

Social Networking Sites and the Ethical Issues They Create

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Social Networking Sites and the Ethical Issues They Create

I. Ethical Pitfalls

When new technological advances are used and abused by the legal profession, the typical response is to clamor for new ethics rules specific to those technologies. By the time the studies are conducted, working groups have debated the issue and public commentary has exhausted itself, the technology has quickly become dated and the next big thing has taken its place. Blogs have been overshadowed by microblogs, MySpace has been dwarfed by Facebook, and so on and so on. Most ethics questions about the use of technology can be adequately answered by existing ethics rules without regard to medium or application.

On a more fundamental level, most of the ethical pitfalls related to social networking can be prevented by a little forethought and exercise of common sense, without regard to ethics rules. The qualities of social networking which are so potentially problematic for lawyers are its immediacy, its accessibility, and its permanency. As a result, like all users of social media, lawyers can react to a situation instantaneously and publicly, with an online posting that will remain on the internet in some form forever. Instead of sober reflection, social media encourages a reactionary and emotional post. Instead of one-on-one communication with a colleague or friend, social media encourages a broadcast to an expansive audience. Instead of ethereal and temporary communication, social media encourages an indelible post. You can get yourself into serious trouble by tweeting an emotional reaction to a judge's adverse ruling from your iPhone as you are walking out of the courthouse, instead of waiting to complain to your partners about the ruling over a cup of coffee back at the office. Since prudent, reflective and sober lawyerly behavior provides the underpinning of most state's ethics rules, those considerations are as important as the ethics rules themselves.

This article will briefly address some of the ethical and practical issues which lawyers may face when they engage in social networking. The issues which seem to arise with the most frequency concern client confidentiality, interaction with parties, witnesses, judges and the public and lawyer advertising.

Clients are typically very protective about their brand and their message. Many have very strict limitations on the information which their law firms and their lawyers may make public. Many do not allow their name to be listed on a firm website as a client. Many do not allow their lawyers to comment publicly about ongoing litigation. Even if a lawyer has received no instruction from her client about the parameters of public discussion concerning the lawyer's representation, a fundamental principle in the client-lawyer relationship is that a lawyer shall not reveal information relating to the representation of a client unless that client gives informed consent. Model Rules of Prof'l Conduct R. 1.6. Informed consent means that the lawyer has communicated "adequate information and explanation" about the material risks of the proposed course of conduct to the client and has received the client's agreement. Model Rules of Prof'l Conduct R. 1.0(e). The commentary to Rule 1.6 makes clear that the confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Model Rules of Prof'l Conduct R. 1.6 cmt. 2.

So, for example, if a lawyer wants to tweet about a courtroom victory for a hardware store chain, the lawyer cannot use the client's name unless she has discussed her intentions with the client and received permission to do so. *See also* Model Rules of Prof'l Conduct R. 1.9(c)(duties to former clients) and Model Rules of Prof'l Conduct R. 1.18(b)(duties to prospective clients). So what if the lawyer makes the same tweet, or discusses a hypothetical on a Facebook post which is based upon a case she is currently handling for the client, but doesn't reveal the client's name? What if the lawyer is a member of DRI and wants to have a successful result

published in the “And the Defense Wins” segment of “The Voice” e-magazine? The result in any of those situations will be the same, so long as “there is no reasonable likelihood” that the reader will be able to ascertain the identity of the client or the situation involved (or if the client has provided consent). Model Rules of Prof’l Conduct R. 1.6 cmt. 4. If the case is one in which the lawyer is involved has received some notoriety, or if the lawyer is a “fan” of the hardware store chain, there may be a reasonable likelihood that the client or the situation would be identifiable. The best practice would be to have a discussion with your client before the post or tweet is made and get its permission, or alternatively, to make the publication as obtuse or generic as possible.

Lawyers are increasingly using social networking sites to mine information concerning witnesses and opposing parties, the ethical implications of which will be discussed later in this article. *See generally* David Hricik, “Communication and the Internet: Facebook, E-mail and Beyond,” (December 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557033. But what about your client and the employee witnesses of your client over whom you at least have nominal control? Your opponent will undoubtedly be doing the same searching inquiry you are doing regarding her client. You don’t want any surprises, so you attempt to do the same searches as your opponent. If you see that your client has posted photos of her doing shots of tequila at the office party on her Facebook page, or if you see that your client’s tweets have racist overtones, what are your obligations to your client? Keep in mind that lawyers are often called upon to provide advice which is well out of their comfort zone or their expertise. In the course of representation, lawyers “may refer not only to law but to other considerations such as moral [and] social. . . factors, that may be relevant to the client’s situation.” Model Rules of Prof’l Conduct R. 2.1. Obviously, you are a legal advisor and not a moral advisor, but “moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.” Model Rules of Prof’l Conduct R. 2.1 cmt. 2. If you are of the opinion that your opponent will see the photo or the tweet and will attempt to use it to her advantage, you will need to counsel your client and make a recommendation about how it should be handled. You will also need to be mindful about Rule 3.4(a)’s prohibition against the alteration and destruction of documents “or other material having potential evidentiary value,” as well as your jurisdiction’s discovery rules, in advising the client regarding a retroactive solution such as attempting to remove the photo or tweet. Prospective solutions, such as advising your client or the employee witness to resist the urge to post party pictures or keep objectionable tweets off the internet, are simple and straightforward.

There are countless public Internet methods to obtain information regarding opposing parties or non-party witnesses, most of which do not implicate ethics rules. The closer an internet contact comes to the equivalent of a prohibited conversation or interaction, the more consideration should be given to the ethical propriety of the conduct. It should be self-evident that attempting to friend a represented opposing party during pending litigation, when the purpose of the contact is to see that person’s Facebook page, would violate Rule 4.2. Model Rules of Prof’l Conduct R. 4.2. What if you ask a legal assistant or another friend, who may or may not have a relationship with the represented opposing party, to do the friending? The prohibition on communication would still most likely apply. The commentary to Rule 4.2 provides: “A lawyer may not make a communication prohibited by this Rule through the acts of another.” Model Rules of Prof’l Conduct R. 4.2 cmt. 4. *See also* Model Rules of Prof’l Conduct R. 8.4(a) (misconduct to knowingly to violate the rules through the acts of another); Model Rules of Prof’l Conduct R. 5.3 (a lawyer may be responsible for the actions of a nonlawyer employed or retained by the lawyer). What if you or a surrogate wanted to follow the tweets of the general manager of the co-defendant’s restaurant where the plaintiff was overserved alcohol? Whether Rule 4.2 will preclude such contact will depend on whether the general manager is “a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or who has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may

be imputed to the organization for purposes of civil . . . liability.” Model Rules of Prof’l Conduct R. 4.2 cmt. 7. If you are intent on making her a policy maker because it is important to your defense in the case, or if you have awareness that she is regularly consulting with counsel for the organization, you should probably not have the contact.

II. Friending?

The ethical obligations and potential prohibitions with regard to unrepresented or non-party witnesses are substantially less clear than those which apply to represented parties. If a lawyer is attempting to friend an unrepresented party (directly, or through a surrogate), such action would typically be for the purpose of gaining information about that unrepresented party for potential use in potential or current litigation. If such contacts are made “a lawyer shall not state or imply that the lawyer is disinterested.” Model Rules of Prof’l Conduct R. 4.3. Rule 4.3 and its comments give considerable attention to the potential misunderstanding of the unrepresented party as to whether or not the lawyer (or her surrogate) is disinterested. It appears that the most prudent course of action in making such contact would be for the lawyer (or her surrogate) to identify themselves and explain that their interests are or may be in opposition. Model Rules of Prof’l Conduct R. 4.3 cmt. 1. The necessary disclosures, however, make it highly unlikely that the friend request will be accepted.

Under circumstances where a third person, such as a co-worker of the plaintiff, or the plaintiff’s neighbor, or a customer who witnessed an in-store accident, may have information which has a bearing on the claim or lawsuit, the obligations are even less clear. In general, it is unlikely that passive and public contact, such as visiting the public portion of a Facebook page or following the witness on Twitter, would be violative of Rule 4.4. Model Rules of Prof’l Conduct R. 4.4. What if the lawyer (or her surrogate) attempts to friend the witness, in order to obtain impeaching information about the witness? The witness can either accept or decline the friend request. Presumably this contact can be made, if done voluntarily, without the need for disclosing the fact that the lawyer (or her surrogate) has a connection to litigation or the opposing party. The Philadelphia Bar Association, however, has rendered an opinion which found that the use of a surrogate who has not revealed affiliation with the lawyer or the reason for the friend request would violate Rules 8.4 and 4.1 because without such information, the friend request would be deceptive. *See* Philadelphia Bar Association, Professional Guidance Committee Opinion 2009-02 (March 2009). *See also* Peter Geraghty, “Facebook: State bar opinions address information gathering,” (November 2010), available at <http://www.abanet.org/media/youraba/201011/article10.html>. What about a circumstance where the lawyer (or her surrogate) creates a pseudonym, or a fake profile, and seeks to friend the witness? Arguably, using subterfuge to gain access to a private or semi-private Facebook page may violate the privacy rights of that person. *See* Model Rules of Prof’l Conduct R. 4.4 (a) (a lawyer may not use methods of obtaining evidence that violates the legal rights of a third person). On the other hand, if a witness allows a stranger to view her Facebook page, she may be waiving any privacy rights attendant to her use of the page. The New York City Bar Association, however, has issued an opinion which holds that deception or trickery may not be used to gain access to a person’s non-public social networking page. *See* Association of the Bar of New York City Committee on Professional Ethics, Formal Op. 2010-2 (September 2010). *See also* Model Rules of Prof’l Conduct R. 8.4(c) (misconduct to engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

On balance, other than perhaps passively viewing the public portions of a witnesses’ social networking page, there is really no way to make anonymous contact with a witness through a social networking site. If a lawyer or surrogate attempts to gain access to the private social networking page as themselves, there is not much chance of misrepresentation, confusion or violation of the witnesses’ legal rights. If the lawyer or surrogate attempts to gain access to the site through a pseudonym, or otherwise misrepresents their identity, the lawyer may run afoul of Rules 4.3 and 8.4(c) and the terms of the agreement with the social networking site.

Considerable media attention has been given to the use of social media in trial (and perhaps more broadly in litigation) by lawyers, judges, jurors, parties and the press. Lawyers and judges can't seem to help themselves from *ex parte* communication via social networking during trial that they would not otherwise have in person. See John Yoder, "Monthly Column – The Ethical Dilemma for Elected Judges Using Facebook," (12/08/2010) available at http://www.facebook.com/note.php?note_id=138761896177206. Jurors can't seem to help themselves from letting the world know their pre-and post-verdict opinions. See Ginny LaRoe, "Barry Bonds Trial May Test Tweeting Jurors," *The Recorder* (02/15/2011), available at <http://www.law.com/jsp/law-technologynews/PubArticleLTN.jsp?id=1202481944364&slreturn=1&hbxlogin=1>. Parties seem more eager to provide their perspective on the trial proceedings, since they have a potentially unlimited audience. See <http://twitter.com/governorrod>. Media want to provide real time trial reporting in 140 character segments. See John Bacon, "Judge will allow tweets during trial," USA TODAY (02/23/2011), available at http://www.usatoday.com/printedition/news/20110223/nline23_st.art.htm. There are many general arguments regarding the propriety or impropriety of the use of social media during trial; however, only two ethical issues involving lawyers will be addressed here. The first is the prohibition against attempts to influence judges and jurors or communicate with them on an *ex parte* basis. Model Rules of Prof'l Conduct R. 3.5. See Stephen P. Laitinen and Hillary J. Loynes, "A New "Must Use" Tool in Litigation?," *For The Defense* (August 2010). The Florida Supreme Court's Judicial Ethics Advisory Committee has determined, for example, that it is impermissible for a judge to add lawyers as friends on a social networking site. See John Schwartz, "For Judges on Facebook, Friendship Has Limits," *New York Times* (12/10/2009) available at <http://www.nytimes.com/2009/12/11/us/11judges/html>. This bright line prevents the appearance of impropriety, but still doesn't reflect the reality of a world that still exists outside of social media. For example, if a lawyer's social acquaintance is a judge and they are Facebook friends, must the judge or the lawyer unfriend each other, despite the fact that they still meet for coffee occasionally or belong to the same running group? Why should social networking be more of an attempt to "seek to influence" a judge than having coffee?

The second rule regards trial publicity. Rule 3.6 attempts to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Model Rules of Prof'l Conduct R. 3.6 cmt. 1. Under this rule, a lawyer involved in a litigated matter may make "extrajudicial statements," but may not make such statements if she knows or reasonably should know that the publicly communicated statements "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Model Rules of Prof'l Conduct R. 3.6. Accordingly, a lawyer involved in a falling merchandise trial may tweet from her iPhone on the courthouse steps about the trial, so long as such communication will not run the risk of materially prejudicing the trial, the tweet is being done with the consent of her client; and the tweet does not violate any other ethical rule. *But see* Hart Van Denburg, "Ahmed Ali's lawyer says prosecutor's Facebook post anti-Somali," *City Pages* (02/17/2010), available at http://blogs.citypages.com/blotter/2010/02/prosecutors_fac.php. While a lawyer should avoid using social media to make negative comments about a trial judge at any time, a lawyer should certainly avoid making such negative comments about the trial judge during the course of the trial. Such comments could violate Rule 3.6, as well as Rule 8.2 if they are false or made without regard to their truth or falsity and if they impugn the judge's qualifications or integrity. See Model Rules of Prof'l Conduct R. 8.2.

III. Advertising

The last general area of ethical concern regarding social media is whether the advertising rules are triggered by its use. Rule 7.1 prohibits lawyers from making "false and misleading communications." Model Rules of Prof'l Conduct R. 7.1. Rule 7.2 allows lawyer advertising and permits the use of advertising through the internet. Model Rules of Prof'l Conduct R. 7.2 cmt. 3. Rule 7.3 prohibits "real-time electronic" solicitation

of professional employment from a prospective client in most circumstances. Model Rules of Prof'l Conduct R. 7.3. Rule 7.4 prohibits lawyers from claiming they are specialists, unless they meet certain criteria or qualifications. Model Rules of Prof'l Conduct R. 7.4.

Lawyers should be very careful about ensuring that their use of social networking site regarding their legal work is not false or misleading. Even a Facebook post regarding a great client result could be considered misleading if it is presented in a way that might give the reader the unjustified expectation of getting the same result. Model Rules of Prof'l Conduct R. 7.1 cmt. 3. Moreover, compliance problems are compounded because of the interactive nature of most social networking websites. For example, if a client or a colleague makes a recommendation on the lawyer's LinkedIn profile, the lawyer must ensure that the statements made in the recommendation are true. *See* Steven Seidenberg, "Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous," *ABA Journal* (2/1/11). LinkedIn, for example, allows a user to self-designate "specialties" on their user profile. These designations must comply with Rule 7.4. Lawyers should be cautious about designating areas of practice, much like they would in a website profile, in the "specialties" summary. Michael C. Flom and Abigail S. Crouse, "Social Media for Lawyers," *Bench & Bar of Minnesota*, November 2010. The risk of mischaracterizing a practice area as a specialty is likely eliminated by using the "professional experience" summary instead.

There is some debate about whether the use of social networking sites constitutes advertising; however, a lawyer should give considerable thought to whether or not the use of Facebook or LinkedIn or similar sites fall within her state's legal advertising regulations. *See* Steven Seidenberg, "Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous," *ABA Journal* (2/1/11). If a tweet regarding a trial victory constitutes an advertisement, it would be nearly impossible to incorporate a state-specific disclosure or disclaimer in 140 characters. *Id.* If a Facebook post regarding the opening of a new office constitutes an advertisement, it would be impractical to have the advertisement approved or pre-approved, if that is required by the state where the lawyer practices. *Id.* Keeping social networking social and compliant, is quite difficult in a site like LinkedIn, where its very purpose is professional networking.

IV. Conclusion

The use of social networking creates new opportunities for lawyers to engage in discovery, communicate with colleagues, clients and the public, and to develop business. Lawyers need to give careful consideration to how they use social networking sites to avoid getting into ethics trouble. Lawyers should also be mindful of the fact that their contributions to social networking sites are most likely permanent and public. Think before you tweet and ponder before you post.

