Ethics Watch

Ethical Issues in Using Social Networking Sites

By Nathan M. Crystal

When I started to write this column, my thesis was that social networking sites, such as Facebook, LinkedIn, and Twitter, did not present any novel ethical problems. "There is nothing new under the sun" was to be my subtitle. My argument was that the new social networking sites are simply a form of communication, subject to the same ethical rules that already govern lawyer communications. In one sense this thesis is correct. While there are few opinions, proceedings, or decisions addressing the ethical issues presented by these sites, ones that do exist apply the traditional ethical principles and rules. But in another sense, this thesis misses the point of the social networking technologies. These technologies are a form of communication, but they radically increase the number of people with whom such communications are made, and they transform what are often ephemeral, private experiences into documented public expressions. To claim that social networking sites are not new is a little like saying that the automobile or television were not new because, after all, they were nothing more than forms of transportation or communication. This article, therefore, is a preliminary effort at addressing the application of traditional ethical concepts to the new social networking sites.

1. Confidentiality. Rule 1.6 provides that a lawyer may not reveal information relating to the representation of a client unless the client gives informed consent or some exception applies. A recent article reports that Illinois disciplinary authorities have commenced proceedings against an experienced public defender who reported on her cases in her blog. John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, NY Times, September 12, 2009. Similarly, in using Twitter to tell followers what a lawyer is doing, a lawyer could reveal client confidences. A lawyer might try to protect himself against an allegation of breach of confidentiality by limiting statements to vague, general postings that did not reveal specific client information. Another possibility is to limit communications to public information. Postings or tweets at that level of generality, however, are likely to be uninteresting. Finally, perhaps a lawyer could include in her engagement agreement a provision in which the client consents to the lawyer's using information from a client's case in a posting so long as the client's name and any personal indentifying information were not used. To make sure that the client actually consented, such a provision should probably be separately signed. Moreover, unless the lawyer informed the client of the risks associated with such disclosures, the consent would probably not be informed. See SCRPC 1.0(g) and comments 6 and 7.

2. Trial Publicity. Rule 3.6 prohibits a lawyer from making extrajudicial statements that have a substantial likelihood of materially prejudicing an adjudicative proceeding. Comments by counsel on Twitter, blogs, or other sites about jurors, witnesses, evidence, the judge, or opposing counsel run the risk of violation of this rule, particularly if the matter is a criminal case tried before a jury. Cf. John Schwartz, *As Jurors Turn to the Web, Mistrials are Popping Up*, NY Times, March 17, 2009.

3. Misrepresentation. Rule 8.4(e) states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." A Texas judge informed the senior partner of a young lawyer's law firm that the lawyer had misrepresented to the court the need for a delay in a trial because of a death in the family. The judge was able to trace the lawyer's actions through her Facebook page. John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, NY Times, September 12, 2009. A Pennsylvania Advisory Opinion found that a lawyer's attempt to use a third person to gain access to a witness's Facebook page as a friend violated Rule 8.4. *Pa. Ethics Op.* #2009-02. Similarly, job applicants have had offers of employment revoked when employers questioned their professionalism after reviewing their Facebook pages.

4. Ex Parte Communications. Both the Rules of Professional Conduct and the Code of Judicial Conduct prohibit ex parte communications between lawyers and judges about pending matters, with certain limited exceptions. See S.C. Code of Judicial Conduct Canon 3(B)(7): SCRPC 3.5(b). Communications between a lawyer and a judge who are friends on Facebook about a pending case probably violate the rule. See Public Reprimand of B. Carlton Terry Jr., Judicial Standards Commission Inquiry No. 08-234 (April 1, 2009), www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf. It would also be improper for a judge to conduct independent factual research about the parties to a case on the Internet. *Id.* Rule 4.2 prohibits a lawyer from communi-

cating with a person who is represented by counsel in a matter without the consent of that lawyer. A lawyer who asked a third person to become a friend with the opposing party in order to gather information relevant to a pending case has probably violated the rule. Cf. *Pa. Ethics Op.* #2009-02.

5. Advertisements. The SCRPC 7.1 provides that a lawyer may not make "false, misleading, deceptive, or unfair communications about the lawyer or the lawyer's services." The rule and the comments provide specific applications of this principle. Rule 7.2 imposes a number of restrictions on lawyer advertisements, including a requirement that any advertisement be filed with the Commission on Lawyer Conduct unless it contains only directory information and will not be publicly disseminated. Rule 7.3 deals with solicitation of clients, whether in person, electronically, or by direct mail solicitation. Use of social networking sites poses a number of issues under these rules. First, is the use of a site an advertisement subject to Rule 7.2, including the filing requirement? Comment 1 to Rule 7.2 states that advertising involves "an active quest for clients." Thus, if a lawyer is using a site such as LinkedIn, through which people can post resumes, the requirements of Rule 7.2 almost certainly apply. If lawyers want to participate personally in social networking sites without complying with these rules, they should establish a personal page with a site that is not directed at business contacts and avoid any references that could reasonably be interpreted as seeking business, e.g. "My practice involves … You can contact me at …" On the other hand, a blog on the law that does not directly seek to promote the lawyer's practice is probably not subject to Rule 7.2.

Second, if a lawyer uses a site aimed at generating business contacts, like LinkedIn, the lawyer should review the rules carefully when establishing his or her profile. For example, LinkedIn has a section on "specialties." Lawyers cannot advertise that they are specialists, however, unless they have been certified as a specialist under the state's certified specialist program. SCRPC 7.4(b). A lawyer could list that the lawyer practices in certain areas, but should include a disclaimer stating that the lawyer is not certified as a specialist by the S.C. Supreme Court.

Third, LinkedIn also has a section on recommendations in which the member can ask other members to recommend the member. Under the South Carolina rules, client testimonials are improper. SCRPC 7.1(d). While there is a substantial question about the constitutionality of this provision—see *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (indicating that truthful advertising may be regulated only if the state establishes a substantial interest in the regulation and the regulation is in proportion to the interest—prudent lawyers will avoid seeking testimonials through social networking sites. In my opinion a lawyer should not be ethically responsible for an unsolicited testimonial from a client, but the lawyer should use reasonable efforts to prevent such testimonials from occurring by making explicit statements on the lawyer's site that client testimonials are not ethically permitted in South Carolina and by removing or asking the client to remove any unsolicited testimonials.

Fourth, under the rules advertisements about results obtained are generally improper unless accompanied by an appropriate disclaimer. See SCRPC 7.1(b) and comments 1 and 3. Thus, a lawyer who sent a "tweet" about the lawyer's verdict in a case is likely in violation of the rule because the shortness of tweets makes it impossible to issue a contemporaneous disclaimer. The lawyer could include a disclaimer on the lawyer's Twitter page, but that might not be considered effective since it would not be directly linked to the communication. Prudence dictates that lawyers refrain from tweeting about litigation success.

6. Law Firm Policies. Owners and managers of law firms have an ethical obligation to establish proper policies and procedures to supervise lawyers and nonlawyers. SCRPC 5.1 and 5.3. Given the widespread use of social networking sites, firms should address the use of such sites by lawyers and nonlawyers, particularly the obligation of confidentiality. See Doug Cornelius, *Blogging/Social Internet Policy for a Law Firm*, http://dougcornelius.com/2008/11/blogging-social-internet-policy-for-a-law-firm/ (November 3, 2008).

7. Formation of an Attorney-Client Relationship. Communications whether by e-mail, chat room, or through social networking sites pose the risk that an attorney-client relationship may be created. Appropriate disclaimers may reduce this possibility, but if a lawyer elicits specific factual information from a person and provides advice based on that information, the risk exists that an attorney-client relationship is formed. Cf. *S.C. Bar Ethics Adv. Op.*

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#00-17 (lawyer may represent only seller at real estate closing, but if lawyer provides advice to buyer, attorney-client relationship may be formed).

I am sure that I have overlooked some important ethical issues with regard to social networking sites. My goal, however, is to alert lawyers to both the old and the new in these sites. The old in the sense that traditional rules of ethics apply to these forms of communications. The new in that the social networking sites dramatically increase the number of professional communications that lawyers can make, and accordingly increase the ethical risks associated with such communications.

The author thanks Barbara Seymour, Deputy Disciplinary Counsel, and attorney Melissa Brown for their insight and comments. This column offers the views of the author, not necessarily those of Disciplinary Counsel, the Commission on Lawyer Conduct, or Ms. Brown.