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ETHICAL ISSUES IN CYBERSPACE: USING SOCIAL NETWORKING SITES WITHOUT GETTING DISBARRED

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I. Introduction

Lawyers abide by a litany of rules to prepare, promote, and continue their practices. The ABA Model Rules of Professional Conduct contain some of the most important policies regulating an attorney's professional and ethical conduct. These rules have traditionally only been applicable in a real world context; however, they apply equally to the real world *and* in Cyberspace. Email constituted the first prolific form of interactive communication on the World Wide Web. However, its introduction ushered in other faster forms of internet communication. Those forms included IMing, blogging, social networking, posting and tweeting. In the last five years, social media websites have proliferated at such a rapid speed that they have outgrown the rules developed to regulate the professional and ethical behavior of attorneys in the real world.

The most popular social networking sites ("SNS"), MySpace and Facebook, were founded in 2003 and 2004, respectively. Twitter, which has become more popular than those sites, was founded in 2007. Thousands of other sites geared towards social networking, including LinkedIn.com, Flickr.com, Bebo.com, Tagged.com, BlackPlanet.com, Goodreads.com, Friendster.com, Plaxo.com, and Classmates.com, are available to the public and are used regularly by everyone, including attorneys. That number does not include a variety of other internet-based technologies that connect people together electronically.

Regardless of the specific technology, in their personal and professional lives, attorneys are using SNS in a myriad of ways. Some are using them to gather information to better represent clients, others are using them to comment on cases and/or the actions of clients, and still others are using them to market

themselves and their businesses. Any use of these websites results in electronically stored information. Electronically stored information ("ESI") is defined as any type of information that can be generated on the computer including, but not limited to e-mails, instant messages, text messages, documents, spreadsheets, databases, file fragments, metadata, digital images, and digital diagrams.[1] That electronically-stored information has the potential for great use in the courtroom and great abuse by the unwary attorney. Gaining a working understanding of the different types of SNS and the professional and ethical limitations on their use is not only advisable but, necessary in this brave new world.

II. What are the Most Popular Interactive Web Applications?

A. Blogs

A blog is a journal or diary of a person's daily, weekly or monthly activities that is posted on the internet. The term blog is short for "Web log." Blogs allow users to express themselves about any subject matter. They often contain a combination of text, images, and links to other blogs. A blog has its own web address and can be accessed by anyone on the internet unless it is restricted by the author. In addition to reviewing the author's comments, visitors to the blog are often allowed to enter comments about the blog's subject matter and comments about other comments.

[1] Fed. Rul. Civ. Pro. 34(a); *Kleiner v. Burns,* No. 00-2160-JWL (D. Kan. 2000); *The Antioch Co. v. Scrapbook Borders, Inc*., 210 F.R.D. 645, 652 (D. Minn. 2002); *Rowe Entm't, Inc v. The William Morrise Agency, Inc*., 205 F.R.D. 421, 428 (S.D.N.Y. 2002); *Simon Prop. Group v. MySimon*, Inc. 194 F.R.D. 639, 640 (S.D. Ind. 2000).

B. Social Networking Sites

Like blogs, SNS provide another way for people to express themselves. The primary focus of an SNS is different from a blog in that its purpose is to connect the user with other people. The concept is simple: a user joins the site by filling out a profile which contains information about that person. That information allows others to find the user and allows the user to find people he or she knows, and then that person waits for others to add them as a friend. Soon, a person is not only connected with old friends, but new friends and friends of friends:

> Social networking web sites enable individuals with common interests or backgrounds to connect and communicate online. Upon joining a social networking service, users can create personal profiles, create links to other members, and contact each other. Self-managed administrative settings provide users with a limited degree of control over who is able to view their profile information and contact them.[2]

The most prolific SNS are Twitter and Facebook. As of today, Facebook's website boasts 500 million actual users. The average user has 130 friends, and people typically spend over 700 billion minutes per month on Facebook.[3] The latest SNS, Twitter, is a privately-funded startup that began as a side project in March of 2006. In March 2010, Twitter had 54 million registered users and is currently the most popular microblogging site.[4] Twitter's website defines it as a "real-time short messaging service that works over multiple networks and devices." The service allows users to write 140-character entries, or "tweets," that are then displayed on users' public websites. These "Twitterers"

[2] See, Credentic.com.
[3] See, Facebook Press Room, at http://www.facebook.com/press/info.php?statistics.
[4] See, *Complete.com,* a social media statistics site.

can "follow" one another and share posts. The site permits direct messaging and is a little like a social network combined with a blog that contains instant messaging functions. In addition to judges and lawyers, movie stars and average people are using Twitter to have ongoing conversations about a variety of topics.[5]

C. Forums, Wikis and Virtual Communities

While SNS are designed for the user to connect with others for networking purposes, forums generally resemble blogs in that they are topic driven. However, unlike blogs, forums encourage real-time responses from viewers. Those viewers can choose to join in a conversation by posting messages, reading messages, and/or engaging in ongoing conversation with some or all of the participants. Forums also typically have a forum administrator who has the ability to edit, move or delete posts or to ban a participant or a thread on the forum.

Unlike a forum, a Wiki allows anyone with access to it to change, add, delete, remove or modify the existing content of the website quickly. Wikis can be restricted to certain users (*i.e.*, company-sponsored sites) or may be open to the entire world (*i.e.*, Wikipedia). Because Wikis allow the users to change the content of the sites, these types of applications contain edit links. When pressed, those links allow the user to modify the existing information. While Wikis can be a great tool for interactive communication on a collaborative project, the information on Wikis may or may not be accurate because it can be modified by anyone with access. Therefore, information from the site should be verified.

[5] *The Electronic Lawyer*, Texas Bar Journal, July 2009, Vol. 72, No. 7.

Virtual communities are, by far, the most encompassing interactive tools used by a growing number of employees. A virtual community is a computer-based, simulated environment where users inhabit and interact via an "avatar." The avatar is the virtual identity of the user and can be made to look any way, shape, or form that is allowed in the community. Virtual communities have been set up in video games, used to teach classes, and contain virtual representations of businesses.

III. A Quick Survey of the Pertinent Model Rules of Professional Conduct

All lawyers are aware that their behavior is subject to the guidelines in The ABA's Model Rules of Professional Conduct. Further, all lawyers have, at some point, pledged that they would follow these rules and remain professional and ethical in their work as attorneys. What most attorneys do not realize, however, is that these rules apply not only to their actions and deeds at work, they also apply with equal force to Cyberspace, including to self-made blogs, comments on Facebook and MySpace, and tweets on Twitter. The following is a survey of those rules.[6]

Starting with the basics, every attorney should know that he or she must keep private information confidential. This rule arises from Model Rule 1.6 which applies to confidential information: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, or the disclosure is impliedly authorized in order to carry out the representation." Consequently, a lawyer commits an ethical violation when he or she discusses or

[6] These rules may also be supplemented by Rules that have been promulgated by the state(s) in which an attorney practices.

reveals confidential information pertaining to a client without the client's consent on a SNS or uses a client's story to market himself or herself without the client's consent. Accordingly, tweets, blogs, comments or postings with information of a confidential nature can and will likely result in a reprimand. Further, Model 3.3 prohibits an attorney from lying in the courtroom. Accordingly, supporting a motion or an argument with information that the attorney knows to be untruthful will subject that attorney to a reprimand.

Furthermore, a person under an attorney's control or supervision who "friends" a represented person may violate the Model Rules. That same person likewise cannot gain a person's confidence by engaging in "tweeting", "posting" or "commenting" with the person without revealing who they are. Specifically, Model Rule 5.1 articulates the responsibility of managing partners and responsible attorneys over others under their control.[7] The Model Rules incorporate control as a primary factor in determining an attorney's responsibility for the ethical conduct of staff, subordinates, and investigators involved in

[7] Rule 5.1 Responsibilities Of Partners, Managers, And Supervisory Lawyers
(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

assisting with providing legal services. With regard to subordinates, Rule 5.2 states a subordinate's obligation to comply with all Rule of Professional Conduct. That rule, however provides an exception when "that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."[8] Further, Rule 5.3 expands a lawyer's responsibility to include work performed by a "non-lawyer assistant" or a person over whom the attorney has "direct supervisory authority" or independent contractors.[9] Rule 5.7 addresses attorney responsibility for law-related services.[10]

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[8] Rule 5.2: Responsibilities of a Subordinate Lawyer
(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

[9] Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[10] Rule 5.7 Responsibilities Regarding Law-Related Services
(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

With those responsibilities in mind, the "friending" of a witness, a party to the lawsuit or another pertinent person in the litigation by an associate, a secretary, an investigator or anyone under the attorney's "control" can result in the supervising attorney being reprimanded for behavior that violates the rules. With those responsibilities in mind, Model Rules 4.1 and 4.2 must frame the context of the investigation. Model Rule of Professional Conduct, Rule 4.1 covers "Transactions with Persons Other Than Clients" and states:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Accordingly, in addition to misrepresenting oneself to become a friend, any form of lying or deceit arguably violates this rule. Rule 4.2 of the Model Rules of Professional Conduct prohibits communication with a represented party:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

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(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Friending a person represented by counsel can be considered "communicating with a party without counsel" and may arguably violate the rules. Because any communication by a subordinate will be imputed to the supervisory attorney, all persons using SNS on a case should be mindful of these rules when attempting to gather information from social media outlets.

IV. How are Lawyers Violating These Rules

Most attorneys are aware of the above-mentioned rules. However, it is clear that some attorneys do not believe that these rules apply to Cyberspace in the same manner that they apply to the real world. The following "teachable moments" serve as examples and warning to others:

- A young attorney requested a continuance to grieve a death in the family. It was granted. Sometime prior to that, the judge was asked to be a friend of the attorney on Facebook. Upon reviewing the attorney's page, the judge learned that the attorney spent more time drinking and motor biking than grieving. The judge denied all other continuances and told her senior partner about her lies.

- Another attorney blogged about his work as a juror on a criminal matter. The blog caused the conviction to be set aside, *and* the lawyer received a 45 day suspension, was fined $14,000 and lost his job.

- An attorney blogged about a judge, calling the judge an "evil and unfair witch." The attorney was subsequently reprimanded.

- An attorney with 19 years' experience in a state's public defender's office blogged about a judge by referring to him as "Judge Clueless." She also blogged about her clients by easily identifiable nicknames, jail identification numbers and other thinly veiled disguises. Additionally, she revealed confidences in her blog, including the fact that one juvenile took a rap for his brother and another lied to a judge about her drug use. She was reprimanded publicly. She lost her job and she was also disbarred.

Judges are not immune to reprimand under the Model Rules. Further, jurors are being more seriously warned about SNS and are being removed from juries altogether as a result of SNS activity:

- A North Carolina judge was reprimanded for friending counsel on Facebook and then discussing an active court matter with said counsel on the site.

- Another judge was reprimanded for the off-color humor that was accessible on a family website not designed for use by the general public.

- A young juror posted news of a guilty verdict on her Facebook page before the jury officially reached a verdict. The juror was removed as a result. A motion for new trial is pending. (Defense counsel's 15-year-old son found the post.)

- In another case, a juror "friended" a plaintiff in a personal injury case to learn more about him. The plaintiff accepted the juror as a friend, and the juror learned that the plaintiff advocated drug use. The juror emailed plaintiff's counsel, who promptly requested a new trial.

V. Usefulness of Social Media

The stories mentioned above may seem extreme. However, these issues continue to be more and more frequent in Cyberspace. To avoid such outcomes, one solution may be to make sure one's "legal space" and one's "Cyberspace" never interact. That reaction makes sense. However, it is short-sighted in that information in Cyberspace can be useful to place clients in a strategically successful position. These sites may provide a litany of helpful information, for example:

- A lawyer at Gordon Rees, who defended a CEO from a sexual harassment charge, investigated the plaintiff on her MySpace page. The plaintiff had portrayed herself as a modest, innocent person throughout the case. However, her MySpace page contained photos of her in provocative attire and contained photos of her engaging in suggestive horseplay at bars with friends. Even though she later replaced the pictures and changed her

privacy settings, copies of the pictures were printed by defense counsel and used against her at trial.

- A partner at Hunton and Williams used the SNS, MySpace and Facebook, to uncover details about a former employee of a client who was planning to violate a non-compete agreement. Using her spouse's different surnames, the employee created several different pages on the SNS and made comments on those sites about how she planned to start a competing business in violation of her non-compete.

Similarly, both plaintiff and defense lawyers are using these sites to evaluate a juror's background, political leanings, and biases which will allow counsel to learn about the matters that may influence their decisions. Several documented cases establish that social media tools are being used more and more for these purposes:

- In one case, after an internet search, an investigator found that a juror had a personal injury claim similar to the plaintiff's. That juror was struck as a result of that information.

- In another case, when a defense team searched the background of a potential juror in the Jose Padilla terrorism case, they found that one of the jurors, a Miami area government employee, said she had no personal experience in the criminal system. However, the search revealed that she was currently under investigation for malfeasance. After the judge was informed, she was dismissed.

As stated earlier, given the proliferation of SNS, avoiding the sites altogether simply is not a reasonable option and may eventually become a violation of the Model Rules. Because courts are allowing this information to be used in trial on a fairly consistent basis, to ignore the information that may exist on these sites may arguably be malpractice. A review of some recent cases illustrates how the wealth of information available online can, in some situations, provide critical information that can be detrimental to an opponent's case:

- A criminal defendant filed a *motion in limine* to exclude evidence at trial that included pictures from his MySpace page, which depicted him counting, showing-off and throwing large wads of cash. The court held that the images were relevant, and that testimony should be heard about the nature of the pictures before determining whether to exclude them. *See United States v. Drummond,* 2010 W.L. 1329059 (M.D. Pa).

- The plaintiff sought damages for permanent back injuries after she was injured from an alleged broken chair. One of her allegations was loss of enjoyment of life because she could not leave her home. Her public Facebook page had pictures of her vacation in Florida. Because her physical condition and loss of enjoyment of life was at issue, the judge allowed those pictures and allowed discovery of the pictures on the private page. *See, Kathleen Romano, Plaintiff, against Steelcase Inc. and Educational & Institutional Cooperative Services Inc.,* 2010 N.Y. Slip Op. 20388; 907 N.Y.S.2.

- In another case, the court allowed discovery of Facebook material when the plaintiff alleged physical and psychological injuries related to electric shock. *See also, Ledbetter v. Wal-Mart Stores, Inc.,* No. 06-cv-01958, 2009 WL 1067018 (D. Colo. Apr. 21, 2009).

In an employment context, such information could easily be used in the same manner. The pertinent consideration for any attorney is to make sure that the gathering of the information is not a violation of the professional rules *and* that the writer of information about a case in Cyberspace is not the attorney him or herself.

VI. Social Networking Do's and Don'ts for Lawyers

The Model Rules do not require that attorneys completely avoid SNS. Practitioners simply must have a heightened sensitivity about the information they post about themselves and their work. This can be easily achieved by remembering 1) that information on the internet travels fast, 2) that this information can be seen by many people, who may or may not be friends, and 3) attorneys must comply with rules that do not bind the rest of the world.

Keeping those items in mind and adhering to the following Do's and Don'ts should significantly lower the possibility of being reprimanded for cyberactivity:

Do's	Don'ts
Do keep information about your clients or ongoing cases off of blogs, comments, or status updates.	Don't think that just because you use nicknames or unrelated references to your clients that you will not be reprimanded. That is not the case.
Limit Facebook friends to people you know.	Don't arbitrarily friend anyone, and don't accept friend requests from strangers, particularly during high profile matters.
Keep your personal and legal cyberlife separate. A good rule is to never write about your work.	Do not comment on a client's actions *or* on a judge's good or bad decision in Cyberspace.
If you are a legal blogger, be very sensitive that you are not violating attorney-client privilege in your communications.	Don't blog about the extra-strange, extra-tantalizing details about a case in hypothetical form. Those details may be the identifying factors that could get you reprimanded or disbarred.
Gather every thing that would assist you in proving that the electronic information that you intend to use was gathered in a legal manner.	With regard to use of electronic information, ask yourself the following question: If the information were obtained by non-electronic means would you use it? If not, don't try to use it now.
If you obtain information that is publicly available, retain any information that shows it is publicly available (such as the SNS policy and a snapshot of the page that contains its privacy settings, and a snapshot of the evidence page with as much date, time and author information as possible).	Don't ask your client to continuously keep tabs on the website of an opponent. This may be considered surveillance and may get your client in trouble.

VII. Conclusion

Social media sites will continue to cause ethical and professional dilemmas for attorneys. Several states, along with the ABA, are making changes to the rules that will more adequately address SNS. In the meantime, all lawyers need to be more mindful of the ways the professional rules impact their cyberlives. The world now consists of a society in which sharing private

information is the norm. Because of its very nature, that cannot and should become the "norm" by which this profession conducts itself. Being mindful of one's actions and words in the social media context, will not only ensure that those actions will not become examples of what not to do in the world of law and social media, they will also keep one's professional reputation from being tarnished by a malpractice suit, a reprimand or disbarment.