Social Networking and Ethics: Tweeters and Twits

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Handout Materials


Web 2.0

- Differs from old web applications
- Communications now run two-way (to and from the user and the webmaster)
- Pagers, Computers, Smartphones, and PDA’s all operate now with Web 2.0 functionality
- Several different types of main applications
Blogs

“Online personal journal with reflections, comments, and often links provided by the user”

Like Op. Ed. Pieces for users

New blog created approximately every 7.4 seconds
Forums

- Dedicated to users posting questions and topics of interest with intent to get a response
- Like a digital water cooler - “envision each forum as a water cooler for the world, only now the discussion lingers in cyberspace for an indefinite period of time, attracting thousands of thirsty listeners”
Social Networking Sites ("SNS")

- Most popular web 2.0 application
- Examples: Facebook.com, Myspace.com, and Youtube.com
Why is Social Networking So Popular?

- SNS expand user-generated features to their utmost potential
- Many companies are accepting this trend by creating their own profile pages
- Always changing: Micro-blogs, like Twitter, allow for a constant barrage of updates in the form of sound bites
What is Twitter?

Twitter is a service for friends, family, and co-workers to communicate and stay connected through the exchange of quick, frequent answers to one simple question: What are you doing?

Get Started—Join!

Twitter is on its way to becoming the next killer app.

TIME Magazine

When I first started doing it, I thought, ‘geez, not another website to worry about updating and checking’, but now I’m glad I did it.

point_chevalier, LiveJournal

Twitter is on its way to becoming the next killer app.

TIME Magazine

Twitter is the first thing on the web that I've been excited about in ages.

Jason Kottke, Blogger
Turner P. Graham

- New in house counsel hire who reports to you
- Prolific blogger, texter and tweeter
- Anxious to impress
- Usually had a bad hangover during professional responsibility class
- Not admitted in SC
In-House Counsel Licensing

Rule 5.5(d)(1) provides: “A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that: (1) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission [.]”

Turner P. Graham just left G’ville courthouse w/ the Big Guy. Had a wreck and now being sued along with the company. Great boss, but already has two DUI’s. Now I got to try to get him and the company off.

Today:

Hey, grahamie whammie! Missed you! Call me.

Turner P. Graham and Bud Wiser are now friends.
Rule 1.6: Confidentiality of Information

A lawyer shall not reveal information relating to the representation of a client UNLESS

• the client gives informed consent;
• the disclosure is impliedly authorized in order to carry out the representation; or
• the disclosure is permitted by paragraph (b).
Rule 1.13(g) Organization As Client

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7

Rule 1.7 addresses conflicts of current clients, including joint representation and when a institution is the client
Kristine P., a lawyer in Illinois, lost her job as an assistant public defender after 19 years of service over blog postings, and now faces disciplinary proceedings as well. She wrote posts to her blog that thinly veiled the identities of clients and confidential details of a case, including statements like, “This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because ‘he’s no snitch.’” [“A Legal Battle: Online Attitude vs. Rules of the Bar,” New York Times 9/13/09]
Turner P. Graham is helping my employer, Autos N Tires, try a big products case. That slug of a plaintiff’s lawyer wants $3M to settle, and ANT has offered $250K. I know we have more in authority, but we’re not going to offer it unless the judge denies our d.v. motion. Besides, we have some real dirt on plaintiff’s expert, complete with video from a low rent rendezvous. See ya!

Today

Just posted our new wedding photos for your viewing pleasure.

Turner P. Graham and Hart Ford are now friends.
A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
This is for real...

- Last year, a juror in a federal drug trial in Florida admitted to the judge that he had been doing research on the case on the Internet, in direct violation of the judge’s instructions. When the judge questioned the rest of the jury, he found out that eight other jurors had been doing the same thing. The judge had no choice but to declare a mistrial, a waste of eight weeks of work by prosecutors and defense lawyers.

- In an Arkansas case, Juror Powell sent Twitter messages during the trial: “Oh and nobody buy [stock of the defendant company]. Its bad mojo and they’ll probably cease to exist, now that their wallet is $12M lighter.” Also: “So Jonathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else’s money.”

- In a federal corruption trial of a former Pennsylvania state senator, a juror posted updates on the case on Twitter and Facebook. The juror told his readers that a “big announcement” was coming Monday.

[“As Jurors Turn to Web, Mistrials Are Popping Up,” New York Times, March 18, 2009.]
Turner P. Graham is OMG! I just found out that Sally Sue Wannamaker is going to be a witness against good ole ANT in the trial. You remember her, she is so HOT! She used to be at all the frat parties. She has some dirt on everybody, whether it’s true or not. Hey, aren’t you her Facebook friend? Check her out and see what she’s gonna say? Let me know.

View More Photos of Me
Edit My Profile

My Friends (6)

Mike  Sunshine

Today:
Hey, Turner. I called out sick today. Wanna join? Surfs up!

Turner has just bought new furniture for his room in YoVille.
Rule 8.4: MISCONDUCT

“It is professional misconduct for a lawyer to:

(d) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(e) Engage in conduct that is prejudicial to the administration of justice…”
This is for real...

- A Michigan juror who posted on Facebook that a defendant was guilty before the completion of trial was dismissed from the jury, held in contempt of court, ordered to pay a $250 fine and required to write a five page essay on the defendant's Sixth Amendment right to a jury trial. Christina Hall, Facebook Juror Gets Homework Assignment, The Detroit Free Press, Sept. 2, 2010

- A state trial court in the Bronx determined that a woman breached her obligations as a juror by sending a Facebook “friend” request to a government witness but rejected the defense's argument that this act had tainted the jury's guilty verdict. Noeleen G. Walter, Access to Internet, Social Media by Jurors Pose Challenges for Bench, N.Y. L.J., Mar. 3, 2010

- A New Hampshire juror charged with contempt of court for revealing during deliberations that the defendant was a convicted child molester pleaded guilty to a reduced charge and agreed to pay $1,200 to reimburse the county for expenses related to two days of deliberations. Debra C. Weiss, Juror Whose Revelation Forced a Mistrial Will Pay $1,200, A.B.A. J., Oct. 13, 2009
A Philadelphia lawyer deposed an 18 year old woman (the “witness”). The witness is not a party to the litigation, nor is she represented. Her testimony is favorable to the party adverse to the attorney. During the course of the deposition, the witness revealed that she has Facebook and MySpace accounts. The attorney believes the witness’ pages on these sites may contain information that could be used to impeach the witness if she were to testify at trial. But access to these accounts can only be obtained by the witness’ permission. Attorney believes the witness will give permission to just about anyone who asks. The attorney proposes to ask a third person, whose name the witness will not recognize, to contact the witness and seek to “friend” her, to obtain access to the accounts. The third person would state his or her true name, but what not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access.

PERMISSIBLE
The proposed conduct would violate Rule 8.4 because the planned communication by the third party with the witness is **deceptive**. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness’ pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access...

The attorney has suggested that his proposed conduct is similar to the common—and ethical—practice of videotaping the public conduct of a plaintiff in a personal injury case to show that he or she is capable of performing physical acts he claims his injury prevents.

[Opinion 2009-02 (March 2009)]
When tweets can make you a jailbird

By RICHARD LARDNER
Associated Press Writer

Maxi Sopo was having so much fun "living in paradise" in Mexico that he posted about it on Facebook so all his friends could follow his adventures. Others were watching, too: A federal prosecutor in Seattle, where Sopo was wanted on bank fraud charges.

Tracking Sopo through his public "friends" list, the prosecutor found his address and had Mexican authorities arrest him. Instead of sipping pina coladas, Sopo is awaiting extradition to the U.S.

Sopo learned the hard way: The Feds are on Facebook. And MySpace, LinkedIn and Twitter, too.

Law enforcement agents are following the rest of the Internet world into popular social-networking services, even going undercover with false online profiles to communicate with suspects and gather private information, according to an internal Justice Department document that surfaced in a lawsuit.

The document shows that U.S. agents are logging on surreptitiously to exchange messages with suspects, identify a target's friends or relatives and browse private information such as postings, personal photographs and video clips.

Among the purposes: Investigators can check suspects' alibis by comparing stories told to police with tweets sent at the same time about their whereabouts. Online photos from a suspicious spending spree - people posing with jewelry, guns or fancy cars - can link suspects or their friends to crime.

The Justice document also reminds government attorneys taking cases to trial that the public sections of social networks are a "valuable source" of information on defense witnesses. "Knowledge is power," says the paper. "Research all witnesses on social networking sites."

The Electronic Frontier Foundation, a San Francisco-based civil liberties group, obtained the 33-page document when it sued the Justice Department and five other agencies in federal court.

A decade ago, agents kept watch over AOL and MSN chat rooms to nab sexual predators. But those text-only chat services are old-school compared with today's social media, which contain a potential treasure trove of evidence.

The document, part of a presentation given in August by cybercrime officials, describes the value of Facebook, Twitter, MySpace, LinkedIn and other services to investigators. It does not describe in detail the boundaries for using them.

"It doesn't really discuss any mechanisms for accountability or ensuring that government agents use those tools responsibly," said Marcia Hoffman, a senior attorney with the Electronic Frontier Foundation, which sued to force the government to disclose its policies for using social networking.
Turner P. Graham can’t believe how awesome my man Iken B. Badd was in court today. He ripped that a new one. ANT’s outside counsel rule! They are way cooler than those stiffs where I used to work. I think I am going to work for them. They win more cases too. If I do, why don’t you get your ole man, the Widget King, to bring his business to me? I’m the best, my boss told me so himself after I got the 3d DUI dismissed. I’ll do the big guy a good job, won’t churn his files and win ‘em all!. I’ve been hanging with Badd so much that I am now a real expert in whatcha call this here products liability stuff.

Today:

Will do. Glad to hear you’re such a pro now.
Rule 7.1: Communications Concerning A Lawyer’s Services

A lawyer shall not make false, misleading, deceptive or unfair communications about the lawyer or lawyer’s services.

- Material misrepresentation of fact or law
- Unjustified expectation about results the lawyer can achieve
- Compare the lawyer’s services with other lawyer’s services
- Contains a testimonial
Rule 7.2: Advertising

(b) A lawyer is responsible for the content of any advertisement or solicitation placed or disseminated by the lawyer… A copy of every advertisement or communication subject to this Rule … shall be filed with the Commission on Lawyer Conduct within ten days after the advertisement is first published … or otherwise disseminated to the public…. A copy of every advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was disseminated
Rule 7.2: Advertising

(f) A lawyer shall not make statements in advertisements or written communications which are merely self laudatory or which describe or characterize the quality of the lawyer’s services...
A lawyer shall not by in person, live telephone or real time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer.
Rule 7.4: Communication of Fields of Practice and Specialization

(b) A lawyer who is not certified as a specialist but who concentrates in, limits his or her practice to, or wishes to announce a willingness to accept cases in a particular field may so advertise or publicly state .... To avoid confusing or misleading the public ...., any such advertisement or statements shall be strictly factual and shall not contain any form of the words “certified,” “specialist,” “expert,” or “authority.”
Shameless Plug
Turner P. Graham is chillin’ like a villain….

Today:
Mike has answered questions about Turner. Click here to view results.

Comment:
Hey, dude, I’ve decided to stay in-house but been thinking about what you said the other night down in Five Points about maybe buying a house for you and the little lady. You know, I’ve been cross-training in real estate. Went to a closing and everything. I wouldn’t worry too much about that funky tax lien thing. Chances are, the feds will never do anything about it. Go ahead and do the deal, y’all need a better pad than the couch in your ma-in-law’s basement.
Rule 1.2: Scope of Representation

Annotation:

“A client-attorney relationship may arise in a variety of situations even without an engagement agreement and even if the attorney fails to recognize the existence of the relationship.”

“A client-attorney relationship may arise from a discussion with a potential client regarding a matter, even when there is no formal engagement agreement.”
Turner P. Graham thinks the Big Boss is the coolest thing this side of an Icee. He showed me some emails he sent to his assistant. He said she had bodacious ta-ta’s (she does!) and he knew a place where they could “get some work done.” Oh yeah. I would like to work with her! She would probably go but she is married. Any way, he says that is one of perks of being the boss, getting the pick of the women. Power is everything. Can’t wait to be the GC.

Dude!!!! When you going to introduce me?
Textual Harassment

Texts, emails, chats, are easily discoverable, making them excellent plaintiff’s evidence in court.

When an employer enables a web 2.0 application, courts will likely treat that application as a part of the workplace. This means employers’ duty to prevent harassment extends to digital media.
**Textual Harassment in the News**

- “Former Waitress Sues Hooters” where a manager allegedly sent a waitress sexually charged texts asking her to date him. After she refused to go on a date, the manager cut the plaintiff’s work schedule.

- “CMU to pay $450,000 to avoid sexual lawsuit” where plaintiff student soccer players alleged their college soccer coach at Central Michigan University sent them sexually explicit texts.

- Chevron paid $2.2 million to settle sexual harassment charges based on an e-mail about “25 reasons why beer is better than Women.”
Rule 1.13(b) Organization As Client

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law. Rule 1.7 addresses conflicts of current clients, including joint representation and when the institution is the client.
Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) commit a criminal act involving moral turpitude;

(d) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(e) engage in conduct that is prejudicial to the administration of justice;

(f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
Annotated South Carolina Rules of Professional Conduct
2010 Edition

by

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keep you up to date at
http://www.scbar.org/annotatedscrpe
Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

A partner in a law firm, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm confirm to the Rules of Professional Conduct.
In the Matter of an Anonymous Member of the South Carolina Bar, 346 177, 552 S.E.2d 10 (2001)

“If an attorney fails to satisfy the supervisory requirements of Rule 5.1 by actions or omissions, that attorney violates the Rules of Professional Conduct and can be sanctioned completely separate from any sanction issued for the underlying actions or omissions of the supervised attorney.”

“A senior attorney in a large firm has an even greater responsibility than an attorney in a smaller practice to enact formal office procedures to ensure compliance with the Rules of Professional Conduct.”

“The rule prevents those attorneys who have the most influence over the atmosphere of the firm from turning a blind eye to the behavior of the firm’s attorneys.”
What drives HR crazy???

✓ Although they may not realize it, almost all businesses have an unofficial network presence. Employees, including attorneys, create social network profiles that reference the employees, contain firm related pictures or content, and perhaps even discuss the firm’s activities and clients.

✓ Unofficial web posts and pages help create and may dominate the online profile for a company. They may also create risks for the company and its reputation.

✓ “If you have not evaluated your [company’s] electronic presence recently, try running the firm name through Google as well as through the most common social network sites. You may be surprised—or disappointed—to learn that a person visiting these very popular sites will receive a very different impression of your firm than you might intend. This includes: … photos of lawyers or staff in embarrassing situations, …or favorite celebrities in lieu of lawyer or staff portraits.”

[Downey, “Law Firm Online Activity Policy.”]
More of what drives HR crazy!!!

✓ “Lawyers and staff may have posted pictures of firm events or contact lists that include client contacts. They may also be answering law-related questions, making representations about their expertise, or exchanging testimonials, without regard for the ethical rules that govern such activities.”

✓ “Recognizing the risk of such online activities, some firms naturally attempt to ban all unauthorized internet postings about the firm. These efforts generally fail.”

✓ “A firm would likely be better served by educating its lawyers and staff about its limitations on and the risks of online activity…. The first step is generally to adopt and seek compliance with a firm social networking policy.”
Why lawyers **SHOULD** use the social networking sites

- Social media provides a rich source of information about clients, potential clients, opposing counsel, witnesses and other parties.

- Social media is here to stay. Ignoring social media will not make it go away. Get used to it.

- It is a good medium to share information, find information, and to market yourself or your firm.

- Social media will soon become the most effective way of building your professional career and creating a personal brand.
Why lawyers **SHOULD NOT** use the social networking sites

- Employers report a 70% increase in spam and malware attacks received via social networking sites in 2009.

- Facebook poses the biggest security risk because it has the most subscribers.

- LinkedIn reveals details about organizations, which makes the site especially dangerous. Hackers with access to corporate directories can reverse-engineer names to find e-mail addresses of potential victims.

- Employees that frequent social networking sites increase the chance that spam will damage the employer’s network.

- Anything you say can and will be posted on the internet.

- Can’t rely on presumed “personal” sites or assurances of confidentiality.

- Content never disappears entirely once it’s been posted.
so what was the technicality? I am confused.

no, its not a joke. if the court was going to overturn the scores on their own they would have done it before the results were first announced. it took some effort.

is that a joke? what did you have to work on to "make this happen?"

surely you are not implying that i passed based on a technicality and not because of my excellent legal reasoning skills. seriously though, we worked really hard last week to make this happen and i'm just relieved that its all over and i can move on!

sounds like the Supreme Court is covering for somebody...
So you’re already doing it anyway...

- You are responsible for what you post.
- What you publish on personal online sites should never be attributed to the firm and should not appear to be endorsed by or originated from the firm.
- Never be false or misleading in your online credentials. Maintain complete accuracy in online bios and ensure there is no embellishment. E.g., “Harvard trained.”
- Do not use the words “expert,” “specialized,” “certified” or “authority,” unless you have a specialty credential through the bar.
- Credit appropriately. Identify copyrighted or borrowed material with citations and links. Give credit to the original source or author.
- Avoid personal attacks, online fights, and hostile communications.
- Never disclose proprietary or confidential information.
- Respect the privacy of your partners and the opinions of others.
- Remember: Content never disappears entirely once it’s been posted.

[Jaffe Associates, Inc. draft “Social Media and Social Networking Policies and Procedures.”]
Social Media Risks For The Client: Your Employer

- Discrimination
- Privacy issues when monitoring/searching
- Retaliation
- Harassment
- Defamation (libel)
- Unfair Labor Practice under NLRA for restrictive policy
- Constitutional issues for public employers
- FTC guidelines
- Trade secrets/confidentiality
- Child pornography
- Copyright
- Release of embarrassing information
Reducing The Social Media Risks For The Client: Your Employer

- Know your objectives/culture
- Update existing policies (e.g., code of conduct and discipline)
- Adopt and enforce a social networking policy
- Include social networking prohibitions in contracts
- Train everybody to understand the risks that social networking creates for your business
- Do NOT create any expectation of privacy with company electronic devices/networks
- Do not use SNS as a screening tool
- Get applicants’ consent to use SNS to screen
- Avoid adverse action for concerted activities
- Discourage or prohibit supervisors from social networking with subordinates
- Monitor or screen only for job-related purposes
Guidance for You As An Employee

- Protect your employer’s brand, image, and reputation
- Protect your image and reputation
- Remember your obligations to co-workers
- Do not state false or misleading information about any person or business
- Avoid profane, obscene, or abusive language or content
- Do not post any information that could hurt someone’s career or business, unless you are personally prepared to defend your comments in a lawsuit or legal proceeding
- Do not post anything that you would not want your mother, children, spouse, pastor, or prospective employers to see
- Internet postings and content may last forever (or a very long time)
Questions?

If you have any, don’t ask me.
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