

Legal ethics involved in online social media and networking: an overview

The use of online social media and networking sites has become so common that it is now impacting lawyers and the practice of law. Lawyers can, and do, benefit from using online social media and marketing services for client development and professional networking. Unlike the general public, however, lawyers must understand and be mindful of the ethical considerations that arise when engaging in online social networking. To that extent, the innocent sounding name “social media” is a misnomer. It would be a serious mistake for attorneys to assume that engaging in social media is purely a social activity with no concerns related to their professional and ethical obligations. Some uses of “private” social media and social networking sites such as Facebook (www.facebook.com), LinkedIn (www.linkedin.com), Myspace (www.myspace.com) and Twitter (www.twitter.com) could subject an attorney to discipline or affect a candidate’s prospects for bar admission. At a minimum, this article provides a broad overview in an attempt to inform Indiana lawyers and potential bar applicants about some of the issues social media platforms raise, and how our profession may be impacted.

This topic is the subject of countless articles and blogs from every state around the country. Several issues and concerns that have been identified to date in connection with the use of social media by lawyers fall into the following general categories:

- Maintaining client confidentiality
- The inadvertent creation of client-attorney relationships
- Advertising and marketing
- The unauthorized practice of law

- Conduct concerning opponents, witnesses and investigations
- Discovery
- Proper communications
- Communications and other conduct between attorneys and judges

Client confidentiality concerns can arise in several contexts, but one obvious example is posting information online about pending or settled cases.¹ Similarly, unintentional or inadvertently created attorney-client relationships can create obligations of confidentiality that can disqualify the lawyer and, in some instances, an entire firm. Worse yet, an unintentional or inadvertently created relationship can expose the lawyer to not only liability for malpractice but also to disciplinary actions.

Social networking and Internet options such as LinkedIn and blogging can present a host of issues under the Rules of Professional Conduct that govern communications, solicitations and advertising directed toward potential clients. There is no clear boundary between the use of social networking media for purely social purposes and using those services for marketing. Using social networking for marketing creates an entirely different set of risks and carries with it the potential for abuse. In some instances, social networking behavior would be viewed as improper solicitation.² Likewise, because lawyers are prohibited from making false or misleading communication about their services, the tendency to engage in hyperbole or make

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exaggerated and spontaneous “off the cuff” remarks on a social networking site may create unintended ethical consequences.

Additionally, while a client or third party may describe a lawyer’s services however they wish, the Rules of Professional Conduct do govern the efforts by lawyers to

circumvent the rules through the acts of others.³ Particularly difficult issues arise if a third party makes statements about a lawyer or firm that the lawyer or firm themselves could not make. Policing those kinds of statements and knowing what, if anything, a lawyer can do to remedy that type of situation can

be problematic. Assuming such a testimonial is unsolicited by the attorney, statements made in such a testimonial still raise the concern of whether some type of a disclaimer is required to indicate that the testimonial is unsolicited.⁴

Extraterritorial and unlicensed practice-of-law issues exist because social networking crosses state lines (as well as international borders). Some social networking and, particularly, blogging or participating in chat rooms may subject an attorney to claims of unauthorized practice of law in other jurisdictions if the attorney provides state- or federal-specific legal opinions or advice and is not licensed to practice in the state in which a recipient participant is located.⁵ Likewise, becoming part of a “virtual law firm” and falling victim to the potential ethical pitfalls of practicing in a virtual law firm can be problematic.⁶

Another emerging practice that is quickly becoming widespread is conducting investigations by using social networking sites and, specifically, gaining access to a witness’ or adverse party’s social networking page (*e.g.*, Facebook or Myspace) to find information to use on cross-examination. There are ethical considerations and limitations on such use. For example, trying to become friends with third parties (opponents or witnesses) on social media sites in order to pursue investigations may run afoul of rules governing contact with such persons.⁷ The possibility of anonymous communications on some websites presents another discreet set of issues.⁸

“Friending” between judges and lawyers is also a source of concern. Currently there is no consistency from state to state on how “friending” with judges is being, or will be, treated.⁹ Some states

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have approved such relationships, with qualifications.¹⁰ The Ethics Committee of the Kentucky Judiciary answered a “Qualified Yes” to the question: “May a Kentucky judge or justice, consistent with the Code of Judicial Conduct, participate in an Internet-based social networking site, such as Facebook, LinkedIn, Myspace or Twitter, and be ‘friends’ with various persons who appear before the judge in court, such as attorneys, social workers and/or law enforcement officials?”¹¹ More recently, in a Dec. 3, 2010 advisory opinion, the Supreme Court of Ohio’s Board of Commissioners on Grievances and Discipline advises judges that social media use and “friending” on social networking sites is permitted, but must be done with caution.¹² Others have banned the practice outright.¹³ At least one state has actually imposed discipline based upon “friending” between judges and lawyers.¹⁴ Many states, includ-

ing Indiana, have not taken a stand on this subject and have no express prohibitions. Of related concern, government employees may be subject to specific legal and regulatory considerations regarding participation in social networking sites.¹⁵

Already there are many and varied iterations of each of the issues discussed in this article. Variations on these themes can – and undoubtedly will – arise as new issues with social media are discovered, which is happening with great frequency. Although the focus on ethical concerns in the context of social networking is fairly new, many of the underlying ethics principles are not new at all. Rather, the social networking environment is a virtual reflection of social relationships in the real world.¹⁶ The interplay between the virtual world and the real world is a window into much broader and nuanced questions that are present in day-to-day conduct and relationships regard-

less of the medium. We cannot talk about social networking in isolation without considering how lawyers operate in day-to-day relationships and without considering the norms that govern those relationships in the real world. Consequently, rules, advice or guidance relating to how we behave in the real world must be applied in the virtual world context.

But, as with all things virtual, there are important distinctions between communications in the virtual world and communications in the real world. The application of ethical principles can turn on those differences. From a practical perspective, with a face-to-face communication, or even with a letter or a phone call, we can take action to correct an inaccurate statement, retrieve a letter, recall a statement or take some other immediate corrective action to cure any perceived miscommunication, misunderstanding or incorrect interpretation. In contrast, Internet communications have a life of their own. The boundaries are not as clear or as well understood as the boundaries we may recognize in day-to-day real life communications. Internet communications can easily be broadcast to parts unknown and to unintended audiences.

So does this mean we need special rules for when lawyers participate in social networking, or do we already have the rules that should apply in this different platform or context? Does this mean networking communications via social media should be treated any differently than any other form of media? With the exception of Florida,¹⁷ most states’ ethics rules do not specifically address an attorney’s conduct when it comes to networking via social media or other electronic means of networking. In other states, interpretations of existing rules as they apply

to new media are beginning to emerge. The South Carolina Bar has issued an ethics advisory opinion about a free website, which is offered by a company that posts information about attorneys nationwide, featuring peer endorsements and client reviews and ratings. The opinion addresses the questions of whether attorneys may claim the Company X website listing, including peer endorsements, client ratings and Company X ratings, and whether attorneys may invite peers, clients or former clients to post comments and/or rate the lawyer on Company X's website.¹⁸ The Kentucky Bar has proposed a regulation that is intended to regulate the conduct of attorneys in Kentucky who reach out to potential clients through social media such as Facebook and Myspace, and would prohibit solicitations through social media unless lawyers pay a \$75 filing fee and permit regulation by the bar's Advertising Commission.¹⁹

Best practice standards for lawyers on the use of the media for client development and professional networking are lacking. As new rules of professional conduct and new interpretations of existing rules are slowly developing and emerging around the country on this topic, however, common sense and existing professional conduct rules will continue to govern and inform an attorney's duties and practices when participating in online social media and networking. At a minimum, before an attorney embarks in the use of social media and networking sites, the ethics rules should be read carefully – specifically, the rules relating to maintaining confidentiality, communication, solicitation and advertising. Lawyers should be cautious in this endeavor, and they should be able to justify their activities on social networks in light of the ethics rules. Ultimately, perhaps the best advice

is: Be responsible and think before you type (or “keyboard,” depending upon your generation). 📧

1. See Indiana Rules of Professional Conduct 1.6, Comments 3 and 4 explaining that the scope of the information an attorney is prohibited from disclosing or discussing with someone other than the client is much broader than the information which would be protected from compelled disclosure by the attorney-client privilege.[0] Accordingly, any description of an attorney's work may violate RPC 1.6, unless presented in a way that would render it almost impossible for someone to figure out the identity of the subject client.
2. See Indiana Rules of Professional Conduct 7.3.
3. Indiana Rules of Professional Conduct 7.1 prohibits false or misleading communication about the lawyer or the lawyer's services. Commentary 2(3) to Rule 7.1 further clarifies that even truthful statements may be misleading and therefore a violation of Rule 7.1 if the statement “contains a claim about a lawyer, made by a third party, that the lawyer could not personally make consistent with the requirements of this rule.”
4. There may be a common misperception that statements made by a third party about a lawyer in the nature of an endorsement or a recommendation can somehow create an ethical violation. However, the Rules of Professional Conduct apply only to the behavior of lawyers, and as such, an ethics violation arises out of such a third-party statement only if the lawyer uses it. In a social-media context, the critical question may be: “Under what circumstances does a lawyer adopt and use a third-party statement which he or she could not make on behalf of himself or herself?” Absent precedent on point that would provide a bright line answer, the existence or nonexistence of a rules violation will likely depend on “the totality of the circumstances.”
5. See Indiana Rules of Professional Conduct 5.5.
6. Virtual law practice is an alternative method of practicing law (as compared to traditional bricks & mortar law firms). The model for a “virtual law firm” allows attorneys to work from home (or any location) by virtue of their Internet connection. See, e.g., Michael W. Hoskins, “‘Virtual’ office reflects broader changes in practice of law,” *The Indiana Lawyer*, <http://www.theindianalawyer.com/virtual-office-reflects-broader-changes-in-practice-of-law/PARAMS/article/24534>, Aug. 18, 2010 (story of an Indiana attorney who started a solo virtual law practice).
7. A recent New York City Bar Association opinion advised that a lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent, to obtain information for litigation from an unrepresented person's webpage. New York City Bar Opinion 2010-2 (Sept. 2010). The Philadelphia Bar Association advisory opinion also found objectionable an attorney's attempt to have a third person whose name a witness would not recognize contact a witness through her Facebook page and send a “friend” request. Philadelphia Bar Opinion 2009-2 (March 2009).
8. One example of the risk of unwittingly or unknowingly communicating with an adverse party, or acquiring information from a non-client who could be or could become adverse, occurred when an attorney had a client involved in online Internet dating. Her client did not know the true identity of his Internet friend until they met in court and he discovered that he had been engaged in the online dating process with opposing counsel. That case created an extremely messy attorney disqualification issue.
9. See, “Judicial Ethics, the Internet, and Social Media” (*The Bench*, November/December), The American Inns of Courts website, Dec. 14, 2010, <http://www.innsocourt.org/Content/Default.aspx?id=5501>.
10. Ethics Committee of the Kentucky Judiciary, Formal Judicial Ethics Opinion JE-119 (Jan. 20, 2010); Ohio Board of Commissioners on Grievances and Discipline, Opinion 2010-7 (Dec. 3, 2010).
11. Ethics Committee of Kentucky Judiciary, Formal Judicial Ethics Opinion JE-119 (Jan. 20, 2010).
12. Ohio Bd. of Commissioners, Opinion 2010-7 (Dec. 3, 2010).
13. Florida Judicial Ethics Advisory Committee, Opinion Number: 2009-20 (Nov. 17, 2009).
14. *Matter of Terry*, North Carolina Judicial Standards Commission Inquiry No. 08-234 (April 1, 2009).
15. See, e.g., United States District Court for the Southern District of Indiana Social Media and Social Networking Policy for Chambers' Staff, <http://indylaw.indiana.edu/clinics/internships/SocialNetworkingPolicy.pdf>.
16. Obviously, anyone who uses online social networking does so in the “real world,” and those communications are indeed very real. In this context, however, because online social networking is purely Web based, it can take on a different characteristic than in-person or telephone communications, hence, the illustrative distinction between “real world” and “virtual world.”
17. Rules Regulating the Florida Bar, Rule 4-7, “Information About Legal Services,” and Rule 4-7.6 “Computer-Accessed Communications.”
18. South Carolina Bar Ethics Advisory Opinion 09-10.
19. See “Seeking Clients via Facebook? In Ky., Bar May Regulate Social Media,” *ABA Journal* website, Nov. 18, 2010, <http://tinyurl.com/2flxg8>.