Tweeting, Friending and Linking In: Social Media Policies and Ethical Constraints on Lawyers Using Social Media

by Jamie P. Clare and Randi W. Kochman

Social networking has become increasingly popular among attorneys and the general public. On Oct. 4, 2012, Facebook announced it had exceeded one billion users, double the 500 million users it reached in July 2010, and 10 times the number of users it had in Aug. 2008. Facebook now boasts 600 million mobile users. LinkedIn, the professional networking site launched in May 2003, reports more than 225 million users in more than 200 countries and territories. Twitter, the micro-blogging site, administers 400 million tweets per day.

The Rise of Social Networking Among Attorneys and Resulting Ethical Implications

A Nov. 2012 survey by the *American Lawyer* reported social networking technology is in use by 75 percent of responding firms. Among them, LinkedIn is used by 90 percent, Twitter by 64 percent and Facebook by 61 percent. A total of 78 percent of AmLaw200 firms have blogs or blogging attorneys.

Lawyers are using social media to uncover sometimes critical, relevant evidence and information about their cases, parties and claims in matrimonial and family law litigation, as well as in personal injury, criminal and employment matters. In acting as employers, lawyers also use social media to aid them in hiring. Given the predominance of social media use by the public and among legal professionals, it is crucial that attorneys understand the ethical constraints and legal ramifications of its use. As employers and practitioners, attorneys must be keenly aware of the pitfalls arising from their use of social media or social networking sites.

Lawyers now face potential claims for ineffective assistance of counsel and legal malpractice for failing to conduct at least rudimentary Internet searches using social media to investigate the factual underpinnings of their cases or to discover pivotal information about the adverse party. In personal injury and criminal matters, social media is utilized to screen potential jurors concerning their views and truthfulness during the *voir dire* process. Social media also has given rise to a plethora of ethics complaints against attorneys, firms and those they employ.

Consider the case of two New Jersey defense attorneys whose paralegal used Facebook to 'friend' the plaintiff in a personal injury action. The paralegal discovered the plaintiff was enjoying travel, dancing and other activities that would tend to refute his claims regarding the seriousness of his injuries. Believing they were zealously advocating on behalf of their clients, and believing the information their paralegal had obtained was available publicly, the attorneys used the information garnered from Facebook to their client's advantage and settled the case.

Despite the excellent result counsel obtained, and the District II B Ethics Committee's conclusion the matter did not state facts constituting unethical conduct, the attorneys now find themselves the subject of a complaint before the New Jersey Office of Attorney Ethics (OAE). The complaint charged counsel with violating New Jersey Rule of Professional Conduct (RPC) 4.2 for communicating with a represented party; RPC 5.3(a), (b) and (c), for failure to supervise a non-lawyer; RPC 8.4(c), for conduct involving dishonesty in violation of ethics rules through someone else's actions or inducing those violations; and RPC 8.4(d), for conduct prejudicial to the administration of justice. In addition, supervising counsel is charged with breaching RPC 5.1(b) and (c), which impose ethical obligations on lawyers for the actions of attorneys they supervise.

While the courts determine the OAE's jurisdiction over the matter, and the outcome of the case before the OAE is by no means a certainty, the fact remains counsel have become embroiled in litigation they may have been able to avoid through implementation of a comprehensive social media policy.[1]

Amendment of the ABA Model Rules

The American Bar Association (ABA) has addressed emerging technologies in its recent rule changes. In Aug. 2012, the ABA approved changes to the Model Rules of Professional Conduct, including rules pertaining to attorney competence, communications with a client and confidentiality, and the use of technology in attorney marketing. In general, the model rules have been clarified and expanded, rather than overhauled, to account for the advent of social networking.

Regarding competency, Model Rule 1.1 commands a lawyer to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Comment 8 to Rule 1.1 has been specifically revised to include reference to "relevant technology," as follows:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Simply put, a lawyer may not be providing competent or diligent representation if he or she fails to use the Internet to search for potentially relevant information about his or her case. Further, a current trend in the courts is to impose an ethical duty on attorneys to employ social media, for example, to locate a defendant to effect service, to find impeachment evidence, to research a potential juror's litigation history or to discover information concerning a potential transaction.[2]

With respect to confidentiality of information, the ABA amended Model Rule 1.6 to add new Section 1.6(c), which requires a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. Comment 18 to the model rule explains, among other things, factors to be considered in determining the reasonableness of the lawyer's efforts to preserve confidentiality. These factors include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or important piece of software excessively difficult to use). Comment 18 continues, however, with the *caveat* that whether a lawyer may be required to take additional steps to safeguard a client's information to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of the rules.

Attorneys must use, and are required to advise their clients to use, secure channels to communicate to avoid the inadvertent disclosure of privileged or confidential information and case strategy in whatever medium they choose to communicate. Lawyers must be diligent to prevent against disclosures by refraining from blogging or posting on social media information that may be construed as privileged or confidential, or concerns strategy. Attorneys, likewise, must avoid employing or disclosing privileged or confidential information in marketing materials posted on social media in violation of the model rules. By way of example, Model Rule 1.6, Comment 19, provides, in pertinent part, when transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.

The ABA also amended Rule 1.18 pertaining to duties to a prospective client, Rule 7.1 regarding communications concerning a lawyer's services, Rule 7.2 pertaining to attorney advertising and Rule 7.3 concerning direct contact with prospective clients to account for technological innovations and the use of social media. In general, the comments to these rules have been broadened to embrace electronic communications and social networking. Attorneys should review the rules and comments, and the corresponding New Jersey RPCs, to avoid ethical breaches involving competency, confidentiality, false advertising and the unintended creation of attorney-client relationships through the use of social media.

Recent Legislation Regarding Social Media

In May 2013, the New Jersey Assembly passed a revised social media privacy bill barring employers from forcing current workers or job applicants to disclose user names and passwords for social media sites. The measure has yet to be approved by the New Jersey Senate, but it is expected to pass without objection in its current form.

The revised bill no longer gives employees a private cause of action for violations of the statute and allows employers to investigate compliance with applicable laws, regulations and reports of work-related misconduct when employers receive specific information concerning a personal social media account. Under the revised bill, employers may also access and use information about employees and applicants found in the public domain and may require workers to disclose whether they have a personal social media account.

Presently, seven states have enacted laws that prohibit employers from demanding access to personal social media accounts, and dozens more have introduced similar legislation. Although New Jersey employers may be permitted to inquire about employee social media accounts, they should be cautious when using information obtained from those sources in making hiring and disciplinary decisions, in light of successful claims by employees for discrimination, invasion of privacy, violations of the National Labor Relations Act, Stored Communications Act and related state laws. For the same reasons, employers should not access a private, password-protected, social media or email account.[3]

The Social Media Policy

Social media policies may protect firms and their employees from claims, assist in avoiding ethical breaches and protect firm clients from similar claims. As with all handbook materials, a firm should be able to clearly establish it adopted, distributed and received acknowledgements of receipt of its social media policy.

A social media policy should, at the outset, alert the firm's members, associates, paraprofessionals and staff to the variety of adverse consequences that can arise from the misuse of social networking, including the creation of unintended attorney-client relationships, contrary positions advocated against the firm or its clients, disclosure of sensitive or confidential information, copyright violations, violations of the Rules of Professional Conduct and potential damage to the firm's reputation. The policy should identify clearly all social networking activity to which the policy applies, both inside and outside of the office, and prohibit attribution of postings placed on social networking sites to the firm or the implication such postings are endorsed or written by the firm. The policy also should incorporate by reference a firm's existing email, voicemail, Internet, harassment, equal opportunity and confidentiality policies.

An effective policy will allow limited use of the firm's information technology (IT) systems to access social networking, provided the use does not interfere with or impact normal business operations. The policy should require employees to comply with all firm policies, not compromise the security or reputation of the firm and not burden the firm with unreasonable costs. The policy also should require anyone participating in a social network to be responsible to read, understand and comply with the site's terms of use. Importantly, the policy must contain a comprehensive list of guidelines for the content of all postings on social media sites and identify an individual or member of the firm to whom questions regarding the content of any posts should be brought. A law firm's social media policy also must prohibit 'pretexting,' or posing as a confidante or as one who is seeking a genuine social or business relationship to obtain information, as this poses the significant ethical and legal implications previously discussed.

Advances in social media and technology have made the practice of law both more efficient and more complex. Employers and firms utilizing social media must familiarize themselves with all relevant ethical rules and authorities to ensure compliance and to avoid involvement in unintended litigation. A well-drafted social media policy is crucial, and can protect a firm by safeguarding its confidential business and client information and ensuring attorneys are properly guided regarding the appropriate interplay between the use of social media and the practice of law.

Randi W. Kochman and Jamie P. Clare are members of Cole Schotz.