#NOTWEETINGAFTERMIDNIGHT: ETHICAL RISKS IN SOCIAL MEDIA USE

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I. An Introduction to Ethical Concerns with Social Media Use

By now, most lawyers know that practicing in the Digital Age is rife with ethical minefields. With over 2 billion people worldwide on Facebook, a billion tweets processed on Twitter every 48 hours, and over 800 million users Instagramming and Snapchatting away, social media is impossible to ignore. Changes to Model Rule of Professional Conduct 1.1 have ushered in new expectations of digital competence as attorneys are now held to a higher standard of being conversant in the benefits and rights of technology. Ethics opinions across the country are addressing issues like the limits of advising clients about what to "take down" from their Facebook pages, contact with witnesses via social media, and even researching the online profiles of prospective jurors. By forgetting that posts on Facebook or Twitter are just as subject to ethical prohibitions as more traditional forms of communication, lawyers nationwide have found themselves facing disciplinary actions.

Take, for example, the recent case of Florida plaintiff's personal injury lawyer David Singer, who began a jury trial in a case over whether a passenger had been permanently injured by walking on the hot deck of a Carnival cruise ship, only to have the federal judge presiding over the case refer him to a disciplinary committee over his Facebook posts. Carnival's counsel argued that Singer should be disqualified for "inexcusable" conduct in posting photos and "willfully improper" statements on Facebook to warn passengers of "outrageously high temperatures" on the cruise ship deck. Among other statements on Singer's Facebook page right before trial were allegations that Carnival "knew that their fake Teakwood deck heated up" so as "to burn the feet of a passenger who ended up having all 10 toes and parts of both feet amputated," as well as admonishments to a defense medical expert that "Doc, your buddies at Carnival knew of the problem because there were nine previous cases of burns on their deck—many of them kids." Carnival's lawyers also claimed that Singer had violated court orders by allegedly publishing private information about a mediation in the case. Although Singer apologized to the court, federal judge Joan Leonard referred the Facebook conduct to a disciplinary committee.

Lawyers have to understand that civility and professionalism are expected not just in the courtroom, or in traditional avenues of communication, but on social media platforms as well. On many occasions, a lack of civility can put a lawyer at risk of disciplinary action or even criminal charges. In In re Gamble in 2014, the Kansas Supreme Court imposed a six-month suspension on a lawyer for his "egregious" and "over the top" messages on Facebook to an unrepresented unwed mother while representing the baby's biological father during an adoption proceeding. The court felt that the lawyer's communications, trying to make the mother feel guilty about consenting to give the child up, violated both Rule 8.4(d) (conduct prejudicial to the justice system) and Rule 8.4(g) (conduct reflecting adversely on the lawyer's fitness to practice).

Beyond civility concerns, lawyers need to be aware of how their use of social media in handling a case can raise ethical issues. This includes such tasks as case investigation, evidence preservation, and even jury selection. A number of jurisdictions around the country have already begun holding attorneys to a higher standard when it comes to making use of online resources, including demonstrating due diligence, researching prospective jurors and even locating and using

exculpatory evidence in criminal cases.[1] As "digital digging" becomes the norm, it becomes harder for an attorney to say he or she has met the standard of competence when the attorney has ignored social media avenues.

Many of the ethical quandaries that social networking presents for lawyers arise out of the manner in which attorneys use (or misuse) these sites). Consider the practice of using social media sites to gather information about a party or witness, for example. While there generally is no ethical prohibition against viewing the publicly available portion of an individual's social networking profile, may an attorney (or someone working for that attorney) try to "friend" someone in order to gain access to the privacy-restricted portions of that profile? Ethics opinions from the Philadelphia Bar Association (March 2009), the New York City Bar (September 2010), the New York State Bar (September 2010), the Oregon Bar (February 2013) the New Hampshire Bar (June 2013), and others have made it clear that the rules of professional conduct against engaging in deceptive conduct or misrepresentations to third parties extend to cyberspace as well.[2] As the New York City Bar ethics opinion emphasizes, with deception being even easier in the virtual world than in person, this is an issue of heightened concern.

Not surprisingly, lawyers have found themselves in ethical hot water for engaging in such "false friending." In June 2013, Cuyahoga County, Ohio, assistant prosecutor Aaron Brockler was fired after he posed as a murder defendant's fictional "baby mama" on Facebook in order to communicate with two female alibi witnesses for the defense and try to persuade them not to testify. County Prosecutor Timothy McGinty had to withdraw his office from the case and hand it over to the Ohio Attorney General, but not before acknowledging that Brockler had "disgraced this office and everyone who works here" by "creating false evidence" and "lying to witnesses."[3] Similarly, even though Rule 4.2 of the Model Rules of Professional Conduct prohibits communicating with a represented party, lawyers have had to be reminded that this applies to *all* forms of communication, including via social networking. Two defense attorneys in New Jersey currently face disciplinary action for allegedly directing their female paralegal to "friend' the young male plaintiff during the course of a personal injury lawsuit in order to gain access to information from his privacy-restricted Facebook profile.[4]

In addition to using social networking sites for gathering information, the ethical duty to preserve information is another concern in the age of Facebook and Twitter. While no lawyer wants to discover embarrassing photos or comments on a client's Facebook page that might

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[1] *See, e.g., Cannedy v Adams*, 706 F.3d 1148 (9th Cir. 2013) (holding that a lawyer's failure to locate a sexual abuse victim's recantation on her social media profile could constitute ineffective assistance of counsel); New Hampshire Bar Association Ethics Committee Advisory Opinion No. 2012-13/05 (June 2013), *available at* http://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_05.asp.

[2] Philadelphia Bar Ass'n Prof'l Guidance Comm. 2009-02;Ass'n of the Bar of the City of N. Y. Comm. On Prof'l and Judicial Ethics, Formal Op. 2010-2; N. Y. State Bar Ass'n Comm. On Prof'l Ethics, Op. 843; Or. State Bar, Formal Op. 2013-189, New Hampshire Bar Association Ethics Committee Advisory Opinion No. 2012-13/05 (June 2013).

[3] James F. McCarty, *Cuyahoga County Prosecutor Fired After Posing as an Accused Killer's Girlfriend on Facebook to Try to Get Alibi Witnesses to Change Their Testimony*, Cleveland Plain Dealer, June 6, 2013, *available at* http://www.cleveland.com/metro/index.ssf/2013/06/cuyahoga_county_prosecutor_fir.html

[4] For a more detailed discussion, see John G. Browning, *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 St. Mary's L.J. on Legal Malpractice & Ethics 204 (2013).

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