Attorneys and Social Media—An Ethical Minefield or Professional Boon?

by Julie Tappendorf



A recent study by the American Bar Association estimated that more than half of all attorneys belong to at least one social media site.[1] That number is certain to grow.[2] Attorneys are just as likely to use social media in their everyday lives as non-attorneys. They post pictures on Instagram, "check in" on Facebook, and tweet about politics, music, and what they ate for dinner just like everyone else. But, where a hasty post or comment might lead only to embarrassment for some, a seemingly innocent disclosure by an attorney could lead to serious ethical repercussions.

Although not a subject of this article, it is important to point out that government attorneys have yet another role in the social media arena – that of advising their government clients on appropriate use of social media. Thus, government attorneys must not only be aware of their own ethical obligations, they must also be knowledgeable about all of the ethical and legal issues with government use of social media, including the applicability of open meetings and records laws, and First Amendment rights, among others.[3]

It's Not All Bad

Social media offers users a diverse array of benefits. Government attorneys can "reach out directly to their constituents, take a more active role in shaping their public image, and overcome longstanding institutional barriers."[4] Social networking also provides attorneys with opportunities to network within the legal field, as well as to market their practice to potential clients.[5] Social media provides attorneys a unique advantage in building relationships with others that might otherwise be impossible or impractical because of barriers like distance and time.

How are attorneys taking advantage of these benefits? Attorneys are blogging, tweeting, and posting on a variety of social networking sites, both personally and professionally. Like others, attorneys have set up personal, professional, and even law firm profiles on sites such as Facebook, Twitter, and LinkedIn. Attorneys and law firms are also increasingly establishing legal-oriented blogs where they post summaries of cases and new laws. As new social networking sites are established, it is likely that attorneys will follow online trends and find new ways to establish a presence on social media.

Social Media and Ethics

Attorneys are in a unique position because of their special ethical obligations. Consequently, they must be careful in their use of social media to avoid engaging in any unprofessional or unethical conduct. While some might argue that the rules of ethics (designed for print and verbal media) do not carry over into emerging technologies, at least one commentator reminds us that:

Fifteen years ago people were saying the same thing about e-mail. Eighty years ago they were worried about telephones. Any time there's a new form of communication, there's fear. Yes, social media are different, but there's no reason we can't apply the same rules we've used before.[6]

Because each jurisdiction has its own ethical rules in place for attorneys practicing in their state, it is important that attorneys consult their own applicable rules and opinions. This article offers an overview of the more common ways social media use could lead to ethical violations using the ABA Model Rules of Professional Conduct as a general reference.[7]

Giving Legal Advice Outside Your Jurisdiction

Attorneys can only practice law in jurisdictions in which they are licensed, with very few exceptions.[8] Model Rule 5.5(a) states: "A lawyer shall not practice law in a jurisdiction in violation of the

regulation of the legal profession in that jurisdiction, or assist another in doing so."[9] Obviously, state lines can become blurred in a social media setting. Accessing a blog written by an attorney in another state (or country for that matter) takes just as much time as accessing one from right down the street. While ease of access and availability of information are arguably the most beneficial aspects of social media, they present particular problems for attorneys.

Facebook "comments," "Ask a Lawyer" sites, and blogs with reciprocal features are just a few examples of situations where attorneys might find themselves unknowingly yet unethically advising someone who does not live within their licensed jurisdiction.[10] The key is to know when you are providing legal information (which would probably not trigger jurisdictional restrictions), as opposed to providing legal advice (which would). The District of Columbia Bar Association distinguished between the two as follows: legal information "involves discussion of legal principles, trends, and considerations," while legal advice involves "offering recommendations tailored to the unique facts of a particular person's circumstances."[11] As a result, an attorney who simply summarizes cases and legislation in a particular legal area on a blog is not likely to implicate Model Rule 5.5. However, attorneys should be careful not to answer specific legal questions outside their practicing jurisdiction and instead should focus on providing more generalized information.[12]

Physical presence in the non-licensed jurisdiction is not required to trigger a violation. An attorney has committed an ethical violation when he has established "an office *or other systematic and continuous presence*" in a jurisdiction where he is not licensed.[13] Ongoing electronic communications could certainly be considered a violation.

Forming Attorney-Client Relationships

Attorneys should also be careful not to inadvertently form attorney-client relationships through online activities. Model Rule 1.18 provides that "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."[14] Moreover, an attorney-client relationship could be inadvertently formed if a client "reasonably relies" on what it believes to be the attorney's legal advice through social media.[15] Thus, when using social media, attorneys should not only speak in generalized terms, but also post explicit disclaimers stating that any interaction does not form an attorney-client relationship in order to inform the user and ultimately rebut any reasonable belief that one exists.[16]

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Compliance with this rule can be complicated for attorneys who represent municipalities or other governmental entities. The important thing to remember is that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[17] This duty also applies to government organizations, although the model rules do concede that "[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules."[18] Government attorneys using social media should take the same measures mentioned above - make sure you post a disclaimer and avoid engaging in any kind of advice to non-clients that could produce a reasonable expectation on their part that an attorney-client relationship was formed.

Advertising and Solicitation

Model Rule 7.1 restricts the content of attorney advertisements, prohibiting attorneys from making "false or misleading communication about the lawyer or the lawyer's services." The rule defines a false or misleading communication as one containing "a material misrepresentation of fact or law" or one omitting "a fact necessary to make the statement considered as a whole not materially misleading."[19] Attorneys should understand that truthful information may nevertheless violate this rule it "omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading" or when there is a "substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation."[20]

Model Rule 7.3 restricts the ways in which an attorney may advertise, prohibiting "in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain," with limited exceptions for the person contacted being a lawyer or one with a family, close personal, or prior professional relationship with the contacting attorney. The rule goes on to prohibit such contact even for the exceptions previously mentioned "when the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or the solicitation involves coercion, duress or harassment."[21]

Whether social media sites are equivalent to "in-person" solicitation is up for debate.

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The answer varies from state to state, so it is important to research any applicable local opinions. For example, the Philadelphia Bar Association issued an advisory opinion holding that attorney participation in some social media forums where users are discussing legal problems is inappropriate where the attorney invites the users to send a message for further legal advice. However, the bar association found that blogs, emails, and chat rooms are not similarly prohibited.[22] The bar opinion was based on a state rule similar to Model Rule 7.3, that forbids in-person, over-the-phone, or real time electronic communication.[23] The bar distinguished between "socially awkward moments" that can arise when a prospective client is in such close proximity through social media as to be the equivalent of an in-person solicitation, from those sites which allow users to ignore any advances and take their time to think and respond – the justification being that those seeking legal advice are often vulnerable and should not be taken advantage of.[24]

Taking a contrary view is the California Bar Association which issued an advisory opinion holding that communications occurring in chat rooms are different than communications occurring in-person or over the phone and would not violate the state rule prohibiting communications that intrude or cause duress.[25]

Even if local rules do not restrict a particular online communication, you should check the purpose of the social media forum before using it to advertise services. You should also incorporate any state-specific advertising language into online advertisements and social media sites such as those requiring inclusion of the words "Advertising Material"[26] as well as the name and office address of at least one lawyer or law firm responsible for the online content.[27]

Using Social Media in Litigation

Attorneys are charged with being "zealous advocates" of their clients. To fulfill this role, it may be tempting for attorneys to use any avenue possible during litigation, such as "friending" witnesses, parties, and jurors though Facebook to collect personal information. Ethical guidelines might restrict these activities, however. For example, Model Rule 8.4 prohibits attorneys from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation," sometimes directly conflicting with the charge of advocacy.[28] As such, attorneys must be careful not to engage in unethical behavior even if it would benefit the client.

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A number of state bars have issued opinions on attorney use of social media during litigation with regards to deceptive actions. For example, the Philadelphia Bar Association held that it was an ethical violation to "friend" a party or witness without disclosing the attorney's identification, regardless of whether or not the party or witness would usually accept friend requests without any disclosure.[29] Likewise, the San Diego Bar Association held that "friending" potential witnesses could not be done with the intention to deceive the witness and could be considered an improper *ex parte* communication.[30] Similarly, the New York Bar Association held that "friending" an individual under false pretenses to obtain evidence was an unethical deception.[31]

Ethical considerations might also restrict attorneys from "friending" or otherwise accessing jurors through social media. For instance, the New York Bar Association issued an opinion holding that it is unethical for attorneys or those working on the attorney's behalf to make friend requests of jurors, extending even to reviewing the juror's comments, pages, or posts when the attorney is aware that the juror would be exposed to those reviews.[32]

Along the same lines, attorneys run the risk of engaging in improper *ex parte* communications and conflicts of interest though online relationships with judges. Model Rule 3.5 prohibits attorneys from contributing to a violation of the ABA's Model Code of Judicial Conduct.[33] States vary as to whether or not judges can be "friends" with attorneys on social media sites, so attorneys should consult the bar association opinions in their particular jurisdiction before accepting or soliciting a friend request with a judge.

Attorneys should also be aware of how these "friendships" can affect their client representation. In Florida , an appellate court recently disqualified the sitting judge in a criminal case because he was Facebook "friends" with the prosecutor.[34] The defendant filed a motion to disqualify the trial judge, which was denied. On appeal, the appellate court looked to a bar association opinion prohibiting judges from "friending" lawyers who appear before the judge on social media sites and from allowing lawyers to add judges as friends. The court found the motion to disqualify well-founded because it raised sufficient facts to "prompt a reasonably prudent person to fear that he could not get a fair and impartial trial."[35]

Revealing Information

Model Rule 1.6 prohibits an attorney from revealing "information relating to the representation of a client," with certain exceptions. Posting personal information online often seems innocent enough such as divulging seemingly unimportant details about one's day.

People read what you post, and the seemingly informal forum of a social media site is no shield for ethical violations of improper client disclosures. An Illinois assistant public defender found this out the hard way, being found to have unethically revealed confidential details about a case when she posted comments such as, "This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch'" and "Huh? You want to go back and tell the judge that you lied to him, you lied to the presentence investigator, you lied to me?"[36] She lost her job.

Attorneys must also be careful what they post with regard to their own personal lives. For example, a Texas attorney requested and received a continuance because her father had passed away. The judge who granted her continuance was subsequently notified of comments on Facebook chronicling days of drinking and partying.[37] Another attorney was summoned to appear before the Florida Bar and fined $1,200 for calling a judge an "Evil, Unfair Witch" on his blog.[38]

Attorneys should also warn their clients about revealing information through social media during a pending case, as doing so could result in the client unknowingly waiving the attorney-client privilege, and opening up information for discovery. This happened in a 2010 case where the client discussed attorney-client conversations in his e-mails, blogs, and instant messages with family and friends. The court ultimately found that the client had waived his attorney-client privilege, entitling the opposition to discovery of the information disclosed online, including his motivation for pursuing litigation, the litigation strategy, and other facts surrounding the case.[39]

Responsibility for Employee Activities

The Model Rules require attorneys to supervise employees and support staff. For example, Model Rule 5.3 provides that "a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer,"[40] and holds the attorney responsible for any violation of the Rules by the non-lawyer if: "(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[41] As a result, attorneys cannot claim immunity from ethical rules simply because they do not personally engage in social media; they may still be held responsible for their employees' social media activities.

Conclusion

Given the growing use of social media, attorneys must learn to weigh the benefits of networking, advertising, socializing, and zealous advocacy against the ethical rules restricting the profession. At stake are attorneys' careers, clients' interests, and the integrity of the legal process. First, be careful what you post online - this is good advice for everyone, but particularly for attorneys who have special ethical obligations. Second, law firms and other employers (including governments) should consider establishing and adopt a well-crafted social media policy that addresses the legal and ethical issues that arise with their employees' use of social media, and train their employees (and themselves) on the appropriate use of social media.[42]

Notes

1. Am. Bar Ass'n, *2010 Legal Technology Survey Report*, 4 WEB & COMMC'N TECH. 23–24 (2010); *see also* Margaret M. DiBianca, *Ethical Risks Arising from Attorneys' Use of (and Refusal to Use) Social Media*, 12 DEL. L. REV. 179, 179 (2011) (noting that social media usage by attorneys has increased by 250 percent from 2008 to 2009, and another 30 percent from 2009 to 2010); Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALA. L. REV. 113, 113–14 (2009).
2. John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, Sept. 12, 2009.
3. For a detailed study of the legal and ethical issues that arise with government use of social media, see Patricia Salkin & Julie Tappendorf, "Social Media and Local Governments: Navigating the New Public Square" (ABA Press, 2013).
4. Stephen Stine & Joshua Poje, *The Good, the Bad and the Ugly of Blogging, Microblogging and Social Networking for Public Attorneys*, 17 PUB. LAW. 13, 18 (2009).
5. Salkin & Tappendorf, *supra* note 3.
6. Helen W. Gunnarsson, *Legal Technology/ Ethics: Friending Your Enemies, Tweeting Your Trials: Using Social Media Ethically*, IL Bar Journal, Vol. 99, No. 10, Page 500 (Oct. 2011).
7. Model Rules of Prof'l Conduct R. 1.11 cmt. 1.
8. Model Rules of Prof'l Conduct R. 5.5.
9. *Id.* R 5.5(a).
10. *See id.*, cmt. 2.
11. D.C. Bar Legal Ethics Commission Opinion 316 (2002).
12. *See id.*
13. Model Rules of Prof'l Conduct R. 5.5 (emphasis added).
14. Model Rules of Prof'l Conduct R. 1.18(a).
15. Patricia E. Salkin, *Social Networking and Land Use Planning and Regulation: Practical Benefits, Pitfalls, and Ethical Considerations*, 31 PACE L. REV. 54, 82 (2011).
16. Michael E. Lackey Jr. & Joseph P. Minta, *Attorneys and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 164 (2012); Model Rules of Prof'l Conduct R. 1.18 cmt. 2.
17. Model Rules of Prof'l Conduct R. 1.13(a).
18. *Id.* R. 1.13 cmt. 9.
19. Model Rules of Prof'l Conduct R. 7.1.
20. Model Rules of Prof'l Conduct R. 7.1 cmt. 2.
21. Model Rules of Prof'l Conduct R. 7.3(a) (b).
22. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2010-6 (June 2010).
23. *Id.*
24. *Id.*
25. Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-166 (2004).
26. Model Rules of Prof'l Conduct R. 7.3(c).
27. Model Rules of Prof'l Conduct R. 7.2(c).
28. Model Rules of Prof'l Conduct R. 8.4(c).
29. Phila. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsbility, Op. 2009-02 (Mar. 2009).
30. San Diego County Bar Legal Ethics Comm., Op. 2011-2 (May 24, 2011).
31. N.Y. City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Op. 2010-02 (Sept. 2010).
32. *Id.*
33. Model Rules of Prof'l Conduct R. 3.5 cmt. 1..
34. *Domville v. State,* No. 4D12-556 (Fla. Dist. Ct. App. Sept. 5, 2012).
35. *Id.*, slip op. at 1 (citations omitted).
36. Schwartz, *supra* note 2.
37. Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, A.B.A. J. (July 31, 2009).
38. Schwartz, *supra* note 2.
39. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2010).
40. Model Rules of Prof'l Conduct R. 5.3(b).
41. *Id.* R. 5.3(c).
42. Salkin & Tappendorf, *supra* note 3; *see also* Paul R. Klenck, *Sample Social Media Policy & Commentary*, Am. Bar Ass'n 2010 Annual Conference: Labor and Employment Law Section (2010). ML