

Ethical Considerations For Using Social Media Issues in Litigation

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New Legal Problems

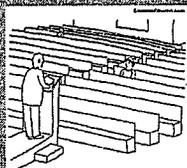
"The internet has opened new channels of communication and self-expression. Countless individuals use message boards, date matching sites, interactive social networks, blog hosting services and video sharing websites to make themselves and their ideas viable to the world. While such intermediaries enable the user-driven digital age, they also create new legal problems."

Fair Housing Council of San Fernando Valley v. Roomates.com, LLC
489 F.3d 921, 924 (9th Cir. 2007)

WHAT IS SOCIAL MEDIA?

Social Media Update

610,736,920	1,860,000,000
2	30%/835,000,000
230,000/95,000/80,000	24/6/5/4
65,000	21.6/19/16.2/15.6/14.7 million
45%/38%	
6h2m59s	
19/275,000,000	



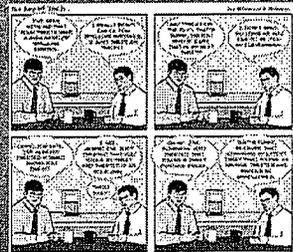
IT IS NOT ABOUT THE NUMBERS

Facebook

A fully filled-out Facebook profile contains over 40 pieces of recognizably personal information: name, birthday, educational and employment history, online and offline contact information, sex, sexual preference and relationship status, political and religious views, favorite movies, books and music, and of course, pictures. Facebook is the largest photo-sharing application on the web with more than 14 million photos uploaded daily.



140 characters to followers with 200 million



140 characters to followers with 200 million

Blogs

Personally maintained
Allows comments



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Tarkenton

"You were a sitco-in. Then I stumbled across your blog."

What About Lawyers?

- 50,000 legal professionals are already blogging, both personally and professionally
- Almost 1 million people in the legal professions are using social media
- 20,000 legal professionals are using Twitter

How can you get in (or avoid) trouble?

Complex Ethical Issues

Competency ▪ Rule 1.1	Communication with Parties ▪ Rule 4.2
Diligence ▪ Rule 1.3	Relevancy ▪ Rule 4.4
Spoilation ▪ Rule 3.4	Supervising Others ▪ Rules 5.1 and 5.3

Competency Rule 1.1

a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Diligence Rule 1.3

A lawyer shall act with reasonable diligence and promptness in representing a client.

Can we Use This Stuff?

The information sought by Defendant regarding Plaintiff's Facebook and MySpace accounts is both material and necessary to the defense of this action and/or could lead to admissible evidence.
• Romanov v. Steelcase, Inc., 907 N.Y.S.2d 650

5 Hurdles

The information must be relevant
The information must be authenticated
The information is subject to the hearsay rule
The information must comply with the original writing rules
The probative value is substantially outweighed by the danger of unfair prejudice
• Litman v. Market Am. Ins. Co., 201 F.R.D. 534 (D.Md., 2007)

How many of you instruct a client to...

delete a social media profile?
delete specific information from a social media profile?
stop posting to a social media profile during the pendency of litigation?

Spoliation Rule 3.4

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Facebook Spoliation Costs Lawyer \$522,000; Ends Career

Lawyer advised client to remove several photos from his Facebook account due to fears they would prejudice his wrongful death case.

Lawyer fined \$522,000, client fined \$180,000 for following instructions.

Lawyer quit his job as manager of firm and no longer practices law.

Let's Talk About Concrete Company

Investigation of a Party

An attorney decides to conduct an investigation of an opposing party. The attorney uses Facebook and gets really great impeachment evidence, but:

- The party's page had no privacy settings.
- The party's page was private, the associate friend requested the party but 1) did not disclose who they were or 2) did disclose who they were.

Communication Rule 4.2

In representing a client, a lawyer shall not communicate about the subject of the representation with:

- (a) 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.

Relevancy Rule 4.4

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Supervising Others

Senior partner asks new associate/law clerk/runner to investigate an opposing party. The associate uses Facebook and gets really great impeachment evidence, but the party's page had no privacy settings. The party's page was private, the associate friend requested the party but 1) did not disclose who they were or 2) did disclose who they were.

Supervising Others Rule 5.1

Rule 5.1 requires a partner or lawyer with direct supervisory authority over another lawyer to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that lawyers shall conform to the RPC.

The rule makes the partner/supervising attorney responsible for another lawyer's violation if the lawyer orders or with knowledge of the conduct ratifies the conduct, or the lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action.

Supervising Others Rule 5.3

Rule 5.3 applies the above standard to the lawyer to supervise non-lawyer assistants. Therefore, if the investigation is performed by a runner, law clerk or paralegal, the supervising attorney is still on the hook.

Contacting a Witness

An attorney decides to contact a witness. The attorney uses facebook and sends a friend request. The lawyer sent the request but

- 1) did not disclose who she was
- 2) did disclose who she was

The lawyer had a third party contact the witness and the third party

- 1) disclosed the relationship with the lawyer
- 2) did not disclose the relationship with the lawyer

Contact with a Witness

A March 2009 Philadelphia Bar Association ethics advisory opinion holds using deceptive means to "friend" a witness, such as having a third party do it without disclosing an affiliation with the lawyer, is unethical. Such tactics violate the Rules of Professional Conduct prohibiting a lawyer from engaging in behavior that involves dishonesty, fraud, deceit, or misrepresentation.

Don't Vent About A Judge

In 2009 the Illinois State Bar filed a complaint against a veteran public defender of 19 years, and she lost her job, after blog postings that contained thinly veiled information about her clients and referred to a "Judge Clueless."

Don't Vent About A Judge

The Florida Supreme Court disciplined an attorney who claimed his blogged rants against a judge he referred to as an "evil unfair witch" were protected free speech.

Don't Vent About An Attorney

In 2006, a prosecutor in San Francisco was disqualified for blogging about a pending case; his statements ranged from calling his opposing counsel "chicken" when she requested a continuance, alluding to her in blog titles that contained obscenities, and mentioning evidence that hadn't been ruled admissible at trial.

Don't Vent About Litigants

In Thibodaux, a child support hearing officer posted the following on his Facebook:

"Just had a fellow leave child support court. He works as a pouncer and has twenty-three (23) children! Of course he gets paid cash and thus paid no (0) taxes. I think he needs another job as he has way too much time on his hands! What do you think?"

Advertising

Are wall postings on Facebook considered advertisements?

Are Tweets considered ads?

"I just won a big case!"
Online communications with a potential client may, under the right circumstances, constitute improper solicitation.

Kentucky

The Kentucky Bar Association proposed a rule that would bar lawyers from having social media pages (even if personal) unless the lawyer paid a fee of \$75 and permitted the Bar to have access to the page to monitor it for unauthorized advertising.

Unauthorized Practice of Law

The prohibition on the unauthorized practice of law can be particularly problematic because clients and prospective clients are reached by an attorney's blog or social networking profile in all states simultaneously.

Helpful Guidelines for Lawyers

- Website maintenance
- Know your reach
- Avoid unethical postings
- Avoid active pursuit of potential clients online
- Refrain from on-line legal advice
- Express disclaimers

What Does The Future Hold?

Jurisdiction by YouTube Rap Video

Rios v. Ferbusan, 51 Conn. Supp. 212, 976 A.2d 592
Defendant, a N.C. resident, posted a rap video on YouTube waving a gun and threatening to harm the mother of his child, a Connecticut resident. The court found that the video constituted "a tortious act within the state" pursuant to its long-arm statute and granted a protection order.

Service of Process

Australia
UK

Computer Forensics

Adultery in the Electronic Era, Spware, Avatars and Cybersex - Wyoming Lawyer Vol 31 No 6 December 2008

- Wife sent threatening emails to husband?
- Soccer mom looking for "playmate"
- Husband has "Second Life" Marriage
- Deleted text messages are recoverable from cell phones

Questions?
