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Bar News - April 16, 2010

Ethics-Social Media: Ethics and Social Media: Some Issues for Now, Not Later

By: **Shelagh N.C. Michaud**

Social media presents a robust and interesting environment in which attorneys may work, research and interact. It can be:

- a source of information about parties, witnesses, judges, and potential jurors;
- an opportunity for advertising services and law practices and for soliciting new clients;
- the forum in which an attorney practices law.

The use of social media by attorneys also presents a plethora of ethical and legal questions. The freedom with which people use social media – whether blogs, social networking, discussion groups or some other form of social media – can lead to ethical issues often not contemplated by users at the outset.

"Social media" is the term used to encompass social networking, internet forums, blogs, wikis, podcasts, picture- and video-sharing, instant-messaging – in fact, almost any form of communication and interaction that is facilitated over the Internet. Social media websites include Facebook, Myspace, LinkedIn, Blogger, WordPrss, Twitter, FriendFeed, Match.com, Delicious, Yelp, Flickr, Photobucket, Snapfish, YouTube, and Skype, to name just a few. Social networking sites, such as Facebook, Myspace and LinkedIn, are a vibrant and fast-growing subgroup of social media where people form groups that interconnect through networks and "friends."

Users of social networking sites create profiles which include personal information, such as education and employment information, birthdays and the status of relationships. Users can post status messages, photos, videos and notes about themselves. Users also allow other users ("friends") to post comments on their "walls" – a bulletin board-type feature that is typically visible only to the user's "friends" and "friends of friends" (the user's "friends" and all the "friends" of those "friends"); or a user may make a customized list of friends who may have access.

Facebook, the largest social networking site, began as a site for college students, utilizing a network format where users were part of groups based on the user's school or work, or location. It recently abandoned this format in favor of a wider audience. Most users set privacy settings to delineate who may see their information, but default settings often allow all of a user's "friends of friends" or "everyone" to see the user's profile and everything posted there – meaning that in many cases, some or all of a user's information is available to anyone on the Internet.

Users frequently have in excess of 100 "friends." What is more, some people "collect" friends – meaning that they accept almost every "friend request," regardless of whether they know people or not.

In 2009, the number of Facebook users grew to exceed the population of the United States – more than 400 million active users. (See www.facebook.com/press/info.php?statistics.) Interestingly, the fastest growing demographic is not college students as many might expect, but 35-55-year-olds and women in particular. Thus, what was once literally a playground for young people is being taken over by a more middle-aged population whose decision to use social media may differ, at least in part, from its initial social roots. As discussed above, attorneys, as well as many other professionals, often use the Internet and social media in particular to advertise themselves and solicit clients.

Social Media and Marketing

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By some reports, the Internet, not the white pages or word-of-mouth, is the first place people look to find an attorney. This reality changes the landscape for attorneys marketing their practices. Attorneys are now using the Internet in many ways to get their names, and their practices, into the public domain. They write blogs to describe developments in their areas of practice, to brag of successes, and to comment on the legal landscape; they post comments on current events and sometimes comment even on trials and hearings on Twitter; they maintain profiles or pages on sites like LinkedIn and Facebook and "friend" colleagues, clients, judges, classmates, and many others.

Most law firms maintain websites which advertise the firm, its practice areas and its attorneys. Some sites allow clients and potential clients to e-mail the firm or specific attorneys. Many social media sites, such as LinkedIn, as well as some ratings and referral sites, allow others to post comments and recommendations about listed attorneys.

As attorneys explore ways to advertise and market on the Internet, they need to remember that in all Internet and social media communications, the rules of professional conduct still apply. Attorneys must be aware of Rule 7.1: *Communications Concerning a Lawyer's Services*; Rule 7.2: *Advertising*; Rule 7.3: *Direct Contact with Prospective Clients*; Rule 7.4: *Communications of Fields of Practice and Certification*; and Rule 7.5: *Firm Names and Letterheads*, to name a few of the rules.

Conduct Rules Jurisdiction

To complicate matters further, the rules of professional conduct vary by state. Sometimes these variations are minor, but at other times they are not. In this developing area of law, it is not clear in every state which rules the courts and bar committees will apply to Internet and social media communications. In New Hampshire, Rule 8.5(a) of the Rules of Professional Conduct provides some guidance by stating that an attorney who is "admitted to practice" in New Hampshire, is subject to discipline in New Hampshire "regardless of where the lawyer's conduct occurs."

However, Rule 8.5(b)(2) also states that an attorney is subject to the rules of professional conduct of the jurisdiction "in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." Accordingly, while it has always been the case that a New Hampshire-licensed attorney can be disciplined in New Hampshire for violations of the rules of professional conduct of another state, Internet marketing greatly expands the jurisdictions whose rules may apply in any given disciplinary proceeding. Attorney advertising and solicitations can now reach worldwide with literally the press of a button or the click of a mouse. Given this, attorneys need to be cautious to avoid violating the rules of professional conduct in any forum.

While some ethical issues arise when attorneys use the Internet and social media to promote themselves and their firms, others arise when attorneys explore this "new" source of information on parties, witnesses, clients, opposing counsel and even judges.

Social Media and Litigation

Depending on the litigation, a social media site can provide useful and informative information about opposing parties and witnesses. "Given the open nature of social networking sites, and the abundance of information posted by members, litigators are increasingly discovering that properly seeking information for their cases from these sites can be a valuable tool in their arsenal. In fact, some attorneys now make it a regular part of their practice to search social networking sites to discover information about their adversaries, witnesses, and even potential jurors." Brown, Daniel L. and Kahn, Aimee, R., *The Smoking Gun in an Adversary's Network*, New York Law Journal (Sept. 11, 2009).

One judge recently used information from a Facebook profile to catch an attorney in a lie. The attorney, who was a Facebook friend of the judge, requested a continuance claiming that her father had died. While visiting Facebook, the judge found that the lawyer was posting status updates about "her week of drinking, going out and partying." When the attorney's partner came back to request a second continuance, the judge denied the request and informed her about the information she had found on Facebook. (See *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, July 31, 2009, www.abajournal.com.)

Attorneys have used Facebook and Myspace information obtained through discovery to show that a claimant's damages are far less than claimed or even that a claimed injury is non-existent. Others have upended a disability claim based upon a claimant's blog entries detailing her daily activities. In criminal cases, Facebook status updates have provided or substantiated an accused's alibi.

Information posted on social media sites, such as blogs, Facebook and MySpace, lies in an amorphous territory of private information which is posted on a public, or semi-public, forum with privacy settings set by the user. Users may limit who can view their profiles and posts, but many

experts and some courts have questioned what expectation of privacy a person can have in information published to hundreds of people on a social media page. That said, there may be ethical limits to social media discovery.

Questionable tactics

The Philadelphia Bar Association Professional Guidance Committee recently issued an opinion concluding that the use of an agent to gain access to an individual's social network, such as a Facebook or MySpace account, by "friending" the witness without disclosing the agent's intent, and then using information on the page in litigation, violated Pennsylvania's Rule of Professional Conduct, Rules 5.3, 8.4 and 4.1. (See *Op. 2009-02, Phila. Bar Ass'n. Prof'l Guidance Comm., March 2009.*) The Committee found that using an agent who is not known to the witness to "friend" the witness and then gather information about the witness from the Facebook or MySpace pages constituted deceptive conduct which is not permitted by attorneys or at an attorney's direction. (*Id.*)

The practice at issue in this opinion, known as "virtual pre-texting," is quickly gaining widespread media attention and criticism. While trolling public social media profiles for information has some similarities to observing or recording someone out in the open doing yard work or shoveling the driveway, the Philadelphia committee drew the line at deceptively friending a social media user, finding that it is more akin to gaining access to a person's home under false pretenses and then surreptitiously videotaping the homeowner. (See *Phila. Bar Op. 2009-02.*)

The issue for courts and states in the future will be whether this analogy is persuasive in the more complex world of social networking, in which users of Facebook and Myspace freely post private, sometimes intimate, information and often inadvertently publish this information to "friends of friends," or even to "everyone." Many users indiscriminately accept "friend requests" with little or no knowledge of the person making the request – large friends' lists are seen by some as a badge of honor or a sign of acceptance. Gaining a person's trust and therefore access to their personal information can be easier on the Internet and in social networking environments.

To date, the use of social media generally, and social networking sites in particular, has not yet received significant attention in reported decisions. However, bar discipline panels and committees are more and more frequently issuing opinions relating to the use of social media and the practice of law. To protect themselves, while using social media and the Internet generally to communicate to friends, clients and potential clients and colleagues and for research purposes, attorneys need to keep the rules of professional conduct at the forefront of their minds.


These are the glass through which these activities will be viewed and should govern decisions on what is appropriate to post, whom it's proper to contact and how, and how the information found may be used in litigation or even corporate transactions.

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