



Social Media— Friend or Foe?

By Linda D. Schwartz

Web 2.0 is a term used to describe Internet communications through interactive commentary or written discussions between a sender and a receiver of information, including social networking media (“Social Media”). There are three primary types of Social Media, namely:

- Web log or “blog” which contains information or commentary by the person who authors the blog;
- interactive community of people creating profiles and providing information for the purpose of connecting or communicating with others for personal or business purposes, and
- interactive community of users that participate due solely to similar interests for individual, professional, or commercial purposes (e.g. hobbies, college classes, listservs for professional organizations, among others).



Social Media functions in “real time” so that the users can contribute, respond to or interact with other users instantaneously. Instant Messaging, Facebook and Twitter are prominent examples of real time Social Media, and each is now ubiquitous in our culture. Instant Messaging allows immediate responses by a particular individual to messages or posts directed to the participants. Facebook enables a member to create a profile and invite “friends” to view messages or other information placed by the member on his or her “wall.”

Once the friend consents to participate, a friend’s comments or posts will be visible to anyone who is allowed by the member to view the member’s wall. The member can create varying degrees of privacy within the policies set by Facebook. See, <http://www.facebook.com/policy>. In contrast to

both Instant Messaging and Facebook, Twitter is a micro-blogging Social Media site that enables the user to post messages on the Internet that contain no more than 140 characters to convey in real time the user’s thoughts, information and message. Such a micro-log is known as a “tweet”, and it may contain a link to another blog or website. Twitter states in its terms of service that what you say on Twitter may be viewed all around the world instantly, and that you are what you Tweet. See, <http://twitter.com/tos>.

Social Media has provided numerous benefits to its users. Lawyers have begun to use Social Media due to the ease of access it provides to clients, prospective clients and other professionals through the rapid location and transmission of pertinent information provided on websites created by the lawyer or the law firm.

Lawyers and law firms can be located on the Internet through search engines (Bing and Google, to name a few) for the purpose of identifying a capable lawyer who can competently handle a given case, issue, or transaction. Consequently, it is easy to conclude that Social Media is used frequently by lawyers as follows:

- to advertise or market the professional capabilities of a particular lawyer;
- to highlight the scope of services of a law firm;
- to provide blogs on current legal information, cutting edge legal theories and posts of interest to potential clients; and
- to locate other attorneys, advisors or experts that may be needed to participate with the client’s team of advisors for any given matter.

While few would disparage the potent effects of Social Media in daily law practice, some disadvantages exist, namely:

- The sender has little or no control of the information or message because the recipient may disseminate or resend information to third parties.
- Search engines and other network service providers may have access to private information provided by users.
- There may be harassment due to the content of a post on the Social Media site if it is abusive to a user or other identified individual.
- Frequent review and response to Social Media can be a distraction which may result in decreased productivity.

Each of us laments the time, energy and effort we spend each day in responding to our emails, text messages, Instant Messages and other Social Media. While it is a necessary and useful tool, in our current law practices one must each be mindful of its disadvantages and implement strategies to lessen the likelihood that the use of Social Media will result in a violation or breach of the Maryland Lawyers' Rules of Professional Conduct ("Rules").

To understand the impact that the Rules have on lawyers' use of Social Media, consider the following situation:

John, a Maryland lawyer, is a member of a golf enthusiasts listserv. His email address is the same one he uses professionally at his law office so that he can read any messages as soon as they are posted. Mary, also a member of the same listserv but personally unknown to John, uses her laptop to write the following post on the listserv:

"Yesterday was a disaster. I was on the fairway approaching the 8th hole at Heaven's Best, and that drunk George actually ran me over with his cart. I am now laid up in the hospital for several days with a broken leg and several other injuries. George is a menace! He should be tossed out of the club."

John reads Mary's post, and he immediately replies:

"Sorry to read you are so severely injured. Your story is terrible. Do not worry, I am a lawyer and I can help you. I have handled similar

cases over the past few years. I know the ropes and we can win big. Won't cost you anything. I will come by today to speak with you. What hospital and room number?"

Later that evening, John visits Mary, and she signs a retainer agreement with John and his law firm. The next day, John asks his cousin, Charlie, to "friend" George on Facebook, and to ask him about the incident with Mary. He also asks Charlie to provide him with any information he may see on George's "wall" that can be used to enhance Mary's case.

The above facts are contrived to illustrate clearly the ethical obligations that the Rules impose on lawyers when the lawyer chooses to use Social Media. The Rules do not expressly set forth certain conduct solely related to the use of Social Media. Rather, the Rules have been written broadly to encompass all conduct governing lawyers even when lawyers choose to use Social Media in their daily practice. Md. Lawyers' Rules of Prof'l Conduct (2007).

The Rules are flexible and fluid so as to be applicable even when there are changes to the technology used in law offices. With regard to the use of Social Media, it should be noted that electronic communications are expressly included within the Rules in several places. A "writing" or "written" is defined as a ". . . tangible or electronic record of communication or representation, including. . . email." Md. Lawyers' Rules of Prof'l Conduct R. 1.0(p) (2007). Second, the Rules governing the information about the lawyer and the lawyer's services in Rule 7.1 *et seq.*, expressly apply to

a lawyer's use of public media and electronic communications to advertise information about the lawyer, the lawyer's services and the lawyer's qualifications, including, a lawyer's direct real time electronic contact with a prospective client. See Md. Lawyers' Rules of Prof'l Conduct R.7.2, 7.3 (2007).

Turning to the scenario presented above, John has failed to comply with the Rules in several respects in his communications with Mary and in establishing the attorney-client relationship. To the extent that John has violated his obligations under the Rules, it may be determined that his direct supervising lawyer and the lawyers having managerial authority at his law firm also have violated their respective obligations under the Rules. Rule 5.1 requires each of them to make reasonable efforts to ensure that both the supervising lawyer requires the junior lawyer to conform to the Rules and that the managing lawyers of the firm have in effect measures giving reasonable assurance that all lawyers in the firm will conform to Rules. See Md. Lawyers' Rules of Prof'l Conduct R. 5.1(a), (b) (2007).

Given the facts described above, John knows from Mary's post that she is in a fragile emotional state. Under Rule 7.3 (a), John can not have a real time electronic communication for the purpose of soliciting a prospective client for pecuniary gain. In addition, John's reply creates unjustified expectations in Mary as to the likelihood of success by John in violation of Rule 7.1 (b), and he makes misleading statements to Mary regarding the payment by Mary of the fees and expenses for her case.

Further, John can not be deceptive or untruthful when dealing with

third parties and he may not knowingly assist or induce another to do so. Consequently, his request to his cousin Charlie to “friend” George to deceptively discover information to be used in the prosecution of Mary’s claims against George constitutes a violation of Rule 8.4 (a) and (c). It is professional misconduct to violate or induce another to act in violation of the Rules to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Md. Lawyers’ Rules of Prof’l Conduct R. 8.4(a), (c) (2007).

In 2009, the Philadelphia Bar Association Professional Guidance Committee concluded that a lawyer request for a third party to contact a witness through a “friend” request on Facebook for the purpose of gaining access to information revealed for the purpose of using the information to impeach the witness at trial was deceptive under its Rule 8.4 (c) and a breach of professional ethics because the purpose for requesting access to the information was purposefully concealed. Phila Eth. Op. 2009-02, 2009 WL 9346232. The opinion can be found at http://philadelphiabar.org/WebObjects/PBARReadonly.woa/contents/WebServerResources/CMSResources/Opinion_2009-2.pdf

In adhering to the Rules governing advertising, strict compliance with the obligations contained in the Rules is essential. Under the Rules, care must be exercised in describing the lawyer’s qualifications, and puffing should be avoided. In addition, Rule 7.2 (b) requires that a copy or recording of an advertisement or other communication must be kept by the lawyer for three years after its last dissemination along with a record of when and where it was used, and Rule 7.2(e) requires that the advertisement

or communication must include the name of at least one lawyer responsible for its content.

Each lawyer must also maintain the confidentiality of all information related to the representation of a client under Rule 1.6. The lawyer’s ethical duty to maintain the confidentiality of all information relating to the representation is broader and more inclusive than the information subject to the attorney-client privilege. Drawing the distinction between the lawyer-client privilege and the client-lawyer confidentiality rule, Comment 3 to Rule 1.6 notes the following:

“The attorney client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The Rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”

With the explosive use of Social Media, sole practitioners, law firms, and corporate and government counsel offices would be prudent to adopt Social Media policies to reduce the risk of violation of the Rules by lawyers and their respective non-lawyer staff. In such policies, it would be important to:

- define the scope of permitted Social Media,
- establish controls regarding the

quality of information posted,

- create permitted uses and sites for posting messages, or other information,
- assess adherence to mandated lawyer advertising requirements,
- track possible prospective clients and check for potential conflicts of interest.

Any Social Media policy should apply to all lawyers, law clerks, paralegal assistants, administrative managers and staff. It should also describe the types of permitted Social Media accurately and address the following concerns:

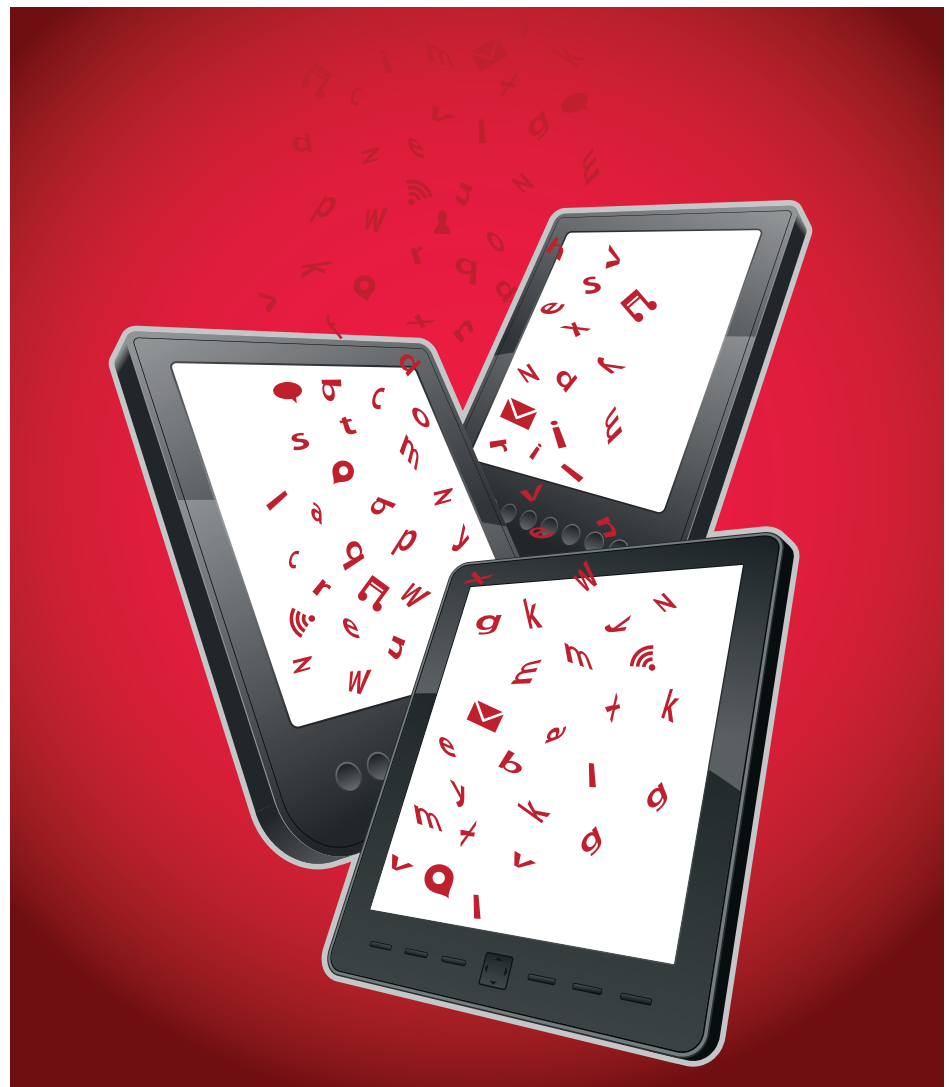
- Separation of private social networking from professional social networking, including the prohibition that the same accounts or profiles should not be used for personal and professional activities.
- Creation of an approval process for the content of blogs, posts or messages to Social Media sites.
- Restrictions on the dissemination or disclosure of confidential information
- Prohibitions on giving legal advice inadvertently to prospective clients or other third parties.
- Requirements for maintaining privacy and access to information by third parties through the use of software and other protections, including an appropriate disclaimer regarding the nature of the content of the Social Media activity and its permitted use.
- Guidelines on the improper use of information to prevent harassment, defamation and other unintended results.
- Restrictions on permitted geo-

graphic practice in Social Media to prevent the unauthorized practice of law.

There are several outstanding articles or materials that should be reviewed prior to undertaking the use of Social Media in a law practice and in the preparation of a Social Media policy, including the following:

- Lynch, Ethical Problems with Computer Advertising and Affiliations, 34 MD. Bar Journal 11 (Dec2001). Hricik. Communication and the Internet, Facebook, E-Mail and Beyond, December 2009, available at <http://ssrn.com/abstract=1557033>.
- Duffy, Developing a Social Media Policy, ABA Section of Real Property, Probate and Trust Law, E Report (October 2010) available at <http://www.abanet.org/rpte/publications/ereport/2010/5>.
- An August 2010 opinion from the American Bar Association Standing Committee on Ethics and Professional Responsibility (ABA Comm. On Ethics and Professional Responsibility, Formal Opinion 10-457 (2010)) issued on August 5, 2010, available at <http://www.abanet.org/cpr/links.html>.

The issues raised above will evolve and multiply as technology changes. For example, Facebook recently announced a new platform through which it will provide enhanced electronic communication services to its users. The legal profession must adapt to the ways in which commerce is transacted in a manner that adheres to the ethical obligations governing the conduct of lawyers. The ABA Commission on Ethics 20/20 recently



issued a paper seeking commentary from the legal profession regarding the impact of technology on the confidentiality-related concerns of the legal profession.

Compliance with the professional rules will be a challenge to all Maryland lawyers because it requires quickly conforming one's conduct to the fast paced changes in software, technology and the manner in which communication occurs and information disseminated. The ethical obligations mandated by the Rules and the basic underlying principles remain constant. Therefore, lawyers must be vigilant in embracing both the new

technology and its implications and applying the Rules to protect the public and the administration of justice. Prudence requires every lawyer to carefully consider the consequences of each Social Media activity and the content of each "tweet", blog, message, and post. Common sense and good judgment should prevail such that if you have any hesitation or doubt, do not post.

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