ETHICAL CONSIDERATIONS IN LAWYERS' USE OF SOCIAL MEDIA

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Social networking platforms like Facebook, LinkedIn, and Twitter have fundamentally changed the way people communicate and share information. Facebook is closing in on 1 billion users worldwide, and Twitter has gone from processing 5,000 "tweets" a day in 2007 to over 340 million a day just five years later. Lawyers, too, have embraced social networking. According to the 2012 ABA Legal Technology Survey Report, 88% of the responding law firms are on LinkedIn, while 55% are on Facebook. While most lawyers report using social media tools for career development and networking (72%), they are also utilizing them for case investigation (44%) and client development (42%). The question, though, is whether lawyers are using social media in an ethical, responsible way, or are they risking a malpractice suit or a trip to the disciplinary board for misusing social media?

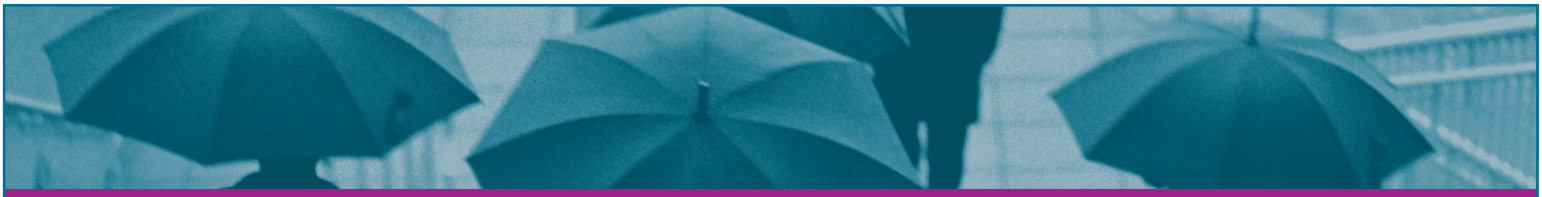
Plenty of lawyers have already found themselves in hot water for their online statements or conduct. In July 2012, former Norfolk, Virginia prosecutor Clifton Hicks was charged with making a felony threat after he allegedly posted messages on Facebook threatening bodily injury to his former employer, Commonwealth's Attorney Greg Underwood. In May 2010, former Illinois assistant public defender Kristine Ann Peshek was disciplined for disclosing client confidences on a blog she maintained, where she frequently referred to clients by their first names, nicknames, or jail identification numbers. She described – in sometimes graphic detail – the clients' cases, courtroom testimony, and other embarrassing and potentially damaging information. Peshek wasn't shy about the judges she appeared in front of, either, referring to one as "Judge Clueless." In Texas, a Guadalupe County prosecutor pleaded guilty to contempt of court for discussing a pending felony murder trial on Facebook, while in California a prominent commercial litigator wound up explaining himself in court after he tweeted about a case and linked to documents that the court had placed under seal.

Clearly, the ease of use and the sheer pervasiveness of social media can lead to some lawyers letting down their guard about such communications, and forgetting that the same rules of conduct apply in cyberspace as they would via more traditional avenues of communication.

So what are the biggest areas of concern for lawyers when it comes to the ethical use of social media? The first might seem to run counter to the cautionary tales like these above – avoidance. One simply can't stick one's head in the sand and hope to avoid problems by avoiding social media. Recently, the ABA Ethics 20/20 Commission approved certain changes to the Model Rules of Professional Conduct in order to address the impact of technology and globalization on the legal profession. One of these changes updates Rule 1.1 – the duty to provide competent representation – and Comment 6 to that Rule. Providing competent representation to clients now not only requires that one stay abreast of changes to the law in your practice area, but also obligates lawyers to remain current on "the benefits and risks associated with technology" as well.

The revision to Rule 1.1 reflects the realities of the modern practice environment, particularly regarding social media. In an age where locating and using content from social networking sites plays an increasingly important role in a broad range of practice areas (a 2010 study by the American Academy of Matrimonial Lawyers revealed that 81% of respondents had used social media evidence in their cases), is a lawyer who is not conversant in the use of social media providing competent representation?

The revision to Rule 1.1 also reflects a growing trend among courts throughout the country to hold lawyers professionally



accountable when it comes to using such online resources. In Griffin v. Maryland, a Maryland appellate court quoted approvingly that "as a matter of professional competence" lawyers should be investigating social media avenues in their cases. And in one California case, Cannedy v. Adams, a lawyer's failure to locate a sexual abuse victim's recantation on her social media profile was held to constitute ineffective assistance of counsel.

Another significant area of ethical concern for lawyers using social media involves the gathering of information about a party or witness. While there is generally no ethical issue in viewing the publicly available portion of an individual's Facebook page, what about those pages with privacy restrictions, allowing only "friends" to see such non-public content? May an attorney, or someone working for that attorney, try to become someone's "friend" in order to gain such access? If the person is a represented party, the answer is clearly "no." Under Rule 4.2 of the Model Rules of Professional Conduct, a lawyer should not communicate or cause another person to communicate with a person represented by consent without the prior counsel of that party's attorney. In May 2011 the San Diego County Bar Association's Legal Ethics Committee considered this Rule's application in the digital age. It ruled that a lawyer seeking access to a represented party on social media sites could not do so through "friend" requests, but rather should seek such information through formal discovery channels or by contacting the party's attorney first, seeking consent to such a communication.

The issue of potential deception or misrepresentation on social media – "false friending" – is at the heart of several other ethics opinions and at least one lawsuit. In separate opinions, the Philadelphia Bar Association Ethics Committee (March 2009), the New York City Bar Association Committee on Professional Ethics (September 2010), and the New York State Bar Association Committee on Professional Ethics (September 2010) all held that a lawyer – or someone working under that lawyer's supervision like a paralegal – could not "friend" a witness under false pretenses. To do so, they pointed out, would violate Rule 4.1's prohibition against knowingly making a false statement of fact to a third person, as well as Rule 5.4's ban on conduct involving dishonesty, fraud, deception, or misrepresentation. And, as the New York City Bar opinion noted the increasing use of social media sites by lawyers and the fact that deception is even easier in the virtual world than in person make this an issue of heightened concern in the digital age.

A final area fraught with ethical risks for lawyers concerns the presentation of evidence. No one wants to discover embarrassing or damaging photos or comments on a client's Facebook page, but lawyers can't instruct the client to remove that content or to delete his Facebook account. Model Rule 3.4 prohibits a lawyer from unlawfully altering or destroying evidence and from assisting others in doing so. A lawyer's ethical duty to preserve electronically stored information encompasses social networking profiles.

Plaintiff's counsel in a 2011 Virginia wrongful death case (Lester v. Allied Concrete) directed his paralegal to instruct the client to delete his Facebook page, and further misrepresented to the defense attorneys during discovery that his client didn't have a Facebook account. After a $10.6 million verdict for the plaintiff, the defense counsel sought a new trial based on spoliation of evidence. The court slashed the verdict in half, and levied sanctions totaling $722,000 against the attorney, and his client for their "extensive pattern of deceptive and obstructionist conduct."

The use of social networking in the practice of law is both a necessary weapon in a lawyer's arsenal and at the same time a potential ethical minefield. Lawyers run the risk of breaching their duty to provide competent representation if they ignore social media platforms and the utility they offer. Yet at the same time, the misuse of social media in investigation and fact-gathering and in preserving evidence presents serious professional responsibility issues. Attorneys need to heed some of the same advice they give to clients: treat social media as simply another form of communication subject to the same ethical constraints (and rules of common sense) as the more traditional modes; and adopt a social media policy that will guide both lawyers and non-lawyer employees in the responsible use of social networking.

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