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## Coates' Canons Blog: Legal Ethics and Social Media

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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.

In this post I highlight some of the more egregious social media missteps made by lawyers in recent years, in the hope that others won't repeat them. Then I describe how the NC Revised Rules of Professional Conduct apply to social media both generally and in specific contexts such as investigations, litigation, and client testimonials.

### 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. When we ignore these well established social norms 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 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 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]." (Her spelling needs as much work as her impulse control.) Later she 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."

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*You're not funny, just offensive.*

Oceans of ink have been spilled over the on-going email scandal at the Pennsylvania Supreme Court. So far one justice has resigned and one has been suspended for sending semi-pornographic photos and jokes about minorities and women. The suspended justice argued that his emails were just harmless "male banter" and "locker room" humor. The disciplinary board disagreed, concluding that the jokes "tainted the Pennsylvania judiciary in the eyes of the public."

*Disguises work for the CIA but not for on-line 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. One attorney got in hot water with a judge after capturing a courtroom selfie with his client after a not-guilty verdict. Another angered her boss, the Pittsburgh district attorney, after posing with weapons that had been entered into evidence in a criminal case.

### **The Good Tweeters**

It is possible to use social media to benefit both you and your audience without being disbarred or fired. Check out the Twitter Laureate of Texas, Don Willett, who also happens to be a state supreme court justice whose Tweets have been written up in the New York Times. Or my colleague Jamie Markham, whose Tweets cover everything from sentencing law to the scary face he once found in a jalapeno. (Hmm, I wonder if it's a coincidence that both of these smart and funny attorneys are Duke 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 on line. 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 on line 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.

The North Carolina state bar has not issued any opinions on this issue, but the guidance from other state bars is 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 these 2015 guidelines from the NY state bar for an excellent summary of the most recent rules and opinions on the use of social media for investigations.

If a social media investigation involves a client's potential or current employees, the attorney needs to worry about

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employment and privacy laws as well as legal ethics. 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.). See this bulletin from my colleague Diane Juffras for more on that issue.

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 non-public 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. See this summary of state laws concerning employer social media access and this 2013 NJ federal district court opinion on the Stored Communications Act for more details.

#### *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. But an attorney can go too far in this direction; deleting existing Facebook posts and failing to preserve copies for discovery purposes might violate rules governing the spoliation of evidence. See this case for an extreme example (and for proof that it's never a great idea to wear an "I ? hot moms" t-shirt.)

#### *Communicating with Judges*

It's great 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.

For more guidance on judicial ethics, please see this detailed bulletin from my colleague Michael Crowell on judges' use of social media.

#### *On-Line 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. And if you happen to get a bad on-line review, please don't reveal confidential client information while responding or you might find yourself in trouble with the bar like this IL attorney.

#### *Unintentional Oversharing.*

Lawyers who use their smart phones for both business and personal activities (in other words, every lawyer with a smartphone) must be careful of inadvertently violating client confidentiality rules through the use of social media apps. As NC State Bar associate ethics counsel Suzanne Lever detailed in her February 2016 State Bar Journal article, giving Instagram of Facebook access to your smart phone photos so you can post shots of your kids' soccer games is problematic if you also have client-related photos on that phone. Lever's article discusses a variety of confidentiality risks hidden in the use of mobile technology and is well worth a read.

#### *"Reply All" and Misdirected Emails*

One of the biggest digital ethical dangers facing lawyers in the digital age might be the "reply all" button. Misdirected emails 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

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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) and related rules governing inadvertent disclosure in the discovery process, North Carolina Rule of Civil Procedure 26(b)(5)(B), 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 (perhaps by removing the "reply all" button from his email system?) and convince a court to conclude that the privilege was waived. They might also lead to questions about 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 NC RRPC 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 NC State Bar ethics counsel or the court as to how she should proceed. See this California Bar Journal article, this Florida Bar Journal article, and New York City Bar Association Formal Opinion 2003-04.

Although the NC state bar has not issued an opinion directly on point, a 2009 opinion barring attorneys from using confidential information inadvertently in an electronic communication as embedded metadata suggests that our state bar would also frown upon attorneys who used confidential information in emails that clearly were not meant for their eyes. See NC 2009 FEO 1.

## Links

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