

## Social Media and Attorney Ethics, There's an App for That

By Natalie Sulimani

Social networking. It's a wonderful thing. It allows us to keep in touch with friends, both old and new. Through it we can keep abreast of important, and maybe not so important, news. Social networking even helps us to save money in these challenging times. So what's not to like? Even the most world-weary lawyers are beginning to see the value of social networking in marketing, networking and most importantly representing their clients. Sounds even better...but wait. Even in the realm of social networking, one must still be aware of the ethical considerations. The media might be new, but the tried and true rules of professional conduct still apply and will help you avoid any legal pitfalls.

Therefore, let's take a look at some situations that arise in the realm of social networking and explore the ethical considerations that may arise therein.

First, let's consider a situation where you are representing a client. As the attorney, you want to be able to utilize any and every tool at your disposal to get the best outcome for your client. This can entail varying degrees of research on the other party, as well as research on potential jurors. This can be time-consuming and costly using traditional methods. However, by using information gathered through social networking channels, your job has been simplified. It is almost as if you have access to a spyglass on all of these people. However, the big question is whether you can use this information and, if so, how can you *ethically* obtain this information?

Throughout the country, bar associations have been struggling with these and other such questions dealing with social networking and have answered them in various ways. However, for the sake of this discussion, let's focus on how New York has dealt with them.

The New York State Bar Association opined in September 2010 that any information you obtain through a public page is fair game. That is to say, any page that may be accessed without a password or any other way being "friended." The page is fully accessible to anyone surfing the net. The attorney is neither contacting a represented party nor gaining access to the person's personal page through false pretenses or otherwise. As an example of the opposite, imagine an attorney who would seek to have access to the opposition's, or a potential witness for the other side's, social network site that would require private access. The attorney or some other agent in that office poses as an interested member or maybe even acquaintance of that party and asks to be "friended" or other such privilege. This is not a public situation because

the other party must grant permission for access to certain information. However, where this is not the case, you may consider the information you find through social networking as a public page. It's as if the lawyer obtained the information out in the open, in a public space without expectation of privacy. Given this knowledge, let's pause for a moment while you check the privacy setting on your Facebook page. (NYSBA Opinion #843).

The New York County Lawyers' Association, however, takes the public social networking page one step further and extends its analysis to situations with jurors. NYCLA recognizes that a lawyer may visit public social networking sites such as Facebook or a Twitter page of the juror before trial in obtaining information about a potential juror, but what about situations of continuous monitoring of a juror? Could such a thing be ethical? Let's look at what the traditional view has been. The Rules of Professional Conduct prohibit communications with a juror during trial unless authorized by court order and, in certain situations, even after the case has been discharged. So, does this standard still apply in our virtual world of social networking? Would subscribing to a juror's blog or Twitter feed be considered, in this traditional sense, an impermissible communication? And, moreover, if it is and you find impropriety on the juror's part, what about the obligation to report this juror misconduct as revealed by "following" that juror online? NYCLA considered these situations and in its opinion concluded that while it is proper and ethical to use online resources to perform research on a potential juror, it drew the line at attempting to "friend" jurors or otherwise try to "connect" with them even by simply subscribing to their blogs or Twitter feeds. However, it also concludes that there still is an ethical obligation to report any juror misconduct if it is known to you. This opinion, therefore, creates an interesting paradox as it leaves one to wonder how a lawyer may happen upon juror misconduct if the lawyer is prohibited from "following" the juror online, but yet if the lawyer happens to overstep the bounds of ethics somehow and discover this misconduct, he or she must report it, which would thereby open the lawyer up for ethical violations. Something of a "don't ask, don't tell" conundrum.... It should be interesting to see how this opinion plays out in the future.

Now, it is quite another story when you are trying to obtain information on another party's/witness's personal page, so let us backtrack to this situation. The rule here is basically FRIENDS ONLY. Here, a lawyer may not gain access to a social networking website under false pretens-

es either directly or through an agent. The most important part of this opinion is “*under false pretenses*.” The New York City Bar Association opinion goes into a scenario where the attorney or agent would create a fictitious profile based on the targeted person’s hobbies, alma maters, jobs, etc. in the hopes that the common interests would induce the targeted person to accept a friend request. It does not matter if it is the attorney or a secretary or paralegal of the firm, this is exactly the kind of behavior that is prohibited because it issuing a false pretense, i.e., you are a member of the public with no legal interest in the targeted person, to gain access to that person’s social networking page or accounts. However, the NYC Bar Association does allow and, in fact, urges informal discovery through such means as friending an unrepresented party truthfully, with full disclosure, or through more formal routes, such as discovery. Therefore, given these legitimate avenues, there should be no reason to resort to trickery that would endanger you or your client’s case. (ABCNY Opinion 2010-2).

Until now, we have discussed the various methods in which an attorney may gather information about other parties and jurors. The other very intriguing issue faced by attorneys these days is their own conduct on social networking sites. After all, attorneys use social media personally and professionally.

In the case where an attorney or law firm uses social networking as a way to market the practice, the traditional attorney advertising rules still apply. After all, regardless of the medium, it can and should be considered advertising or a solicitation. In the following sections, I will discuss the biggest mediums for social networking, Twitter and Facebook, and then will end the article with the newly approved advertising through Groupon.

Let’s first consider Rule 7 of the Attorney Rule for Professional Conduct, which outlines attorney advertising. However, given the fast pace of the Internet, it may seem burdensome or difficult to abide by these guidelines. Therefore, a good practice is to use your firm’s website, which is already compliant, as the underlying platform for any advertising you may do online.

When setting up your social media for online advertising, you must first decide on your “handle” (in the case of Twitter) or username. This is an important decision because the Rules provide that you may not choose a name that may be misleading or promise a particular outcome. It is a similar consideration to choosing a vanity domain name. While you may choose a domain name like “newyorkmatrimonialattorney.com,” your website has to indicate the firm name, partners, address, etc., as limited by the rules governing New York attorneys. So, when choosing your handle or username, while your firm name

or personal name may be appropriate, be careful if you choose to use a name like “facebook.com/quickiedivorce” as this might create an expectation that the divorce cases you handle are, indeed, expeditiously handled. As far as I am aware, you cannot put a disclaimer in your handle or username that prior results do not guarantee outcome to escape an advertising infraction.

Once you have chosen your name and signed up for the account, your next step is usually a description of who you are, what your firm does, etc. Obviously, since you are setting up a social media account for marketing, this message is very important. Generally, when embarking on a social media campaign, you want your message to be unified and cohesive. To comply with the Rules, it should neither contain statements that are deceptive or false nor should it reference yourself as an “expert” unless you do, in fact, fall into that narrow category, e.g., passed the Patent Bar.

The next step is usually peer or client recommendations. Here you must pay particular attention to posting the disclaimer “Prior Results Do Not Guarantee Outcome,” and should the recommendation come from a client, he or she must consent in writing that you can publish the recommendation. After all, attorney-client privilege is paramount and a foundational concern for all social media. So a good rule of thumb is to get any client’s consent in writing if you even contemplate using a party’s recommendation, and moreover, make sure that this party is fully aware of what consent means. Review all recommendations and make sure they accurately portray what you did for the testimonial parties. Of course, a testimony cannot be provided for a matter still pending. After all, it is *our* duty as lawyers to adhere to the Rules, we cannot expect the client to know.

In the case of LinkedIn, the username is usually not at issue since LinkedIn should be considered your online resume or CV. As such, by default, you will always use your name for your profile. However, a potential pitfall in LinkedIn is filling out the expertise section of your profile. According to the Rules, you cannot call yourself an expert unless you have specific credentials, e.g., passed the Patent Bar. So, I would suggest skipping this section altogether and instead fill out the “Skills and Expertise” section.

Now you are ready to begin the task of marketing yourself through social media, or to a lesser extent just interacting with the social stratosphere at large. However, it is vital that you keep in mind and guard against not making representations that will cause unrealistic expectations or provide a false impression. Usually, this takes the form of excited utterances after a great win. Or, perhaps more often, you had a bad day at court and you feel the

need to exorcise the beast by Tweeting to the world what a <\*&\*%\*^\*\$> the judge was. DANGER! Attorneys cannot speak ill of a judge in public. Your reputation is still on the line and being scrutinized even if you have a clever handle that you think no one will trace back to you...they will!

Cooler heads should always prevail, especially in social networking. It is always best to simmer on anything you put out there in social media of any form. The worst of human nature goes viral fast and stays online forever. LinkedIn aside, there is no delay and like a bad marketing campaign, it will make its rounds around the world and back before you can even begin to deal with the backlash.

So, what are good rules of thumb in embarking on a social media campaign to market yourself, your practice or the firm you work for?

- Familiarize yourself with the Rules;
- Read up on the various opinions;
- Pick a username/handle that does not disguise who you are;
- Do not embellish your description of yourself and your practice, make sure you can back up your assertions;
- Advise your clients about your use of their recommendations;
- Edit the recommendation if you have to; and
- Make sure you route back to your website.

While these tips are by no means exhaustive, referring back to your website might be the most powerful way to adhere to the guidelines. The FTC issued guidelines regarding truth in advertising, which prompted a lot of bloggers to start using a service called C.M.P.L.Y. This is a short URL at the end of paid-for Tweets that allows bloggers to disclose their vested interest. It is a wonderful answer to the 140 character limitation, but as of the date I wrote this article, this doesn't seem to include attorney advertising. Having said that, it would be a fantastic tool to recommend to your clients. In the end, the answer to avoid problems is to route your tweets, status updates, etc. to your site where you have enough real estate to disclose what you need to disclose such as:

- Attorney Advertising which is prominently displayed on your website; and
- Prior Results Do Not Guarantee Outcome, especially if you are talking about a recent win.

Finally, let's talk about Groupon. Since I have discussed this on various panels, I am familiar with that glaze that must be falling across your face as you read this, but in truth, it is probably no different than when attorneys started advertising on TV. While this may not suit many of you, it can be a great tool and, indeed, has worked for a handful of brave attorneys who were willing to try.

In a recent opinion (12/13/11), the New York State Bar Association weighed in on marketing legal services through a daily deal site. Essentially, the opinion stated that an attorney may offer his or her services through a daily deal site provided the advertising is not misleading or deceptive and that the attorney makes clear that there is no relationship formed until the proper checks are performed. If the lawyer is unable to provide services, a full refund must be made. If the client terminates representation the refund is subject to the quantum meruit claim. The opinion is interesting and goes into greater detail of a non lawyer receiving a referral fee since the website is taking a fee for the advertising. In that case NYSBA opines that the website is taking a fee for advertising and the website has no individual contact with the client. What I think is also interesting to think about if you do decide to advertise on a daily deal site is what you would do if your campaign is successful. I have seen businesses turn to Groupon as the answer to their cash flow only to be shut down faster due to the demand that they couldn't satisfy. What are the implications of referring those potential clients. When would that disclosure need to be made? Also, Rule 7.1 provides specific guidance regarding disclosures of fees and the attorney may be bound by these rates for no less than 30 days after broadcast. All considerations when embarking on any advertising campaign.

This is just the beginning of many opinions regarding attorney ethics and social media and the tips above are by no means exhaustive. So, when in doubt, check your local rules, utilize the Ethics Hotlines available through your bar association, and download the NYSBA Mobile Ethics App to your phone or tablet. But, fear not social media; it is certainly not going anywhere.

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