Legal Ethics and Social Media

By Chris McLaughlin

The number of lawyers using Facebook, Twitter, LinkedIn, and other social media networks grows daily. So too does the number of lawyers doing foolish and unethical things on those networks. Be it insulting Tweets, deceitful Facebook friend requests, or "reply all" mistakes, lawyers continue to wade into trouble on the Internet in varied and creative ways.

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Social media is not inherently bad, of course. Lawyers can and do use evolving technologies to benefit themselves, their clients, and the public without drawing the ire of the courts or the State Bar. This article seeks to empower more lawyers to use social media in more appropriate fashion. It highlights some of the more egregious social media missteps made by lawyers in recent years in the hope that other lawyers won't repeat them. It then analyzes how the Rules of Professional Conduct apply to Internet activity both generally and in specific contexts such as investigations, litigation, client testimonials, and inadvertent emails.

The Stats

The ABA's annual Legal Technology report suggests that lots and lots of lawyers are on social media. The 2014 survey results included these stats:

- 96% of attorneys have a LinkedIn account;
- 33% of lawyers have a presence on Facebook;
- 10% of lawyers maintain a Twitter account;
- 8% of lawyers maintain a legal blog.

For law firms, the figures are even higher: 52% on Facebook, 19% on Twitter, 24% with blogs.

The Easily Avoidable Gaffes

Many lawyers find themselves in trouble after social media missteps because they forgot the basic rules of civility that our parents tried to teach us as kids: be nice, play well with others, treat everybody like you'd like to be treated. None of those guidelines are unique to social media; it's simply that when we ignore them on the Internet our misconduct is memorialized for ridicule and quite possibly legal discipline.

Think It, Don't Tweet It

A Kansas court of appeals research attorney was fired and subject to Bar discipline in 2013 when she tweeted insulting comments about former Kansas Attorney General Phill Kline during his own disciplinary hearing concerning alleged lies about his agency's investigations into abortion providers. The research attorney, Sarah Peterson Herr, tweeted that Kline was a "naughty, naughty boy" and then criticized his facial expression during the disciplinary hearing: "Why is Phil Klein [sic] smiling?" she wrote. "There is nothing to smile about, [derogatory name]." (Apparently Herr's spelling needs as much work as her impulse control.) Herr later apologized, saying "I didn't stop to think that in addition to communicating with a few of my friends on Twitter I was also communicating with the public at large."

You're Not Funny, Just Offensive

Oceans of ink have been spilled over the ongoing email scandal at the Pennsylvania Supreme Court. So far Justice Seamus

McCaffery has resigned and Justice Micheal Eakins has been suspended for sending not-safe-for-work photos and jokes about minorities and women. Eakins argued that his emails were just harmless "male banter" and "locker room" humor. In late 2015 the Pennsylvania judicial disciplinary board disagreed, concluding that the jokes "tainted the Pennsylvania judiciary in the eyes of the public."

Disguises Work for Batman and Superman but Not for Online Lawyers

Former Arkansas Circuit Court Judge Mike Maggio is apparently a huge LSU fan, often posting on a popular LSU fan board under the pseudonym "Geauxjudge." Many of those posts were full of offensive jokes and insults to women, while one disclosed confidential information about the adoption of a baby by movie star Charlize Theron that took place in his courthouse. Unfortunately for Maggio, the state judicial ethics board had little difficulty piercing the veil of his pseudonym and permanently barring him from serving as a judge. Maggio won't have to worry about finding a job anytime soon, however, as he'll be spending the next few years in federal prison for accepting a bribe to reduce a jury verdict against a nursing home from $5 million to $1 million.

No Selfies in the Courthouse

Attorneys aren't immune to the urge to snap cute photos with their phones and share them with their Facebook friends. But those selfies can lead to trouble when you take them in the courthouse. In 2015 Wisconsin Criminal Defense Attorney Anthony Cotton got in hot water with a judge after capturing a courtroom selfie with his client after a not guilty verdict in a murder trial. The judge was concerned that the photo might traumatize the victim's family or inadvertently show jurors' identities. Also in 2015, Pittsburgh Assistant District Attorney Julie Jones angered her boss by posing with weapons that had been entered into evidence in a criminal case. After the photo was posted on a colleague's Facebook page, the district attorney's office commented that Jones' conduct was "contrary to office protocol with respect to the handling of evidence" and was being investigated.

The Good Tweeters

It is possible to use social media to benefit both you and your audience without being disbarred or fired. Check out Don Willett, the Twitter laureate of Texas, who also happens to serve on that state's supreme court. He tweets using the handle @JusticeWillett. The justice has been written up in the *New York Times* for his "oblique political commentary ('When it comes to legislating from the bench—I literally can't even'), savvy cultural references, and good-natured sports talk." Or UNC School of Government faculty member Jamie Markham, whose entertaining and informative Tweets cover everything from sentencing law to the scary face he once found in a jalapeno. Find him on Twitter @jamie_markham. (The author, a proud Blue Devil, notes approvingly that both of these smart and funny attorneys are Duke Law grads.)

The Rules

None of the Rules of Professional Conduct that govern lawyers in NC is aimed specifically at the use of social media. But that doesn't mean that attorneys are free to act as they wish online. The same rules that restrict deceptive, offensive, or inappropriate behavior by attorneys in the real world also restrict attorney behavior in the digital world. If an attorney can't do something in person, she can't do it online either.

A few examples:

Social Media Investigations

Rules 4.2 and Rules 4.3 limit an attorney's ability to interact with third parties who are represented by counsel or who may be adverse to her client's interests. Combined with Rule 8.4, the general prohibition against deceitful conduct, these rules mean attorneys must be careful when using social media to investigate opposing parties, witnesses, and potential litigants.

Although the North Carolina State Bar has not issued any opinions on this issue, the lessons from other state bars are fairly consistent. All public Facebook posts are generally fair game for viewing by attorneys. But an attorney can never send a Facebook friend request to a represented person or to jurors. It's also a no-no for attorneys to conceal their identities when sending Facebook friend requests for investigatory purposes by using pseudonyms or other peoples' Facebook accounts. Some states require an attorney who sends an investigatory friend request to fully disclose his identity as an attorney involved in a particular legal dispute. See the *Social Media Ethics Guidelines* issued by the New York State Bar Association in June 2015 for an excellent summary of the most recent rules and opinions on the use of social media for investigations.

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It's not just legal ethics you need to worry about when using social media for investigations, especially when those investigations arise in the employment setting.

Consider clients who wish to investigate potential hires using Facebook or other social media networks. So long as the attorney doesn't advise the client to conceal its identity on Facebook, this activity probably would not trigger any legal ethics concerns. But it could lead to employment law problems if the client stumbles upon protected information about job candidates (religion, disability, sexual orientation, etc.). For more guidance on this issue, please see School of Government Public Employment Law Bulletin #38, *Using the Internet to Conduct Background Checks on Applicants for Employment*, October 2010, by Diane Juffras.

Similar employment law concerns arise if an attorney assists a client's social media investigation into potential misconduct by current employees. Those legal risks increase tremendously if the client uses coercion to obtain access to nonpublic Facebook posts. Forcing an employee to provide access to a Facebook account (be it her account or that of another employee with whom she is a Facebook friend) could violate state laws prohibiting that practice as well as the federal Stored Communications Act. Although North Carolina has not adopted any prohibition on this issue, more than two dozen other states have. See ncsl.org for a summary of state laws concerning employer access to employee's social media accounts. *Ehling v. Monmouth-Ocean Hospital Service Corp.*, 961 F.Supp.2d 659 (D.N.J. Aug 20, 2013) discusses how the Stored Communications Act applies to nonpublic Facebook posts.

Scrubbing Your Client's Social Media Sites

Attorneys need to worry about their own clients' Facebook pages as well as those of opposing parties. The "competency" requirement in Rule 1.1 obligates attorneys to counsel clients on the potential legal impact of their social media activity. NC 2014 Formal Ethics Opinion 5. This guidance makes clear that it is not only wise for attorneys to recommend that clients filter their social media posts, but obligatory.

An attorney can go too far in this direction, however. Deleting existing Facebook posts and failing to preserve copies for discovery purposes might violate rules governing the spoliation of evidence and violate ethical rules requiring candor to the court and opposing parties. *See Lester v. Allied Concrete Co.*, 2011 Va. Cir. LEXIS 245 (Va. Cir. Ct. 2011 Sept. 6, 2011) for an extreme example (and for proof that it's rarely a good idea to wear an "I ♥ hot moms" t-shirt).

In *Lester,* a wrongful death plaintiff lost his young wife in a tragic accident and claimed severe emotional distress as a result. Yet prominently displayed on his Facebook page were photos of him drinking beer while surrounded by young female adults and wearing the questionable t-shirt. Reasonably fearing that these posts undermined his client's claims, the attorney ordered the client to delete his Facebook account. The defendant had already submitted discovery requests, including a request for all social media postings by the plaintiff. Nevertheless, the attorney concluded that he could still certify that the client had no social media accounts because the Facebook page had been deleted before the attorney signed the discovery response. The court and the State Bar took a dim view of the attorney's actions, sanctioning him for $700,000 of the defendant's legal fees and suspending him from practice for five years.

Communicating with Judges

It's fine to be friends with a judge. But be careful when accepting a Facebook friend request or a LinkedIn invitation from a judge before whom you regularly appear. And definitely do not use social media to contact a judge during a pending proceeding for fear of violating the ban on *ex parte* communications. *See* NC 2014 Formal Ethics Opinion 8.

Online Reviews

Facebook, LinkedIn, Avvo, and other sites offer the opportunity for client reviews and testimonials. It's fine for attorneys to accept (and even request) these reviews so long as they conform to traditional rules governing lawyer advertising. In particular, attorneys should make sure those reviews don't contain references to specific jury award amounts or promises that the attorney can get the same results for other clients. *See* NC 2012 Formal Ethics Opinion 8.

If you happen to get a bad online review, feel free to respond, but take care not to reveal confidential client information while doing so. Consider Illinois Employment Lawyer Betty Tsamis who replied to multiple negative online reviews thru the Avvo website with this:

"I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about."

The Illinois State Bar reprimanded Tsamis for disclosing confidential information about the client while "exceeding what was necessary" to respond to the negative review.

"Reply All" and Misdirected Emails

It's not just new social media networks that present ethical dangers for attorneys. Good old email can create just as many headaches. Consider the seemingly innocuous "reply all" button. How many times have you seen that button misused on your office? Misdirected emails can do more than embarrass the sender and annoy the recipients. When they occur in connection with litigation, they can violate the ethical restrictions against communicating with a represented party and raise attorney-client privilege concerns.

NC 2012 FEO 7 discusses how and when the ethical prohibition against contacting represented parties in Rule 4.2(a) is violated thru use of the "reply all" button. In general, an attorney may not email an opposing party without the explicit consent of that party's attorney. The fact that an attorney cc'ed her client in an email to the opposing attorney does not automatically give the opposing attorney permission to email that client thru use of the "reply all" button.

A misdirected email usually will not be fatal to the attorney-client privilege so long as the sender takes quick action to remedy the mistake. *See Multiquip v. Water Management Systems*, 2009 WL 4261214, (D. Idaho) for an example of how a court would typically deal with confidential communications inadvertently sent to opposing parties via email. The court bases its analysis largely on discovery and evidentiary rules that forgive the inadvertent production of privileged materials in the discovery process so long as the sender took reasonable steps to prevent the disclosure and to remedy it once it occurred. *See* North Carolina Rule of Civil Procedure 26(b)(5)(B), the nearly identical Federal Rule of Civil Procedure 26(b)(5)(B), and Federal Rule of Evidence 502(b).

But repeated email mistakes could demonstrate that the attorney was not taking reasonable steps to protect the confidential information. (Did you know you can install a pop-up warning box for "reply all" emails? Google the "TuneReplyAll" add-on for Outlook.) A court could then conclude that any privilege attached to the misdirected emails was waived while also questioning that attorney's competence under Rule 1.1.

It's not just the sending attorneys who need to worry about misdirected emails. The recipient of an email that was clearly not intended for that attorney has an ethical obligation under Rule 4.4 to "promptly notify the sender." The rule does not explicitly require the recipient to stop reading or destroy the misdirected email.

That said, the wisest course of action for an attorney who receives information she knows she wasn't supposed to receive is to seek guidance from the sending party or the court as to how she should proceed. See "Inadvertent Disclosure and the Attorney-Client Privilege," *California Bar Journal* (Wendy L. Patrick, August 2011), and "What Do You Do With Misdirected Documents?" *Florida Bar News* (Jeffrey M. Hazen, June 2010) as well as New York City Bar Association Formal Opinion 2003-04.

The NC State Bar has not issued an opinion directly on point. But a 2009 opinion barring attorneys from using confidential information inadvertently in an electronic communication as embedded metadata suggests that North Carolina would also frown upon attorneys who used confidential information in emails that clearly were not meant for their eyes. *See* 2009 FEO 1. ■

Chris McLaughlin is an associate professor of public law and government and the UNC School of Government.