

“TWEET” THIS: The Ethics of Social Networking

by

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Social Networking is Here. While skeptics viewed the initial wave of electronic social networking as a passing fad, the ensuing years have proved them wrong. At this point, the numbers tell the story:

Facebook leads the way, with more than 400 million active users. Over 5 billion pieces of content, including 60 billion photos, are shared among the members each month.¹ *MySpace* boasts 100 million active users.² *Twitter* has 75 million users, who post 50 million tweets every day. That is an average of 600 tweets per second.³ *LinkedIn* “has over 60 million members in over 200 countries and territories around the world.”⁴ *YouTube* shows videos of every kind and nature. A recent search found more than 120,000 videos which include the subject “lawyer.”⁵ Of course, these are only some of the more popular examples.⁶

With so much electronic communication and interaction, the user is likely to “get it wrong” once in a while. Further, the narcissistic need to share one’s every thought and action can lead to regrettable posts that cannot be rescinded.⁷ To paraphrase Judge Cardozo, “[t]he hand once set to a Tweet may not be withdrawn with impunity.”⁸

Social Networking and Lawyer Marketing. Despite reputation and appearances, lawyers do try to keep up with changes in society – though often perhaps a step behind. Many lawyers have today ventured into the realm of social networking in an effort to improve their visibility for marketing purposes.⁹ Indeed, the Kansas Rules of Professional Conduct recognize this obvious reality in the Comment to Rule 7.2 (Advertising):

Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.^[10]

According to a 2009 survey by the ABA, 43 percent of the lawyers surveyed have a presence on Facebook, while a surprising 12 percent of law firms have a Facebook page.¹¹ There are so many lawyer- and law firm-blogs that a special site has been set up just to synthesize and present only the perceived “best” of those web logs.¹²

Advertising through electronic media is certainly permitted, so long as (a) the advertising is not false or misleading, and (b) it contains the name of at least one lawyer responsible for its content. The advertising also must not create unjustified expectations about results the lawyer can achieve.

As with any advertisements, lawyers should be careful that their websites, blogs, and other electronic promotional materials are truthful, and otherwise comply with the requirements of these rules.

Ethical Risks for Lawyers in Social Networking. While keeping up with the Woods' is considered important for the hip lawyer, keeping up with the Model Rules of Professional Conduct while doing so is even more important. A review of several Rules in the context of social network marketing and communication is worthwhile.

Scope of Representation (Rule 1.2). When exchanging information on a blog or tweet, there is a risk that the recipient of the lawyer's wisdom may well consider herself a "client" of the lawyer, rely on the "advice" rendered, and then feel slighted when that off-hand advice proves incorrect (probably because the lawyer did not have all the facts, or responded in an off-hand manner without full analysis). Lawyers should refrain from rendering legal advice to non-clients. Lawyers should also make it clear, when exchanging casual communications, that the exchange does not constitute legal advice, and that the lawyer does not represent the recipient.

Confidentiality (Rule 1.6). Of course, client information remains confidential, and should not be disclosed in any setting, including in an informal electronic exchange.¹³

Positional Conflicts (Rule 1.7). Under the modern Miranda Rule, anything one says in a Facebook page can and will be used against you in a court of law.¹⁴ Therefore, it is wise to refrain from making pronouncements on legal issues or principles, since the lawyer or his firm may be asked (and paid) to take a contrary position.¹⁵

False Statements (Rule 4.1 and Rule 8.4(c)). While such considerations clearly do not appear to restrain many participants in social networking, lawyers should be careful not to make false statements of material fact or law, and should not engage in dishonesty, fraud, deceit or misrepresentation in their posts.

Contact with Represented Party (Rule 4.2) and Unrepresented Party (Rule 4.3). Care must be taken not to engage in inadvertent (or intentional) communications with persons known to be represented by counsel, at least insofar as such communications would or could relate to "the matter" in which that person is represented. In addition, communications with an unrepresented party cannot be untruthful or misleading.¹⁶

Ethical Risks for Clients. The attorney-client privilege is a valuable protection for communications between lawyer and client. However, the privilege belongs to the client, and it can be waived by intentional disclosure of privileged communications. Therefore, clients should be careful not to disclose privileged communications to persons outside the relationship or where there is not an expectation of privacy in the communication.¹⁷

Conclusion. When engaging in social networking, lawyers should be careful to be circumspect and thoughtful. Otherwise, a tweet sent in haste may cause the sender to repent at leisure.

¹ <http://www.facebook.com/press/info.php?statistics> .

² <http://www.myspace.com/pressroom?url=/fact+sheet> .

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- ³ http://www.computerworld.com/s/article/9148878/Twitter_now_has_75M_users_most_asleep_at_the_mouse
- ⁴ <http://press.linkedin.com/about> .
- ⁵ http://www.youtube.com/results?search_query=lawyer&search_type=&aq=f .
- ⁶ See also, e.g. www.bebo.com, www.friendster.com, and www.hi5.com.
- ⁷ McAvoy, Espinoza-Madrigal and Walton, “Think Twice Before You Hit the Send Button: Practical Considerations in the Use of Email,” *The Practical Lawyer* (December 2008), p. 45, found online at <http://www.ffhsj.com/siteFiles/Publications/477A62C7B74E1712936E0E03B8E4D844.pdf>
- ⁸ *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 167, 159 N.E. 896 (1928).
- ⁹ See, e.g. “Legal Marketing Using Facebook,” found on Facebook at <http://www.facebook.com/pages/Boston-MA/Legal-Marketing-using-Social-Media/143662898018>.
- ¹⁰ Kansas Rules of Professional Conduct (“KRPC”), found at Rule 226, Rules of the Kansas Supreme Court, at Rule 7.2 (Comment).
- ¹¹ 2009 Legal Technology Survey Report, <http://legalcurrent.com/2009/10/21/2009-aba-legal-technology-survey-report/>.
- ¹² Kevin O’Keefe’s “Real Lawyers Have Blogs,” <http://kevin.lexblog.com/>.
- ¹³ See, e.g. “Use Gmail – Waive Privilege,” found online at <http://www.geeklawblog.com/2009/08/use-gmail-waive-privilege.html>.
- ¹⁴ *Clark v. State of Indiana*, Case No. 43S00-0810-CR-575 (Indiana Supreme Court, October 15, 2009), found online at <http://www.in.gov/judiciary/opinions/pdf/10150901rts.pdf> (social networking site admissible to show criminal defendant’s character).
- ¹⁵ Richmond, “Choosing Sides: Issue or Positional Conflicts of Interest,” 51 Fla. L. Rev. 383 (July 1999).
- ¹⁶ Philadelphia Bar Association Ethics Op. 2009-02, found online at http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf (lawyer cannot use a third-party to “friend” an unrepresented person on Facebook or MySpace, to obtain information about the person, because failure to disclose the lawyer’s identity as the true inquirer would be deceitful and a violation of Rules 4.3, 4.1, 5.3, and 8.4).
- ¹⁷ See, e.g. *Scott v. Beth Israel Medical Center Inc.*, 17 Misc.3d 934, 940, 847 N.Y.S.2d 436, 441 (N.Y.Sup. 2007).

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