

Blogging and Social Networking for Lawyers: Ethical Pitfalls

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AS SOCIAL NETWORKING WEBSITES such as Twitter, Facebook, MySpace, and LinkedIn become more popular among lawyers, judges, support staff, and clients, lawyers have to be mindful about ethical concerns that may not be obvious. Some lawyers might say that social networking does not present any novel issues for lawyers to worry about. Lawyers cannot afford to be so cavalier. Experienced lawyers and seasoned judges have suffered professional discipline for the improper use of social networking tools. The informality and speed that characterize social networking sites can contribute to errors and ethical transgressions. Social networks are public, easily searched, and permanently archived.

Confidentiality

Rule 1.6 of the Virginia Rules of Professional Conduct requires a lawyer to protect and not disclose a client's confidences and secrets, unless the client consents to the disclosure. Confidences are communications between lawyer and client that are protected under the common law attorney-client privilege. Secrets embrace all other information gained in the course of the lawyer-client relationship that the client wants kept confidential or that, if disclosed, would be detrimental or embarrassing to the client. Unlike Virginia, most states did not keep the "confidences and secrets" formulation when they adopted a rule modeled after American Bar Association Model Rule 1.6. ABA Model Rule 1.6 requires that all information relating to the representation of the client be kept confidential. It is important for Virginia lawyers who are admitted in other jurisdictions to know that other jurisdictions' rules on confidentiality. Under ABA Model Rule 1.6, even the client's identity and the fact of representation are confi-

dential, whereas under Virginia's Rule 1.6, that generally is not the case.

A lawyer who discusses his or her cases on Twitter, Facebook, or a blog risks violating Rule 1.6, absent client consent. A lawyer could easily breach confidentiality on Twitter simply by tweeting to followers what they are doing at that particular time. A lawyer could try to avoid disclosing specific client information by keeping the message general and vague but this would not be interesting to read. A lawyer may consider having the client permit the lawyer to post information about the client's matter on a social networking site. However, the lawyer must ensure that any disclosure will not hurt the client's legal position or embarrass the client.

Since there might be information that is unknown at the outset of an engagement, an advanced consent may not be effective, because it was not informed. The client may be angry with the lawyer for posting information learned after the consent was given. In addition, there is a risk that the posted information may be read by the client's adversary, opposing counsel, or other third parties.

While it may be improper under certain circumstances for lawyers or their agents to mine for an opposing party's personal information on a social networking site, some lawyers don't think, don't know, or don't care that obtaining and using your client's information may be unethical.

The Illinois Attorney Registration and Disciplinary Commission began disciplinary action against an experienced assistant public defender who discussed her cases on her blog. She posted:

#127409 (the client's jail identification number) This stupid kid is taking the rap for his drug-dealing

dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.¹

In another post, the assistant public defender stated:

"Dennis," the diabetic whose case I mentioned in Wednesday's post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.²

In yet another post, the assistant public defender vividly described her client's perjury in a criminal case.³ In addition to the blog entries described above, the lawyer referred to a judge as being "a total asshole," and in another she referred to a judge as "Judge Clueless."⁴ The Illinois Board has recommended her disbarment.⁵

Criticizing a judge in a blog got lawyer Sean Conway in trouble in Florida. In a conditional plea, Conway agreed to a reprimand for calling a judge an "evil, unfair witch" in a blog post. He claimed in a brief submitted to the Florida Supreme Court that his remarks were protected by the First Amendment, but the court disagreed and affirmed the disciplinary agreement.⁶

On Facebook, a user's profile, photographs, and updates are sometimes available to the public or to any other member who is authorized by the user. Facebook's platform allows users to add such "friends" and to send them messages, as well as leave postings on "friends" profile pages through "comments" and "wall posts." Fortunately, privacy and security settings on Facebook allow the user to restrict or limit access to the user's profile to only members, the user's "friends," or even a select few "friends." But information can easily fall into the wrong hands. For example, in *People v. Liceaga*, a Michigan murder trial, the prosecutor sought to admit photographs found on the defendant's MySpace page as evidence of intent and planning.⁷ The defendant's profile Web page contained photographs of himself and the gun allegedly used to shoot the victim, and in which he was displaying a gang sign.⁸

In *In the matter of K.W.*, a North Carolina court admitted into evidence an alleged child abuse victim's MySpace page as impeachment evidence. The court held that the victim's posting of suggestive photographs along with provocative language could be used to impeach inconsistent statements made to the police about her sexual history.⁹

Courts have also permitted information gathered on a person's social networking site to be used as evidence at sentencing. In *United States v. Villanueva*, the court found that postconviction images on the defendant's MySpace page of the defendant holding an AK-47 with a loaded clip—photos taken after the defendant had been convicted of a violent felony—could be used as evidence to enhance sentencing.¹⁰

Trial Publicity

Virginia Rule 3.6 prohibits a prosecutor or a defense lawyer from making public statements about pending criminal cases in which they are involved if the statement will have a substantial likelihood of interfering with the fairness of a trial by jury. Other states' versions of Rule 3.6 impose the ban in civil cases as well. As jurors use the Internet when they go

home for the evening, there is a risk of a mistrial if the lawyers participating in the case are blogging or tweeting about it.¹¹

A forty-year-old California attorney had his law license suspended for forty-five days over a trial blog he wrote while serving as a juror. Because of a blog post by Frank Russell Wilson, an appeals court reversed and remanded the felony burglary case, reports the *California Bar Journal*. As a juror, Wilson was warned by the judge not to discuss the case, orally or in writing. Wilson evidently made a lawyerly distinction concerning blogs: "Nowhere do I recall the jury instructions mandating I can't post comments in my blog about the trial," he writes, before posting unflattering descriptions of both the judge and the defendant. He also failed to identify himself as a lawyer to the trial participants, the *Bar Journal* notes.¹²

Using Pretext to Obtain a Person's Information on a Social Networking Website

As social networking websites such as Myspace, Facebook, and Twitter continue to become more popular, criminal and civil attorneys across the nation are beginning to find these websites useful for gathering evidence and personal information relevant to their cases. However, lawyers must be mindful of Virginia Rule 8.4(c), which prohibits deception and misrepresentation and Rule 8.4(a), which states that a lawyer cannot use the agency of another to violate the ethics rules. A recent ethics opinion by the Philadelphia Bar Association holds that a lawyer violates Rule 8.4 by employing a third party to go online and gain access to a person's information on Facebook by asking to be their "friend."¹³

Misrepresentation

A lawyer requested a continuance claiming a death in the family, but the Galveston, Texas, judge checked her Facebook page and discovered news of a week of drinking and partying. The judge informed the lawyer's senior partner of her misrepresentation. The judge told the *ABA Journal* that the lawyer "defriended" her.¹⁴

Ethical Lapses by Judges

A North Carolina judge has been reprimanded for "friending" a lawyer in a pending case on Facebook, posting and reading messages about the litigation, and accessing the website of the opposing party. See *In the Matter of B. Carlton Terry Jr.*, North Carolina Judicial Stds, Comm'n, No. 08-234 (April 1, 2009). Both the Virginia Rules of Professional Conduct and the Canons of Judicial Conduct prohibit ex parte communications between lawyers and judges about pending matters, subject to some limited exceptions. Virginia Rules of Professional Conduct, Rule 3.5 (e); Canons of Judicial Conduct, Canon 3B(7).

The Florida Supreme Court's Judicial Ethics Advisory Committee has issued an opinion holding that it is judicial misconduct for a judge to add as "friends" on Facebook lawyers who may appear before that judge. The committee believes that listing lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge. See also Va. CJC, Canon 2B.

Lawyer Advertising Rules

Lawyers should review Virginia Rules 7.1 and 7.2 to make sure all statements or claims made via a website, a blog, Twitter, Facebook, or LinkedIn are in compliance with the advertising rules. Rule 7.1 prohibits a lawyer in his or her public communications from making false or misleading statements about the lawyer or the lawyer's services. Rule 7.2 imposes additional requirements on "lawyer advertising," including identifying by name and office address the lawyer responsible for the advertisement. Rule 7.2(e). Consider also reading Virginia Legal Ethics Opinion 1750 (Advertising, Compendium Opinion). Lawyers must ensure the advertising rules are followed if using Internet media to promote their services—especially if they use celebrity endorsements, client testimonials, specific case results, specialization claims, or comparative statements. Moreover, advertising with

electronic media is subject to Rule 7.2(b), which requires that a record be maintained of the advertisement for one year from its last appearance date.

For example, LinkedIn has a section on specialties. In many jurisdictions, lawyers are either forbidden from holding themselves out as specialists or required to meet certain requirements to do so. In some states this means the lawyer must be certified as a specialist under that state's specialization certification program. Virginia does not have such a program. However, Virginia does not prohibit a lawyer from holding out generally as a specialist or expert in an area or field, so long as the claim can be factually substantiated. Virginia's Rule 7.4 prohibits a lawyer from saying that he or she is certified as a specialist, unless the communication also has a required disclaimer that the state of Virginia does not have a procedure for approving or certifying specializations.

A lawyer who tweets about obtaining a huge verdict in a case likely violates Rule 7.2's prohibition against advertising specific case results, because the 140-character limitation on tweets makes it impossible to include the required disclaimer. Rule 7.2(a)(3).¹⁵ Rule 7.2(e)'s requirement of responsible attorney identification may also preclude the use of Twitter as an advertising medium.

Client recommendations or endorsements must be scrutinized by the lawyer for compliance with the advertising rules. South Carolina Ethics Advisory Opinion 09-10 states that a lawyer is responsible for any recommendations, endorsements, or ratings ascribed to that lawyer on a third-party website. If the lawyer cannot monitor and remove or edit noncompliant statements, the lawyer must cease participation on that website. Some legal ethics experts believe a lawyer should not be held responsible for an unsolicited endorsement or recommendation.¹⁶

LinkedIn has a section on recommendations in which the member can ask other members for a recommendation. Some states do not allow client testimonials, so Virginia lawyers admitted and practicing in other states should be aware of those states' rules. Even if the state, like

Virginia, allows client testimonials, endorsements, or recommendations, the testimonials must be monitored, revised, or removed so as to comply with Rules 7.1 and 7.2. For example, the lawyer cannot permit to remain on his or her LinkedIn page a client recommendation that says the lawyer is the "best personal injury lawyer in town," because it is a comparative statement that cannot be factually substantiated.

Is There a Form of "Solicitation" that Is Prohibited or Restricted?

Virginia's Rule 7.3 regulates direct communication with prospective clients and states "[i]n person communication means face-to-face communication and telephonic communication." Thus, invitations from a lawyer to a prospective client into the lawyer's LinkedIn or Facebook page would likely not fall within the rule. However, lawyer solicitation rules vary from state to state, so a Virginia lawyer licensed in other jurisdictions should review all applicable ethics rules to determine whether these forms of communication are subject to regulation as a form of solicitation.

Creating Unintended Lawyer-Client Relationships

The lawyer must consider whether informational advice on a blog or website creates the impression of giving legal advice that can be relied on by a visitor. Clear disclaimers can be helpful in resolving this problem. The question to ask is, "Does the online resource do anything that would create client expectations?"

Legal information of general application about a particular subject or issue is not "legal advice" and should not create any lawyer-client issues for the blogging or posting lawyer. Appropriate disclaimers will assure this conclusion. However, if a lawyer, by online forms, e-mail, chat room, or a social networking site, for example, elicits specific information about a person's particular legal problem and provides advice to that person, there is a risk that a lawyer-client relationship will have formed. Virginia Legal Ethics Opinion 1842 (2008) addresses this issue somewhat in connection with visitors on

a law firm's Web page. The Virginia State Bar's Standing Committee on Legal Ethics believes the lawyer does not owe a duty of confidentiality to a person who unilaterally transmits unsolicited confidential information via e-mail to the firm using the lawyer's e-mail address posted on the firm's website. The person is using mere contact information provided by the law firm on its website and does not, in the committee's view, have a reasonable expectation that the information contained in the e-mail will be kept confidential.

On the other hand, if the law firm's website invites the visitor to submit information via e-mail to the law firm for evaluation of their claim, there will be a limited lawyer-client relationship for purposes of Rules 1.6, 1.7, and 1.9. The law firm may be disqualified under those circumstances if it also represents a client adverse to the website visitor. The website disclaimer might state, for example, that no attorney-client relationship is being formed when a prospective client submits information and that the firm has no duty to maintain as confidential any information submitted. The disclaimer should be clearly worded so as to overcome a reasonable belief on the part of the prospective client that the information will be maintained as confidential. In addition, the committee recommends the use of a "click-through" (or "click-wrap") disclaimer, which requires the prospective client to assent to the terms of the disclaimer before being permitted to submit the information.

Law Firm Policies and Supervision of Employees

Lawyers in law firms have an ethical duty to supervise subordinate lawyers and nonlawyer staff to ensure that their conduct complies with applicable professional rules, including the ethical duty of confidentiality. See Rules 5.1 and 5.3. To this end, law firms should have policies to govern employees' use of social networking websites during and outside of normal business hours.

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Endnotes:

- 1 *In the Matter of Peshek*, No. 6201779, Comm. No. 09 CH 89 (Aug. 25, 2009) (recommendation of disbarment).
- 2 *Id.*
- 3 The disciplinary complaint stated that not only did Peshek seem to reveal confidential information about a case, but that her actions might also constitute “assisting a criminal or fraudulent act.” See Va. Rule 1.2 (c).
- 4 *Id.*
- 5 *Id.*
- 6 John Schwartz, “A Legal Battle: Online Attitude vs. Rules of the Bar,” *New York Times* (Sept. 12, 2009).
- 7 *People v. Liceaga*, No. 280726, 2009 Mich. App. LEXIS 160, *7 (Mich. Ct. App. Jan. 27, 2009).
- 8 *Id.*
- 9 See Molly McDonough, “Trial Consultants Add Facebook/MySpace to Juror Research Toolbox,” *A.B.A. J.*, Sept. 29, 2008.
- 10 *United States v. Villanueva*, No. 08-12911, 2009 U.S. App. LEXIS 3852, *7 (11th Cir. 2009).

- 11 *Cf.* John Schwartz, “As Jurors Turn to the Web, Mistrials Are Popping Up,” *New York Times* (March 17, 2009).
- 12 *Cal. Bar. J.* (Aug. 2009) accessed January 6, 2010, at http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/August2009&MONTH=August&YEAR=2009&sCatHtmlTitle=Discipline&sJournalCategory=YES#s10.
- 13 Philadelphia Bar Ass’n Ethics Op. 2009-02 (March 2009).
- 14 Molly McDonough, “Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches,” *ABA Journal*, July 31, 2009.
- 15 A second federal lawsuit challenging the constitutionality of Louisiana’s new lawyer advertising rules was filed Nov. 24, 2009, by an attorney who claims that the mandatory rules will stifle evolving forms of lawyer speech on the Internet (*Wolfe v. Louisiana Attorney Disciplinary Bd.*, E.D. La., No. 08-4994, filed 11/24/08). The suit claims that the Louisiana rules will unfairly restrict lawyers’ modern modes

of communication such as blog posts and online discourse, and it charges that the rules will make it difficult or impossible for law firms to place small Internet text ads with Google and other Internet services. The challenged provisions should be struck down as contrary to the First Amendment and the due Process clause of the Fourteenth Amendment, the complaint contends. For example, the bar’s requirement that an ad identify the name and address of the lawyer responsible for its content would unduly burden on a “tweet” or message via Twitter because of its 140-character limitation. Wolfe noted that text ads provide only a small space for the advertiser to deliver its message—sometimes no more than 30 or 60 characters. If an attorney is required to provide a name and address, this would virtually eliminate the attorney’s ability to say anything else in the ad, he said.

- 16 Nathan Crystal, *Ethical Issues in Using Social Networking Site*, *S.C. Bar J.* at 8-10 (Nov. 2009).