

**Social Networking :Ethical
Issues**

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- As a neutral mediator and arbitrator with over twenty (20) years of experience, he has mediated and/or arbitrated over one thousand cases.



Social Networking

- Tweeting, blogging & posting comments online, using chat rooms, list serves, instant messages and networking sites.



Social Networking Includes:

- Social networking such as Facebook
- Social media such as: Youtube, Twitter
- Blogging



Social Network Sites

- Facebook, MySpace, LinkedIn
- Twitter
- Foursquare
- Disapora
- Youtube
- Orkut (Brazil)
- Mixi (Japan)



Social Network Definitions

- Blogs – websites known as a weblogs, which are web-based but are frequently updated with net content.
- Social networking – discussion groups on social networking sites.
- Forums/Discussions – web-based bulletin systems where one can exchange public messages with others.



Social Network Definitions

- Wikis – web-based collaborative knowledge bases, like encyclopedias for the masses.
- Podcasts – audio presentations and archived radio shows that can be played on a computer or downloaded to a portable digital music player.



Twitter, Facebook, LinkedIn

- Significant sources of information
- Witnesses, parties, lawyers, potential jurors, and judges.
- Social networking is here to stay
- Lawyers must develop a plan for dealing with electronic data discovery (EDD) because so much info is stored electronically



Issues

- Legal advertising
- Conflict of interest
- Solicitation
- Unauthorized Practice of Law
- Confidentiality
- Inadvertent creation of an attorney-client relationship
- Communication with a represented person



Issues

- How to apply the rules of professional responsibility to social media



Facts

- Facebook has 500 million active users
- Twitter has 175 million
- LinkedIn – 80 million, with 216,000 lawyers as of June 2008




Facts Continued

- 75% of all lawyers belong to some type of online social network
- 75% of all lawyers between 25 & 35 belong to an online social network




Lawyer Advertising

- Advertising –
 - Legal advertising is commercial speech- [Bates v. State Bar of AZ, 433 U.S. 350(1977)] –
 - Entitled to First Amendment protection so states could place reasonable limits on time, place, and manner of advertising and could prohibit false or misleading advertising.




Solicitation

- Solicitation – ABA Model Rule 7.3 states that lawyers shall not by in-person, live telephone, or real time electronic communications solicit employment from a prospective client.
- Could happen inadvertently during social networking.



UPL

- Unauthorized Practice of Law (UPL)
 - An issue when a lawyer targets a state she/he is not licensed to practice in
 - UPL violations can result in civil and criminal penalties and bar/discipline
- Could happen inadvertently during social networking.



Attorney-client relationship

- Inadvertent creation of an attorney-client relationship
 - Determined by reasonable expectation of the purported client
 - Could arise from chatroom discussions and comments to blogs



Confidentiality

- A lawyer must keep client information confidential
- Many lawyers use Twitter to post information without much thought
- Inadvertent disclosure of confidential information



Confidentiality

- Example of breach of confidentiality
 - An Illinois public defender was sanctioned for disclosing client information in a personal blog where she talked about new cases without mentioning any names and complained about the legal process



Communication with a represented person

- ABA Model Rule 4.2 prevents communication with a represented person whom the lawyer knows is represented by another lawyer in the matter
- “Friending” a party or witness could violate this provision or cause a conflict, even if it’s unintentional



Electronic Discovery

- Treat v. Tom Kelly Buick Pontiac GMC, Inc., No. 1:08cv173, 2010WL 1779911 (N.D. Ind. Apr. 30, 2010)
 - Wrongful termination and sexual harassment case
 - P produced during discovery a printout of the inappropriate sexual story to her by her boss from his MySpace page



FRCP

- Federal Rules of Civil Procedure 26(b)(1)
 - allows for a broad scope of discovery such that any non-privilege matter that is relevant to any party’s claim or defense is discoverable



FRCP

- Thus FRCP allow discovery of personal information posted on a social networking site if it is relevant to the litigation and the discovery request is narrowly tailored.



Relevancy

- Relevancy is determined by specific facts of each case
- E.g., in Quigley Corp. v. Karkus, No.09-1725, 2009 WL 1383280, at *3-5 (E.D. PA, May 15, 2009) the court held that Facebook “friends” status of the co-D is irrelevant in litigation involving allegations that shareholders of a corporation violated the Securities and Exchanges Act by refusing to disclose their relationship.



Requests for overly broad discovery of revelation will be decided

- E.g., Mackelprang v. Fidelity Nat. Title Agency of Nevada, Inc., No. 206-cv-00788-JCM-GWF, 2007 WL 119149, *1 CD.Nev. Jan 9, 2007), in sexual harassment action, D’s request for all records showing P’s extra-marital affair including private email messages, on P’s MySpace page was denied as being too broad and a fishing expedition.



Discovery

- And in Crispin v. Christian Audigier, Inc., No. CV 09-09509 MMM (JEMX), 2010 WL 2293238, *1-2(C.D. Cal. May 26, 2010), court quashed subpoenas seeking discovery of private email messages on social networking sites.



FRCP 34

- FRCP 34 states that a party may request any electronically stored information that is within the “possession, custody, or control” of the responding party



Cases

- In a tort action, (P fell from her office chair) Kathleen Romano v. Steelcase, 2006-2233 (N.Y. Super. Sept. 21, 2010), Steelcase sought by subpoena to obtain copies of her Facebook and Myspace profiles both publicly available pages and private pages.



Cases

- Court held that she waived any expectation of privacy in her nonpublic social networking post relevant to show the extent of her injury and damages.
- Public portions of her social networking sites contain material contrary to her claims and deposition testimony



Social Networking & The Judiciary

- Legitimate Reasons for Social Networking
- Reconnecting with old classmates and friends
- Staying in touch with distant family members and colleagues
- Monitoring the use of the network by the judge's minor children



Social Networking & The Judiciary

- To provide links to newspaper articles on the judge's website as long as they were dignified, truthful, and not misleading
- *N.Y. Advisory Comm. On Judicial Ethic, OP-08-176 (Jan.29, 2009)



Social Networking & The Judiciary

- Judge must consider whether any online connections rise to a level of a close personal relationship requiring personal disclosure or recusal
- Also, judges must employ an appropriate level of providence, discretion, and discovery in using social networking sites, and to stay abreast of new features to the extent that they may present additional ethical issues requiring further guidance



Judiciary - Florida's Ethics Opinion

- A judge may post material on the judge's social networking page if posting does not violate Code of Judicial Conduct
- Judge may not add lawyers as friends and permit lawyers to add the judge as their "friend"
- Why? Such violates the Florida CJC (2B) against lending the prestige of the judicial office to advance the private interests of the judge or others.



Florida's Ethics Opinion Minority Opinion

- Social networking sites are now so ubiquitous that the term "friend" on these pages merely identifies a person as a contact or acquaintance and not a "friend" in the traditional sense, and would not violate Canon 2B



South Carolina Judicial Ethics Opinion

- A magistrate judge can have local law enforcement officers as friends on Facebook as long as they do not discuss anything related to the judge's position as magistrate.
- Why? It allows community to see how the judge communicates and gives the community a better understanding of the judge.
- Also, "... complete separation of a judge from extra judicial committees is neither possible nor wise; a judge should not become isolated from the community in which the judge lives."



Social Networks & Political Communications

- Florida ethics opinion – a campaign committee may post material on the judge's website if the material does not violate the code of judicial conduct



Social Networks & Political Communications (Cont.)

- Florida ethics opinion, a campaign committee may establish a page that has an option for persons to list themselves as "fans" or supporters of the judge's candidacy so long as access is not controlled by the judge or the committee



Social Networks & Political Communications (Cont.)

- Judicial candidates in two states have been disciplined for seeking campaign contributions through the internet
- Washington – the judge’s campaign literature solicited donations by email over the judge’s signature
- Kansas – a judicial candidate sent a cell phone text seeking donations from attorneys. Text stated, “If you are truly my friend then you would cut a check to my campaign! If you do not then its time I checked you. Either you are with me or against me.”



Social Networks & Political Communications (Cont.)

- Las Vegas – a temporary judge was removed from the bench for a post on his MySpace page that was hostile to prosecutors and used hostile language



Social Networks & Political Communications (Cont.)

- North Carolina – a trial judge was reprimanded for using Facebook to friend the defense attorney in a child custody and support case, responding to posts by the defense attorney about the case, using the internet to gather information about the plaintiff’s photography business and to find poems written by the plaintiff.
- The Judge, at the request of the plaintiff’s attorney, disqualified himself, vacated his order, and ordered a new trial
- The North Carolina Judicial Standards Commission found that the judge violated numerous provisions of the North Carolina Code of Judicial Conduct



Facebook Can Compromise User Privacy

- Users can share online information with Facebook friends using the "like" button. But whether or not the user presses the "like" button, if she is logged in while surfing, Facebook will know when the user visits any sites with social plug-ins. Facebook can basically track a person around the web unless the user opts out
- Facebook keeps user's web-surfing data for no longer than 90 days. How? Log onto Facebook, then open a new window or tab and surf the web then you will come to a website where your Facebook profile pops up next to a picture, news article or video and you will be urged to "be the first of your friends to like this." Or, you will see pictures of your Facebook friends with a message telling you they have connected to a particular website
- Facebook has more than 200,000 sites with social plug-ins.



Being Tracked Offline Facebook "Places"

- A tool that lets you "check in" at physical locations like Starbucks with the help of the GPS on your Smartphone
- It lets friends know where you are
- Facebook users can now know where you live or where you are even if you haven't posted that info yourself




Businesses and Facebook

- Businesses can allow customers to sign up as fans to hear about the fastest products and deals.
- A Brand's Facebook fans spend an average of \$71.84 more on its products per year than nonfans.
- But these social network sites can be trouble. They make it easier for consumers to organize and complain.




The Internet and Jurors

- Jurors are texting, e-mailing, chatting, and blogging about their jury service.
 - Examples – “I’m so bored,” “He’s so guilty,” “I just gave away \$12 million of someone else’s money.’




The Internet and Jurors

- Jurors are using online research to seek independent opinions and answers to questions not answered in court.
- A U.K. study showed that between 17% & 39 % of jurors admitted online exposure (either intentional or unintentional) to information about cases they were deciding while serving as jurors.




The Internet and Jurors

- As Jurors Turn to Web, Mistrials Are Popping Up
- By John Schwartz
- Published: March 17, 2009
- Last week, a juror in a big federal drug trial in Florida admitted to the judge that he had been doing research on the case on the Internet, directly violating the judge’s instructions and centuries of legal rules. But when the judge questioned the rest of the jury, he got an even bigger shock.




The Internet and Jurors

- Eight other jurors had been doing the same thing. The federal judge, William J. Zloch, had no choice but to declare a mistrial, a waste of eight weeks of work by federal prosecutors and defense lawyers.




The Internet and Jurors

- One juror said, "What's the big deal? If I'm called to jury duty I have the right to know every detail about a case, not just what the lawyers tell us in the courtroom."
- People, young and old, are addicted to the internet.




The Internet and Jurors

- Why do jurors ignore the judge's instructions about internet usage?
 - Insufficient explanations.
 - Lack of understanding of their role as judges of the facts.
 - Jurors want to make the right decision. They feel that they need information to do so.




The Internet and Jurors

- Personal observation - When I need an answer about something I do not know, I go to the internet. I don't even think about it.
- I need context, background, and an a better understanding of subjects.
- So do jurors.
- How about you?




The Internet and Jurors

- Jurors are shocked when they hear the judge say, "Don't use the internet" or "No internet use."




The Internet and Jurors

- What can attorneys do to encourage jurors not to get online during trials?




The Internet and Jurors

- Jurors do not feel they have been given a sufficient explanation of the rationale for the rules.
- They do not fully grasp the nature of their role as judges of the facts in the trial process.
- Jurors want to make the right decision, but feel that they do not have enough information to do so.




The Internet and Jurors

- Ask the judge to tell the jurors why they cannot use the internet; why no communication; why no research.
- Judge should tell jurors why getting outside info can lead to problems.
- Ask judge to expand the admonition with a detailed instruction of the whole point of a trial is to decide case based on evidence presented at trial, not on any other basis.




The Internet and Jurors

- Ask the judge to explain what no communication means:
 - No discussion with family or friends;
 - No electronic means of any kind;
 - No encyclopedias, dictionaries, thesauruses;
 - No outside source of any kind.




The Internet and Jurors

- Lawyers should question jurors about their internet usage and discuss these concepts during voir dire.
- Get each juror's commitment to obey the rules.




The Internet and Jurors

- Voir dire questions:
 - Do you regularly communicate online with tweets, texts, posts and blogs?
 - How will you handle a temporary change in your normal habits.
 - What will you say to your online contacts if you are selected as a juror?



The internet and jurors

- Voir dire questions:
 - Ask heavy users of social media - How do you feel about taking on a role that requires a degree of social isolation and electronic silence?"
 - If the juror can't withdraw from social media, that may be the basis of a cause challenge.



Ethical lawyers and social media

- Rule 1.1 of ABA Model Rules requires lawyers to be competent in their representation of clients
- Q – can a lawyer provide truly competent representation if she ignores social media?



Ethical lawyers and social media

- Argument – social media have become so engrained in contemporary society that a lawyer who ignores social media completely cannot provide truly “competent representation.”



Ethical lawyers and social media

- Comment 6 to Rule 1.1 stated that lawyers should keep abreast of changes in the law and its practice.
- E.g., one group of matrimonial lawyers reports that 66% of divorce attorneys use Facebook as their primary source for online evidence.



Ethical lawyers and social media

- Query – can a family law practitioner fulfill his duty of competence if he never incorporates searches of online social networking sites as part of her efforts in divorce cases?



Ethical lawyers and social media

- Diligence – AB Model Rule 1.3, comment 1 states that a lawyer should “act ... with zeal in advocacy upon the client’s behalf.”
- Query – if the lawyer is not familiar with social media, can she really act with zeal?



Ethical lawyers and social media

- If most divorce lawyers use Facebook as their best source for online evidence, can failure to check Facebook for evidence about the client’s adversary constitute a failure to perform diligence.



Ethical lawyers and social media

- E.g., does a lawyer have a duty to warn his client against posting potentially damaging content on her Facebook page?
- Remember opposing counsel will probably search Facebook for damaging information about your client.



Ethical lawyers and social media

- Spoliation – Upon seeing damaging information about your client on her Facebook page, can you instruct your client to delete it?
- M.R. 3.4(a) prohibits lawyers from unlawfully altering or destroying evidence and from assisting others from doing so. Lawyer may have a duty to preserve evidence.



Ethical lawyers and social media

- Better alternative is to advise the client to set her profile page as “private”



Ethical lawyer's duty to ensure that subordinates understand SM

- M.R. 5.1 requires that a lawyer with direct supervisory authority over another lawyer make reasonable efforts to ensure that the other lawyers complies with his ethical duties.
- M.R. 5.3 requires those lawyers who manage a firm make reasonable efforts to ensure that the firm has reasonable measures in effect to assure that non-lawyers comply with their ethical duties.



Ethical lawyer's duty to ensure that subordinates understand SM

- M.R. 5.3 holds a lawyer responsible for the ethical conduct of his non-lawyer assistant.
- Query- do these rules require a law firm to have a social media policy?
- Arguably, yes.



Ethical lawyer's duty to ensure that subordinates understand SM

- Query- does a law firm have to make reasonable efforts to educate its lawyers about the ethical risks inherent in social media.
- Arguably yes.
- M.R. 5.3(c) requires firms to educate its non-lawyer personnel as well.



Ethical lawyer's duty to ensure that subordinates understand SM

- E.g. Phila. Bar Assoc. Op. 2009-02 concluded that it would be unethical for a lawyer to instruct or permit a non-lawyer personnel to attempt to "friend" a non-party witness for the purpose of accessing information on the witness' Facebook page; unless employee disclosed identity and purpose of "friending"



Ethical lawyer's duty to ensure that subordinates understand SM

- Model Rule 4.2 prevents a lawyer from communicating with a person the lawyer knows is represented by another lawyer. Thus, it would be unethical for a lawyer to instruct or permit a non-lawyer personnel to attempt to "friend" a represented party for the purpose of accessing information on the witness' Facebook page.

What about online profiles of lawyers?

- Many lawyers have established profiles on MySpace, Facebook, LinkedIn and Twitter
- But what if you create a site on a whim and never use it again or if someone in firm creates it for you?
- What is your duty?



What about online profiles of lawyers?

- Once a lawyer claims or creates a profile, it must comply with the ethical rules on advertising.
- Lawyer can be responsible for inaccurate or misleading info posted on her profile, even if posted by third party.



What about online profiles of lawyers?

- What if third party poster is anonymous?
- E.g., on Avvo.com, “clients” can post anonymous “reviews” of lawyers.
- If the lawyer or her firm claims the profile, it is the ethical responsibility of each attorney to ensure that the information in the profile, and all comments posted to the profile, are not misleading and untrue.



What about online profiles of lawyers?

- Lawyers can add a disclaimer with any profile they claim.



What about online profiles of lawyers?

- What if the online profile was created by a third party?
- Was the third person an agent of the lawyer?



What about online profiles of lawyers?

- E.g. an appointed judge in Florida was reprimanded for using the word, “re-elect” in a campaign commercial posted on YouTube even though it was posted by a political consultant w/o the judge’s knowledge – it was potentially inaccurate or misleading.
- The judge took responsibility during the disciplinary hearing. In re Angela Dempsey, No. SC09-1747 (Fla. Feb. 4, 2010).



What about online profiles of lawyers?

- In sum, with online profiles, lawyers should comply with the rules of professional responsibility and rules of advertising as they pertain to social media.
- That duty may require the lawyer to educate and supervise those who she supervises, including non-lawyer employees.



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