

THE PRIMERUS 180

180

FALL 2011

How Do You Measure Return on Investment?

page 2

Countless Lines in the Water

page 4

Avoiding the Ethical Pitfalls of Social Networking Sites

page 8

From the Bar to the Bench and Back

page 10

The Critical Impact of Expert Witness Disclosure

page 13

Social Media and Your Practice: What You Don't Know Can Hurt You!

page 16





Ashley L. Belleau

Ashley Belleau recently served as the 83rd President of the Federal Bar Association and is a partner with Montgomery, Barnett, LLP in New Orleans, Louisiana. Her main areas of practice include commercial litigation, business law and alternative dispute resolution. She recently was selected for inclusion in the 2011 Inaugural Edition of the Martindale-Hubbell® Bar Register of Preeminent Women Lawyers™, an honor reserved exclusively for less than 5 percent of women lawyers who are Rated AV® Preeminent™.

Montgomery, Barnett L.L.P.

3300 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
504.585.3200 Phone
504.585.7688 Fax
abelleau@monbar.com
www.monbar.com

Social Media and Your Practice: What You Don't Know Can Hurt You!

What is social media?

“Social media is to marketing what email is to business.”¹

The ongoing rapid changes in technology have significantly impacted the practice of law. Many lawyers use social networking for business networking, professional development, and as a litigation tool. As members of a regulated profession, we need to be mindful of our ethical obligations when we use social networking. Social networking websites typically allow users to post profiles, add com-

ments to their profiles and to the profiles of friends, engage in marketing, and otherwise report on their personal and professional lives. Websites such as Facebook, MySpace, Twitter, LinkedIn, Plaxo, Avvo, and Legal OnRamp are the oft-cited examples.

According to Facebook's statistics website page dated September 1, 2011:

- More than 750 million active users are on Facebook;
- 50% of active users log on at any given day;
- More than 2.5 million websites are integrated with Facebook;

- Average user has 130 friends;
- People spend over 700 billion minutes per month on Facebook;
- There are more than 250 million active users currently accessing Facebook through their mobile devices; and
- People that access Facebook on their mobile devices are twice as active on Facebook that non-mobile users.

A 2009 survey of nearly 1,500 lawyers shows that “more than 70% of lawyers are members of an online social

network—up nearly 25% from the past year—with 30% growth reported among lawyers ages 46 and older.”²

According to the American Bar Association’s 2010 Legal Technology Survey Report³:

- 56% of respondents reported that they use networks such as Facebook, LinkedIn, LawLink, or Legal On-Ramp, compared with 43% in the 2009 survey and 15% in the 2008 survey.
- The highest percentage of respondents reported maintaining a presence in LinkedIn (83%), followed by Facebook (68%) and Plaxo (18%).
- 77% of respondents in the 30- to 39-year-old age group maintain a presence in an online community/social network (compared with 72% in the 2009 survey), followed by 68% of 40- to 49-year-olds (compared with 58% in the 2009 survey), and 50% of 50- to 59-year-olds (compared with 35% in the 2009 survey).
- 63% of large-firm respondents maintain a presence in an online community/social network (compared with 57% in the 2009 survey and 13% in the 2008 survey).
- 52% of solo respondents (compared with 37% in the 2009 survey and 15% in the 2008 survey) engage in some type of social media.
- The most common reasons cited for maintaining a presence in online communities/social networks include:
 - 76% – Professional networking
 - 62%– Socializing
 - 42% – Client development
 - 17% – Career development
 - 6% – Case investigation
 - 10 % of respondents had a client retain them as a result of social media.

—From the 2010 ABA Technology Survey Report

Some lawyers join social networking websites purely for social interaction; others utilize these sites as a networking



or professional development tool. Either way, with so many members of the bar Facebooking, Tweeting, status updating, friending, and posting, an examination of ethical considerations faced by attorneys is in order. Social media use does not transform otherwise appropriate conduct into something unethical.⁴ However, an attorney’s social networking activities may implicate several of the rules of professional conduct in the jurisdiction(s) in which the attorney is licensed to practice. **You must know your state’s rules.**

One area of concern is the inadvertent formation of an attorney-client relationship that can occur when we post items on a website. Legal directory websites such as www.avvo.com include social networking and legal advice components. Avvo advertises that users can “Ask a Lawyer—Get free, personalized legal advice from experienced attorneys.” Users post their questions on a public discussion board, and the attorneys listed in Avvo’s directory may post responses. In certain circumstances, there is a possibility that an attorney may

unintentionally create an attorney-client relationship by responding to a posted question. Attorneys should use caution and their considered professional judgment in responding to posts on legal discussion boards. At a minimum, attorneys should use disclaimers if they choose to respond to posts on legal discussion boards.

The Internet has immeasurably facilitated communication beyond the borders of the states in which each of us is licensed to practice law. This ease of communication has increased the risk that an attorney may engage in the unauthorized practice of law.⁵ Moreover, an attorney who is licensed in one state may unwittingly develop an attorney-client relationship with a client in a state where the attorney is not licensed.⁶

Social networking sites facilitate communication, and oftentimes people freely communicate about matters which they would never consider discussing in person. Attorneys must resist the temptation to discuss or post items regarding

their clients or matters because they run the risk of betraying their clients' confidences. A Facebook status update that tells a lawyer's "friends" that he is drafting an exception or a motion to dismiss a petition on particular grounds could reveal confidential information.⁷ So too might a post that tells "a story to friends about a recent trial without revealing the identity of the client or any other fact not contained in the public record of the case." Nevada Opinion 41 (June 24, 2009). At least one lawyer has faced disciplinary charges after she published information about cases she was handling on her blog.⁸ Confidential information can also be revealed in another, less obvious way. Many networking sites permit the importing or uploading of contact information. If a lawyer releases his or her contacts in this manner, client contacts, expert witness or consultant contacts, vendor contacts and other sensitive information could become available to a very wide audience.⁹

Additionally, attorneys are prohibited from making misrepresentations or lying, especially to a judge. For instance, in Texas it was reported that an attorney requested a continuance, asserting that the cause was the death of her father. However, that attorney had earlier posted a string of Facebook status updates, "detailing her week of drinking, going out and partying. But in court, in front of Criss [the judge], she told a completely different story."¹⁰


Beware of badmouthing a judge. In Florida, an attorney was angry at a Fort Lauderdale judge, so he did what millions of angry people do these days: he blogged about her, saying she was an "Evil, Unfair Witch." Unlike millions of other online hotheads, the lawyer found himself hauled up before The Florida Bar, which issued a reprimand and a fine for his intemperate blog post.¹¹

Using social networking sites as a litigation tool to gather intelligence on opponents may violate Rules 4.1 and 8.4. For example, Philadelphia Opinion 2009-02 (March 2009) considered a situation in which a lawyer believed that an adverse

party's witness's private Facebook and MySpace pages might contain information that could impeach the witness's testimony. The lawyer could not access these private pages because they were available only to the witness's "friends." The lawyer wanted to hire an investigator to "friend" the witness without revealing his affiliation with the lawyer, obtain access to the private pages, and then pass on any information to the lawyer. That plan was found to be deceptive under Pennsylvania's version of Rule 8.4(c)¹² because it would purposefully "conceal [the investigator's reason for seeking access to the private pages] from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the [investigator] was associated with the lawyer and the true purpose of the access."

Can you "friend" a judge? Under Rule 8.4(e) of the Model Rules, it is professional misconduct for a lawyer to "[s]tate or imply an ability to influence improperly a judge." A recent Florida ethics opinion concludes 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" and thus violate Canon 2(B) of the Florida Code of Judicial Conduct. Florida Judicial Ethics Advisory Committee Opinion 2009-20 (Nov. 17, 2009). A contrary result was reached by the South Carolina Advisory Committee on Standards of Judicial Conduct, which opined that "[a] judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge's position as [M]agistrate." South Carolina Advisory Committee on Standards of Judicial Conduct Opinion 17-2009 (Oct. 2009). Similarly, a New York Judicial Ethics Opinion found no per se violation of New York's Rules Governing Judicial Conduct when a judge "establishes a connection with an attorney... appearing in the judge's court through a social network," but advised the judge to "consider whether any such online connections, alone or in combina-

tion with other facts, rise to the level of a 'close personal relationship' requiring disclosure and/or recusal." New York Judicial Ethics Opinion 08-176 (January 29, 2009).

In using social networking as a litigation tool, and to network and market our practices, we should use common sense, think twice before we post, and consider the application of the Rules of Professional Conduct. A good rule of thumb is what my mother taught me: Don't do or say anything you don't want to appear on the front page of the newspaper! 

¹ Robert Ambrogi and Reit Trautz at the 2011 ABA Techshow.

² Baldas, *They Blog, They Tweet, They Friend*, NAT'L L.J. (Dec. 21, 2009).

³ See also Nora Riva Bergman's presentation "Increasing Client Inquires Through Creative Internet and Social Media Marketing," *reallifeppractice.com/wordpress/wp-content/uploads/2011/03/Social-Media-Marketing-For-Family-Law-Attorneys.pdf*.

⁴ See Carolyn Elefant and Nicole Black, *Social Media for Lawyers: The New Frontier*.

⁵ See Melissa Blades & Sarah Vermeylen, *Virtual Ethics for a New Age: The Internet and the Ethical Lawyer*, GEO J. LEGAL ETHICS, pp. 637-657 (Summer 2004); Wersh, A Bold New Frontier—To Blog Where No Lawyer has Blogged Before, IOWA LAWYER (Jan. 2009).

⁶ See Joel M. Schwarz, *Practicing Law Over the Internet: Sometimes Practice Doesn't Make Perfect*, 14 HARV. J.L. & TECH. 657,675-77 (2001).

⁷ Mayle, *Navigating the Ethical Pitfalls of Online Networking*, ABA Young Lawyers Division, The 101 Practice Series: Breaking Down the Basics (2009).

⁸ Levin, *More on the New Rules—Social Networks*, CBA Record (Nov. 2009).

⁹ Jeffrey T. Kraus, *Online Social Networking—Ethics and Liability Issues*, ALAS Loss Prevention Journal (Summer 2010).

¹⁰ See Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, ABA Journal, posted July 31, 2009.

¹¹ John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, THE N.Y. TIMES (Sept. 12, 2009); see also *When Talking Smack About a Judge, Proceed With Caution*, WALL STREET JOURNAL LAW BLOG, posted Sept. 14, 2009.

¹² Pennsylvania's version of Rule 8.4 adopts the Model Rule. Compare Model Rule 8.4.