The Tweet Smell of Success, or a Trip to the Disciplinary Board? Ethical Concerns in the Use of Social Media

***The Bencher*-January/February 2013**

By John G. Browning, Esquire

Social networking platforms like Facebook, LinkedIn, and Twitter have fundamentally changed the way people communicate and share information. Facebook has more than one billion users and Twitter has gone from processing 5,000 "tweets" a day in 2007 to over 340 million a day just five years later. Mirroring society, the legal profession's embrace of social media has evolved from the digital equivalent of a perfunctory handshake to the full-on bear hug of a long-lost friend. According to the 2012 ABA Legal Technology Survey Report, 88% of the reporting law firms report being 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%). But are lawyers using social media in an ethical, responsible fashion, or are they risking a malpractice suit or a trip to the disciplinary board for misusing social media?

A number of lawyers have already found themselves in ethical hot water for their online statements or conduct. In July 2012, a former prosecutor was charged with making a felony threat after he allegedly posted messages on Facebook threatening bodily injury to his former employer. That same month, it was discovered that an assistant district attorney had a Facebook page displaying inappropriate and offensive photos of himself. In February 2012, the South Carolina Supreme Court publicly reprimanded a 2008 law school graduate for exaggerating his experience and making misleading statements about his legal skills on sites like LinkedIn. In February 2011, a deputy attorney general was fired from his job after sending offensive tweets. In February 2012, an ethics complaint was filed against a criminal defense attorney for allegedly posting on YouTube a discovery video of an undercover drug buy in an attempt to sway public opinion. In May 2010, an assistant public defender 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, testimony, and other embarrassing and potentially damaging information. In Texas, a county prosecutor pleaded guilty to contempt of court for discussing a pending felony murder trial on Facebook, while in California a prominent commercial litigator had to explain 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 lawyers letting their guard down about such communications and forgetting that the same rules of conduct apply in cyberspace, the same as they would via more traditional avenues of communication. So just what are the biggest areas of concern for lawyers when it comes to the ethical use of social media? The first runs counter to one possible reaction to cautionary tales like those above-avoidance. One simply cannot stick one's head in the sand and hope to avoid such problems by avoiding social media. Recently, the ABA Ethics 20/20 Commission proposed, and the ABA accepted, 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 in the law of one's practice area, but also obligates lawyers to remain current on "the benefits and risks associated with technology" as well.

This revision reflects the realities of the modern practice environment, particularly regarding social media. In an age when locating and using content from social networking sites is playing an increasingly important role, (a 2010 study revealed that 81% of lawyer respondents had used social media evidence in their cases) is a lawyer who is not familiar with the use of social media truly 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. For example, in *Griffin v. Maryland*, a

More Bencher Resources:

Deadlines & Themes

Reprint Permission

Recent Articles

Ethics Column

Maryland appellate court quoted approvingly that "as a matter of professional competence" lawyers should be investigating social media avenues in their cases. In *Canedy v. State*, a California appellate court held that a lawyer's failure to locate a sexual abuse victim's recantation on her social media profile could constitute ineffective assistance of counsel. Meanwhile, in *Johnson v. McCullough*, the 2010 Missouri Supreme Court imposed an affirmative duty on attorneys to make online investigation a key part of their jury selection process "(i)n light of advances in technology allowing greater access to information."

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 viewing the publically available portion of an individual's social networking profile, what about those Facebook pages with privacy restrictions, allowing only "friends" to view 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 counsel without the prior consent 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, when a lawyer representing an allegedly wrongfully discharged employee against the former employer presented an interesting situation. Although the lawyer knew that the company had appeared and was represented by counsel, the plaintiff's lawyer had sent "friend" requests to two of the defendant company's employees; his client had identified both as dissatisfied with their employer and likely to have made disparaging comments about it on their Facebook pages. The ethics committee ruled that the lawyer's request violated both the rule against contacting a represented party and the attorney's duty not to deceive others, holding that lawyers seeking access to a represented party on social media sites must either seek such information through formal discovery channels or contact the party's attorney first seeking consent to such a communication.

This issue-potential deception or misrepresentation to third parties-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. Pointing to Rule 4.1 prohibiting knowingly making a false statement of fact to a third person, as well as Rule 8.4 banning conduct involving dishonesty, fraud, deception, or misrepresentation, each of the committees found that trying to gain access to someone's social media page by friending her or having a third party friend her at the lawyer's behest would be unethical. As the Philadelphia Bar observed, not telling the witness of the lawyer's role or his paralegal/investigator's affiliation with the lawyer "omits a highly material fact, namely that the third party who asks to be allowed access to the witness' pages is doing so only because he or she is intent on obtaining information, and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness." The New York City Bar opinion noted that the increased use of social media sites by lawyers, with deception even easier in the virtual world than in person, makes this an issue of heightened concern in the age of Facebook and Twitter.

Such fears have already led to legal action against one law firm, its investigator, and its insurance company client. In a state court lawsuit filed in Cleveland, Ohio in May 2012, the plaintiff maintains that an Ohio insurance defense firm hired an investigator to gain access to the privacy-restricted Facebook page of a 12 year-old girl who was the plaintiff in a dog bite case. According to the plaintiff's complaint, the investigator posed as one of the girl's Facebook friends, enabling him to view her private information and access over 1, 000 posted messages and 221 photos between the minor plaintiff and her friends. The lawsuit asserts claims of invasion of privacy as well as violation of wiretapping statutes.

A final area rife with ethical risks for lawyers involves the preservation of evidence. No one wants to discover embarrassing photos or comments on a client's Facebook page that can adversely impact the case. But lawyers can't instruct the client to remove the damaging content or to delete his Facebook account. Model Rule 3.4 prohibits a lawyer from unlawfully altering or destroying evidence and assisting others in doing so. A lawyer's ethical duty to preserve electronically stored information encompasses social networking profiles. In yet another cautionary tale for the digital age, plaintiff's counsel in a recent Virginia wrongful death case, *Lester v. Allied Concrete*, directed his paralegal to instruct the client to delete his Facebook page. The client, the surviving widower of a young woman killed in a collision with one of the defendant's cement trucks, had Facebook photos that depicted him looking like anything but a grieving husband. Plaintiff's counsel also represented to the defense attorneys during discovery that his client did not have a Facebook account. After a $10.6 million verdict for the plaintiff, the defense lawyers sought a new trial based on spoliation of evidence. The court slashed the verdict in half and assessed sanctions of $722,000 against the plaintiff and his attorney for their "extensive pattern of deceptive and obstructionist conduct." As disturbing as the spoliation itself is, it is equally concerning that the conduct did not occur at the hands of an inexperienced or marginal practitioner. The attorney, who has since resigned from the practice of law, was a partner at the largest plaintiffs' personal injury firm in Virginia and was a past president of the Virginia Trial Lawyers Association.

Even putting aside the ethical dilemmas raised by the use of social media in marketing one's law firm, clearly the use of social networking in the actual practice of law is simultaneously both a vital weapon in a lawyer's arsenal and a potential ethical minefield. Attorneys run the risk of breaching their duty to provide competent representation to clients if they ignore seemingly ubiquitous social networking platforms like Facebook and Twitter and the utility they offer. Yet at the same time, the misuse of social media in managing client communications, investigating and fact-gathering, and preserving evidence present serious professional responsibility issues. Because of this, attorneys would do well to heed some of the same advice they dispense to clients: treat social media as simply another form of communication subject to the same ethical constraints 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.

John G. Browning, Esquire, is a partner in the Dallas office of Lewis Brisbois Bisgaard & Smith, and a Master in the William 'Mac' Taylor Inn of Court. He is the author of The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law*, as well as two forthcoming books on social media and the law. He also teaches courses on social media and the law at SMU Dedman School of Law and Texas Wesleyan University School of Law.*

225 Reinekers Lane, Suite 770, Alexandria, VA 22314 | Phone: (703) 684-3590 | Fax: (703) 684-3607 | info@innsofcourt.org