before someone who knows the drill, so to speak, and who can help you make the right decisions from the get go so that you best protect yourself," Romundstad recently told the Business Journal.

When entrepreneurs ask Romundstad, who has been practicing law for 37 years, for advice, he has a series of questions he asks. "I ask them what their objective is,

what kind of business is it, what they want to do with it, where they want to take it," Romundstad said. He explained that the answers to these questions often help determine whether an entrepreneur should set up a sole proprietorship, a limited liability corporation or some other corporate entity. Each choice, he explained, affects an owner's liability differently. "Increasingly, people who are starting businesses recognize that protecting themselves, their families, their assets and so forth from liability is crucial right from the get go," Romundstad said.

Attorney Paul Carter, who practices law at the Long Beach firm Bergkvist, Bergkvist & Carter, added that it's important for potential business owners to consider factors such as workers' compensation coverage and liability insurance. "If you're not insured properly the penalties can be severe, so you definitely want to have adequate insurance," Carter said.

Although discussing potential failure is not always a pleasant conversation to have with a client, Carter added that it's a good idea to consider failure before it happens. "When you talk to people, you hope the business is going to succeed, but what

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