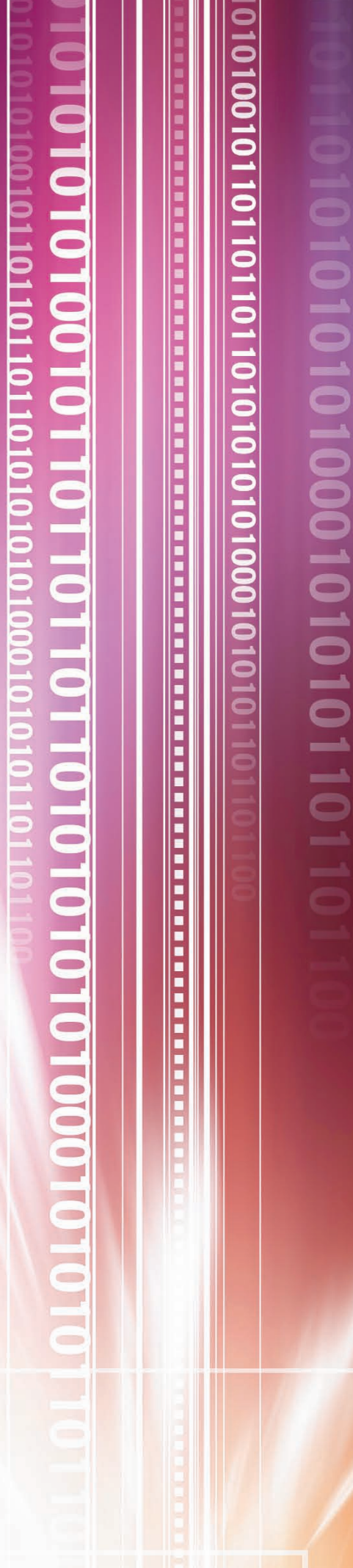


The Federal Lawyer

February 2011 Volume 58 Number Two

THE LEGAL MIND IN
THE DIGITAL AGE

E-DISCOVERY



President's Message

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How Social Networking Impacts Lawyers

THE THEME OF this issue of *The Federal Lawyer* is “Technology and E-Discovery.” The on-going rapid changes in technology have significantly impacted the practice of law. In December of 2010, I had the opportunity to speak at the Second Annual FBA Hawaii

Conference about the on-going ethical considerations we face in social networking on the web. In addition to personal reasons, many lawyers use social networking for business networking and professional development reasons. 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 comments to their profiles and to the profiles of friends, engage in marketing, and otherwise report on his or her personal and professional life. 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 December 2, 2010:

- More than 500 million active users are on Facebook;
- 50% of active users log on at any given day;
- More than 1 million websites integrate with Facebook;
- The average user has 130 friends;
- People spend over 700 billion minutes per month on Facebook;
- There are more than 200 million active users currently accessing Facebook through mobile devices; and
- People that access Facebook on mobile devices are twice as active on Facebook than 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.”¹

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.

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.² 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.³

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 client's 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.⁴ 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.⁵

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



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in this manner, client contacts, expert witness or consultant contacts, vendor contacts and other sensitive information could become available to a very wide audience.

An attorney should not lie to a judge. For instance, it was recently reported that an attorney in Texas 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.”⁶


Beware of badmouthing a judge. In Florida, an attorney was steamed 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 in April issued a reprimand and a fine for his intemperate blog post.⁷

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 where 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)⁸ 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 befriend 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 violates 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 combination with other facts, rise to the level of a ‘close personal relationship’ requiring disclosure and/or recusal.” New York Judicial Ethics Opinion 08-176 (Jan. 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! **TFL**



¹Baldas, *They Blog, They Tweet, They Friend*, NAT’L L.J. (Dec. 21, 2009).

²See Melissa Blades & Sarah Vermynen, *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).

³See Joel M. Schwarz, *Practicing Law Over the Internet: Sometimes Practice Doesn’t Make Perfect*, 14 HARV. J.L. & TECH. 657, 675-77 (2001).

⁴Mayle, *Navigating the Ethical Pitfalls of Online Networking*, ABA Young Lawyers Division, The 101 Practice Series: Breaking Down the Basics (2009).

⁵Levin, *More on the New Rules—Social Networks*, CBA RECORD (Nov. 2009).

⁶See Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, ABA JOURNAL, posted July 31, 2009.

⁷John 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.

⁸Pennsylvania’s version of Rule 8.4 adopts the Model Rule. Compare Model Rule 8.4.