

MOSES & SINGER LLP

“You Can Tweet But You Can’t Hide:
Social Networking for Lawyers”
By Devika Kewalramani

06-30-10

Today, almost everyone belongs to at least one online social network. Some people enjoy browsing Facebook for profiles, pictures and status updates of friends, or friends of friends. Others prefer Twittering, whether to express their own thoughts or to follow the thoughts and activities of others. Despite the vast number of social networking participants, few people consider the potential consequences of their online behavior. In fact, many would argue that what they say and do outside the office in their private lives is clearly beyond the scope of their professional responsibilities.

For lawyers, however, the harsh reality is that the line dividing their professional and personal lives is indistinct. A lawyer's online activity outside the workplace regarding dealings with judges, opposing counsel and clients can lead to ethical violations resulting in professional discipline, not to mention embarrassment, humiliation and reputational injury.

Did You Know...

One Florida lawyer never envisioned when he left the courtroom after a challenging day and went home to blog about it, he would face professional repercussions. On a blog created by a criminal defense lawyers' group in Broward County, Fla., the lawyer referred to the judge presiding over his case as an "evil witch." The Florida Bar issued a reprimand to the lawyer and ordered him to pay a \$1,250 fine for posting the comment.¹

What are the odds of being "followed" and found out in this manner? When lawyers take the courtroom, boardroom and war room back to their home computers, they may not realize the magnitude of the risks they are taking. Unless lawyers begin to pay attention to these issues in their day-to-day practice of law, adverse professional ramifications will become increasingly prevalent.

Consider just how easy it is to get trapped in a lie by posting online. A judge in the Texas District Court in Galveston County was approached by a young lawyer in her courtroom who requested a trial delay because of a death in her family. The judge granted the delay, but later discovered through her own online investigation on the lawyer's Facebook page that, while there was a funeral in the family, the lawyer spent most of her "grieving period" posting pictures of herself partying. When the requested extension was up, the lawyer asked for additional time to prepare for trial. The judge denied the request and disclosed her online investigation of the lawyer. The judge also reported the lawyer's indiscretion to her law firm.² Although the lawyer

was never formally sanctioned by the Texas State Bar, her employment was terminated soon after the incident.

Bar Ethics Committees React

State bar ethics committees around the country are beginning to take notice of the ethical implications of judges and lawyers engaging in online social networking. In January 2009, the New York State Advisory Committee on Judicial Ethics issued an opinion, advising judges to exercise appropriate discretion in using social networking and to "stay abreast of features or any such service as new developments may impact his or her duties under the Rules [Rules of the Chief Administrator of the Courts Governing Judicial Conduct]." ³ In April 2009, a judge in North Carolina was reprimanded for communicating ex-parte with a lawyer via Facebook regarding a pending trial in which the lawyer was representing one of the parties. ⁴ In November 2009, the Florida Judicial Ethics Advisory Committee issued a formal opinion advising judges against "friending" or communicating with lawyers via social networking if they appear before the judges in court. ⁵ The committee noted that allowing such activity would produce a public record suggesting that certain lawyers, by virtue of being "friends" with judges online, wield influence over them, thereby creating a presumption of impropriety.

While the current focus of bar ethics committees appears to be on judicial conduct, similar ethics or advisory opinions might be on the way for lawyers. This could be because the bench and the bar are closely related and judges and lawyers are generally held to comparable ethical standards. Note, the Florida Bar Examiners are considering conducting an investigation of each bar applicant on social networking Web sites as part of their evaluation of bar admission applicants. ⁶ By including investigation of applicants' social networking activities in the bar admission process, the Florida Bar Examiners will make it difficult for applicants to sweep under the rug any improper online activities that would otherwise escape scrutiny by admissions authorities.

Applicable Ethics Rules

A review of the New York Rules of Professional Conduct (NY Rules) reveals that comments about judges could run afoul of at least two rules: Rules 8.2(a) and 8.4(h). Rule 8.2(a) prohibits a lawyer from making "a false statement of fact concerning the qualifications, conduct or integrity of a judge." Rule 8.4(h) operates as a "catch all" provision, prohibiting lawyers from "engag[ing] in any other conduct that adversely reflects on the lawyer's fitness as a lawyer." While many lawyers might think that blowing off steam is hardly conduct that "adversely reflects on the lawyer's fitness," in reality, that is exactly the type of behavior that the ethics rules prohibit. It is highly unlikely that a lawyer would have thought it was proper to call a judge an "evil witch" in her courtroom. Why then did the lawyer think nothing of going home and creating a lasting record of the comment for the world to see?

In connection with communications with judges, it goes without saying that lawyers are prohibited from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). Engaging in such conduct could indicate a lack of judgment which in turn reflects adversely on the fitness to practice law. Rule 8.4(h). In addition, in New York, there is a specific statute which deals with penalties for "deceit upon the court." New York Judiciary Law, §487.

Additionally, law students and out-of state lawyers seeking admission to the New York Bar should remember that Rule 8.1(a), which governs admission to the bar, provides that a lawyer is subject to discipline if, in connection with an application to the bar, he or she has made or failed to correct a false statement of material fact or has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

Best Practices

Online social networks have become essential career building tools. Blogging, Tweeting and Facebooking are everyday activities, especially for younger lawyers. So, how can lawyers properly meet their ethical obligations while participating in various online activities?

The best way for lawyers to avoid any adverse exposure from online activity is to adopt some good old-fashioned common sense:

- Be careful, what you "say" online "stays" online: even if you delete a post or comment, chances are it is stored somewhere.
- Educate yourself about the Web sites you use and the privacy settings you choose: try to limit the reach of your online conversations.
- Think before you post, toast or roast: if you would not brag about yourself or tell a person to his face what you think about him, don't do it online.
- Avoid unintended audiences who can produce unexpected consequences: social networking often encompasses people you never intended to meet, some of whom can create unpleasant outcomes if you are unwary.
- Don't let your voice be distorted: you may think you are saying one thing but the person reading your blog or comment may interpret it differently.
- Use your judgment: in certain situations, instead of posting a blog or comment that all your "friends" will see, consider calling a friend or, saying nothing at all.

Social Networking 101 Four of the most popular online social networks

| | Twitter | Facebook | MySpace | LinkedIn |
|------------|---|---|---|--|
| What It Is | Twitter enables users to exchange news and opinions. Members join and locate other members they are interested in interacting with. | Facebook allows each user to set up their own account to create a personal profile and a network of friends with whom to share information, pictures and interests. | Similar to Facebook, MySpace is premised on the creation of user profile pages, allowing users to share information on a more informal basis than Facebook. | LinkedIn is a professional social network that allows registered users to maintain a list of business people (referred to as "Connections") they know and trust. |

| | | | | |
|-------------------|--|---|---|--|
| How It Works | Users type in short messages or status updates that can be read by people (your “followers”) following them, as does anyone else who comes across them in a search. | Attached to each user’s profile is a “wall” on which the user’s “friends” can post messages, pictures, videos and/or links to internet sites. A “friend” is someone who views a user’s profile and communicates with the user via Facebook. To become someone’s friend, find their name in the Facebook database and send a request through Facebook to the user’s e-mail address. Upon receiving the request, the user can either accept or deny it. If accepted, the new “friend” can view details about the user, depending on the user’s privacy preferences. | Profile information includes “About Me,” “Who I’d Like to Meet,” “Interests” and “Details.” Under “Details,” users can post their education, employment history, etc. Profiles also contain a blog with standard fields for content and media. MySpace also supports uploading images and videos. | Users can invite anyone to become a “Connection.” Contact networks are built up of direct connections and connections of their connections. LinkedIn allows users to research companies where they are interested in working. “LinkedIn Answers” allows users to ask questions for the community to answer. “LinkedIn Groups” allows users to establish new business relationships by joining alumni, industry, etc. |
| Security Settings | A Twitter profile is public by default. If a user is hesitant to have strangers read his updates, he can limit it to approved followers and keep his updates out of reach. | Facebook affords users broad control over the public availability of the information published on their profiles. A user with intermediate security settings may block his pictures posted on Facebook from being viewed by anyone other than his “friends” but might allow all users to view his walls or profiles. A user opting for strict security settings can “hide” his profile on Facebook to preclude other users from finding his name in the Facebook database when trying to send a “friend” request. | Like Facebook, MySpace offers different levels of privacy to users depending on how a user sets his privacy settings. By default, MySpace pages are public and can be found and accessed by a Google search of a person’s name. | LinkedIn allows users to review and edit personal information through a user’s personal profile page. Users can choose what information to make available to search engines. However, certain LinkedIn services require it to make a user’s information available to third parties. Users can change their settings to control visibility and accessibility of their profiles. |

Devika Kewalramani is a partner and Co-Chair of Moses & Singer's Legal Ethics & Law Firm Practice Group. Valeria M. Castanaro, an associate at the firm, assisted with the preparation of this article.

Endnotes:

¹ *Fla. Bar v. Conway*, 996 So.2d 213 (Fla. 2008); John Schwartz, "A Legal Battle: Online Attitude vs. Rules of Bar," New York Times (Sept. 13, 2009).

² John Schwartz, "A Legal Battle: Online Attitude vs. Rules of Bar," New York Times (Sept. 13, 2009).

³ New York State Advisory Committee on Judicial Ethics, Formal Opinion No. 08-176 (Jan. 29, 2009).

⁴ *In re Terry*, N.C. Judicial Stds. Comm., Inq. No. 08-234 (April 1, 2009).

⁵ Fla. Judicial Ethics Advisory Committee, Formal Opinion No. 2009-20 (Nov. 17, 2009).

⁶ Jan Pudlow, "On Facebook? FBBE May Be Planning a Visit," The Florida Bar News (Sept. 1, 2009) available at <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/8c9f13012b96736985256aa900624829/d288355844fc8c728525761900652232?OpenDocument>.

Devika Kewalramani

New York, N.Y.

Reprinted with permission from the "June 30, 2010" edition of the "New York Law Journal" © 2010 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com.

MOSES & SINGER LLP

Disclaimer

Viewing this document or contacting Moses & Singer LLP does not create an attorney-client relationship.

This document is intended as a general comment on certain developments in the law. It does not contain a complete legal analysis or constitute an opinion of Moses & Singer LLP or any member of the firm on the legal issues herein described. This document contains information that may be modified or rendered incorrect by future legislative or judicial developments. It is recommended that readers not rely on this general guide in structuring or analyzing individual transactions or matters but that professional advice be sought in connection with any such transaction or matter.

Attorney Advertising

It is possible that under the laws, rules or regulations of certain jurisdictions, this may be construed as an advertisement or solicitation.

Copyright © 2010 Moses & Singer LLP
All Rights Reserved