It's Complicated

How to walk the fine ethical line in the age of social media.

BY JOHN BROWNING

Without a doubt, social networking platforms like Facebook, Twitter, YouTube, and LinkedIn have revolutionized the way people communicate and share information. Facebook boasts more than 1.12 billion users worldwide, and Americans alone log more than 10.5 billion minutes each day on the site. Twitter has gone from processing 5,000 tweets a day in 2007 to more than 400 million a day in 2013. And according to the Pew Research Center, 72 percent of adult Americans maintain at least one social networking profile. Not surprisingly, lawyers have embraced social media as well; in a study by American Lawyer Media, nearly 75 percent of law firms in the United States employ one or more social networking platform for marketing purposes. And beyond its use as a marketing tool, social networking has proven to be a digital treasure trove of information for cases. In 2010, only 6 percent of attorneys reported using sites like Facebook for case investigation, according to the American Bar Association. But when the ABA performed the same survey in 2012, 44 percent of the responding attorneys were doing so. In an age in which people seemingly share all kinds of details of their lives online, lawyers in virtually all practice areas have found social media to be a valuable avenue for discovery.

However, such emerging technologies have also raised new ethical questions for lawyers. The first question goes to the very core of an attorney's duties to a client—to provide competent representation. While lawyers who are uncomfortable with the pace of technological innovation may be tempted to stick their heads in the sand when it comes to social media, they really can't afford to thanks to the recent changes to the ABA Model Rules of Professional Conduct. In August 2012, Rule 1.1 of the Model Rules, which discusses competence, was expanded to make it clear that competent representation doesn't just mean keeping current in case law or statutory developments in one's area of practice anymore, but also now encompasses staying abreast of "the benefits and risks associated with relevant technology," including how such advances impact carrying out investigations, engaging in legal research, advising clients, and conducting discovery.[1] A number of jurisdictions around the country have already held attorneys to a higher standard when it comes to making use of online resources, including demonstrating due diligence, researching prospective jurors, and even locating and using exculpatory evidence in criminal cases.[2] As "digital digging" becomes the norm, it becomes harder for an attorney to say she's met the standard of competence when she's ignored social media avenues. For example, in an era in which it has become standard practice for divorce lawyers to comb the Facebook pages of both the client and the adverse spouse (the American Academy of Matrimonial Lawyers surveyed its members, and 81 percent reported using evidence from social networking sites in their cases), can a lawyer who fails to do so truly profess competence?

However, many of the ethical quandaries that social networking presents for lawyers stem from the manner in which attorneys use (or misuse) these sites. Consider using social media sites to gather information about a party or witness, for example. While there is generally no ethical prohibition against viewing the publicly available portion of an individual's social networking profile, may an attorney (or someone working for that attorney) try to "friend" someone to gain access to the privacy-restricted portions of that profile? Ethics opinions from the Philadelphia Bar Association (March 2009), the New York City Bar (September 2010), the New York State Bar (September 2010), the Oregon State Bar (February 2013), and others have made it clear that the rules of professional conduct against engaging in deceptive behavior or misrepresentations to third parties extend to cyberspace as well.[3] As the New York City Bar ethics opinion emphasizes, with deception being even easier in the virtual world than in person, this is an issue of heightened concern.

Not surprisingly, lawyers have found themselves in ethical hot water for "false friending." A Cleveland, Ohio, insurance defense law firm, along with the insurance carrier that retained it and the investigator they hired, are facing a civil suit for invasion of privacy after the investigator gained access to the Facebook page of a minor plaintiff in a dog bite case by posing as one of the girl's friends. And in June 2013, Cuyahoga County (Ohio) assistant prosecutor Aaron Brockler was fired after he posed as a murder defendant's fictional "baby mama" on Facebook to communicate with two female alibi witnesses for the defense and try to persuade them not to testify. County prosecutor Timothy McGinty had to withdraw his office from the case and hand it over to the Ohio attorney general but not before acknowledging that Brockler had "disgraced this office and everyone who works here by 'creating false evidence' and 'lying to witnesses.'"[4] Similarly, even though Rule 4.2 of the Model Rules of Professional Conduct prohibits communicating with a represented party, lawyers have had to be reminded that this applies to *all* forms of communication—including via social networking. The San Diego County Bar Association Ethics Committee addressed this in a May 2011 opinion dealing with a plaintiff's lawyer in an employment lawsuit seeking to use Facebook to contact employees of the company he'd sued. Two defense attorneys in New Jersey currently face disciplinary action for allegedly directing their female paralegal to "friend" the young male plaintiff during the course of a personal injury lawsuit to gain access to information from his privacy-restricted Facebook profile.[5]

Beyond using social networking for gathering information, the ethical duty to preserve information is another concern in the age of Facebook and Twitter. While no lawyer wants to discover embarrassing photos or comments on a client's Facebook page that might undermine the case, Rule 3.4 prohibits an attorney from unlawfully altering or destroying evidence or assisting others in doing so. Clearly, a lawyer's ethical duty to preserve electronically stored information encompasses content from social networking sites. It's a lesson that some lawyers have learned the hard way. For example, in the Virginia wrongful death case of *Lester v. Allied Concrete* in 2012, the plaintiff's attorney directed his paralegal to instruct the client to delete content from his Facebook page that depicted him as something less than a grieving widower (the attorney also had his client sign sworn interrogatories stating that he didn't have a Facebook account). After a $10.6 million verdict for the plaintiff, the defense brought a motion for new trial based on spoliation of evidence. The trial judge cut the damages award in half (the

Virginia Supreme Court later reinstated the full verdict) and imposed sanctions of $722,000 (most of which were against the plaintiff's counsel) for an "extensive pattern of deceptive and obstructionist conduct."[6] The attorney, a partner in the largest plaintiff's personal injury firm in the state and a past president of the Virginia Trial Lawyers Association, had his license to practice law suspended for five years by the Virginia Bar in June 2013.

Unfortunately, poor judgment plagues lawyers just like anybody else, and social networking sites have provided a wider audience than ever for such lapses. In 2012, an assistant public defender in Miami-Dade County (Florida) was fired after she posted a photo of her murder defendant client's leopard print underwear on Facebook along with a snarky caption (she also posted some comments that questioned her client's innocence). Several veteran federal prosecutors in New Orleans have resigned in the wake of revelations that they were anonymously discussing cases they were handling and parties they were investigating on a newspaper's blog. An Illinois criminal defense attorney faces a suspension following his YouTube post of a discovery video of an undercover drug buy—used as an attempt to sway public opinion. The lawyer, who also linked to the video on Facebook, later acknowledged that instead of depicting drugs being "planted," the video actually appeared to incriminate his client. In July 2012, a former prosecutor in Virginia was charged with making a felony threat after he allegedly posted messages on Facebook threatening bodily injury to his former employer. In California, a prominent commercial litigator had to explain himself in court after he tweeted about a case and linked to documents that the court had placed under seal. And proving that celebrities are not the only ones worrying about scandalous online photos and cyberstalking, a Virginia county prosecutor is embroiled in a legal battle with an ex-lover (and prominent Missouri attorney) over nude photos of her that the ex had posted on Twitter.

Jury selection is another area in which lawyers' use of social media can raise ethical questions. Should lawyers probe the online selves of prospective jurors? The Missouri Supreme Court has actually imposed an affirmative duty on lawyers to conduct certain Internet background searches of potential jurors (specifically that juror's litigation history), if the lawyer plans to argue juror bias related to his or her litigation history. To date, only three ethics opinions have addressed the question of "Facebooking the jury." In 2011, the New York County Lawyers' Association Committee on Professional Ethics held that "passive monitoring of jurors, such as viewing a publicly available blog or Facebook page" is permissible so long as lawyers have no direct or indirect contact with jurors during trial. Subsequent opinions from the New York City Bar Association (2012) and the Oregon State Bar (2013) agreed with this, while sounding a cautionary note to lawyers that even accessing a prospective juror's Twitter profile or LinkedIn profile could cause the juror to learn of the lawyer's viewing or attempted viewing. Such contact, according to both ethics committees, "might constitute a prohibited communication even if inadvertent or unintended." In other words, as with other aspects in which lawyers might use social media, ignorance or lack of familiarity will not be an excuse in committing an ethical violation.[7]

While the use of social networking in investigation and fact-gathering, preservation of evidence, and even jury selection represents a vital addition to a lawyer's arsenal, the misuse of these platforms is a potential ethical minefield. Lawyers should heed some of the same advice they dispense to clients: treat social media outlets as forms of communication subject to the same rules and ethical constraints as more traditional modes; be familiar with the features and functionality of the sites themselves; and above all, be careful what you post. **TBJ**

NOTES

1. ABA Commission on Ethics 20/20, Report to the House of Delegates Resolution 105A, at 6 (Aug. 2012).
2. *See*, for example, *Canedy v. Adams*, in which a California appellate court held that a lawyer's failure to locate a sexual abuse victim's recantation on her social media profile could constitute ineffective assistance of counsel. 2009 WL 3711958 (C.D. Cal. Nov. 4, 2009).
3. Philadelphia Bar Ass'n Prof'l Guidance Comm. Op. 2009 02; Ass'n of the Bar of the City of N. Y. Comm. On Prof'l and Judicial Ethics, Formal Op. 2010 2; N. Y. State Bar Ass'n Comm. On Prof'l Ethics, Op. 843.
4. James McCarty, "Cuyahoga County Prosecutor Fired After Posing as an Accused Killer's Girlfriend on Facebook to Try to Get Alibi Witnesses to Change Their Testimony," *The Cleveland Plain Dealer*, June 6, 2013.
5. For more detailed discussion, see John G. Browning, "Keep Your 'Friends' Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media," 3 *St. Mary's L.J. on Legal Malpractice and Ethics No. 1* (2013).
6. *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013).
7. For more detailed discussion, see John G. Browning, "As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn?" *The Jury Expert*, Vol. 25, No. 3 (May/June 2013). In fact, this very topic was recently raised in the high-profile "Hustle" mortgage fraud case brought against Bank of America over its Countrywide unit. A juror claimed improper contact in violation of the federal judge's pretrial order after a first-year associate with one of the defense firms looked at his LinkedIn profile, and the juror received a notification from LinkedIn of the viewing.

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