Can Lawyers Tweet about Their Work?
Confidentiality & Legal Professionalism in the Age of Social Media

Jason Schultz (Moderator)
David Lat
Ben Sheffner
John Steele

Conference:
Social Networks: Friend or Foes?
Confronting Online Legal and Ethical Issues in the Age of Social Networking

October 23, 2009
The Bancroft Hotel
Berkeley, California

The fifth panel at today's conference—*Can Lawyers Tweet about Their Work? Confidentiality & Legal Professionalism in the Age of Social Media*—will address the application of legal ethics rules and the law governing lawyers to the world of social media.

The speakers will be:

- **Jason Schultz** - Director, Samuelson Law, Technology & Public Policy Clinic; Assistant Clinical Professor of Law, UC Berkeley
- **David Lat** - Managing Editor, AbovetheLaw.com
- **Ben Sheffner** - Production Counsel, NBC Universal Television Group; Editor, Copyrights & Campaigns blog
- **John Steele** - Attorney at Law; Visiting Professor, Indiana University (Maurer School of Law)

To organize the panel, we will examine how four norms of legal ethics are being pressured by the social norms now being developed in online social networks.

Norm 1: Confidentiality

Lawyers have a fiduciary duty to protect client confidences. The duty is embodied in Rule 1.6 of the ABA Model Rules of Professional Conduct, and was previously found in Canon 37 of the ABA Canons. In the California scheme, client confidences were originally protected solely in the State Bar Act (California Business & Professions Code §6068(e)) but today there is also an ethics rule—California Rule of Professional Conduct 3-100—that articulates the same rule.

The duty of confidentiality is far broader than one might imagine—indeed, broader than many lawyers realize. Depending upon the rule in place in any given jurisdiction, confidences may include all information learned during the course of the attorney client relationship; all information relating to the representation; or all information relating to the representation which might be embarrassing or detrimental to the client if disclosed.

So, it's not correct to say that if information is known by members of the public it cannot be a client confidence. It's not correct to say that information counts as a client confidence only if the information came from the client; or only if it's the client's propriety and undisclosed knowledge; or only if it's protected by the attorney client privilege.

The extraordinary breadth of what counts as a client confidence can sometimes lead to conceptual confusion. If almost all information relating to the representation is confidential, how can lawyers go about representing the client? The concept of client consent—express or implied—ameliorates most of that conceptual confusion. If the client approves of the lawyer's disclosure, the disclosure is no breach of duty. In the normal course of an attorney client representation, the client at least impliedly authorizes a lot of disclosure.

And yet, even if the duty of confidentiality is broad, we know that lawyers can be chatty. They love to discuss interesting cases they're working on, love to swap wars stories, and love to pad their professional credentials by revealing their prestigious clients and important matters. Many of those disclosures have traditionally been made in the course of private, oral conversations among professional peers. While there are some famous examples where lawyers' loose comments proved costly, lawyers spoke freely—if too freely—about their clients' matters.

Social networking sites have changed that. There is a vastly diminished expectation of privacy in social networking, and once words are posted on the internet they may be public forever—as the saying goes, Google's memory is infinite. As just one example, in August 2009, the Illinois Attorney Registration and Disciplinary Commission recommended an investigation into the behavior of a public defender who disclosed client information on her blog

Norm 2
Interacting with Third Parties

The ethics rules regulate how lawyers interact with third parties. Rules 4.1-4.3 basically require the lawyers to refrain from dishonesty, to refrain from contacting persons represented by counsel on a matter, and to avoid confusion about the lawyer's role and who the lawyer represents.

The internet makes third party communications much faster, much easier, and potentially more misleading. Consider, for example, a litigator who maintains a blog or Facebook page and who is contacted by the opposing party. May the lawyer respond? Or consider the lawyer hunting for information about the opponent. May the lawyer make a "friend request"? Must the friend request disclose the lawyer's role and the identity of the lawyer's client? Can the lawyer ask someone else to "friend" the opponent or witness?

Recently, a local ethics committee was asked about the ethics of "friending" witnesses on Facebook, and the committee's opinion reasserted traditional norms. The Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02 (March 2009).

Norm 3
Avoiding Deceit and Lying

The law governing lawyers has struggled with how to deal with lawyers' non-fraudulent dishonesty. Rule 8.4 forbids lawyers from engaging in deceitful or dishonest conduct. But in some situations the courts and disciplinary authorities appear to approve, or at least tolerate, some deceptions. For example, lawyers enforcing civil rights laws frequently concoct false personas so that "testers" can see

if apartment buildings are refusing to lease apartments to people of color. Intellectual property lawyers use ruses to ferret out the source of counterfeit or gray market goods. Those deceits are often—but not always—permitted.[1]

Internet norms include all sorts of potentially misleading if not outright deceitful conduct. Users may utilize anonymous names, false names (e.g., "NewYorker498" used by a California lawyer), sock puppets, and false personas of all types. On some sites, it's expected that the people posting there "flaming" (i.e., saying things they don't believe and making false claims just to provoke people).

Norm 4
Not "Trying Your Case in the Press"

Canon 20 forbid lawyers from engaging in newspaper discussions of pending litigation. That rule was substantially eroded, but even today Rule 3.6 forbids lawyers from engaging in public discussion that will likely prejudice an adjudicative proceeding. Those rules reflected a norm that social disputes are supposed to be moved into the legal system and then resolved internally, within that system.

But today we know that the court of public opinion may matter more than the court where the case is filed. To take one example, military lawyers defending Guantanamo detainees sometimes concluded that media campaigns would be more effective than purely legal strategies. So they took their cases to the press and to the internet. Without question, that strategy was in tension with historical ethical norms. It also seems unquestioned that we will see more of that strategy.

---

[1] See *Apple Corps Ltd. v. International Collectors Society*, 15 F.Supp.2d 456, 475-76 (D.N.J. 1998) (offering approval of some dissembling); *Gidatex v. Campaniello Imports, Ltd*., 82 F.Supp.2d 119 (D.N.J. 1998) (approving limited deception for purposes of uncovering wrongdoing). *But see, Monsanto Company v. Aetna Casualty & Surety Co*., A.2d 1013 (Del. Sup. 1990) (condemning investigator's use of false identities when interviewing former employees of plaintiff); *In re Conduct of Gatti*, 330 Or. 517, 8 P.3d 966 (Or. 2000) (disciplining attorney for numerous acts, including false statements about identity and purpose during attorney's factual investigation efforts). More generally, see, Isbell & Falvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation under the Model Rules of Professional Conduct*, 8 Geo. J. Legal Ethics 791 (1995).

Norm 5
Not Criticizing the Court

Ethics rules have traditionally forbidden lawyers to openly criticize the courts and judges except in the traditional ways. That is, a lawyer is free to say "the president is a dishonest bum," but risks discipline if she says the same about a sitting judge. Scholars of First Amendment jurisprudence have long puzzled over these speech restrictions, but there is no doubt that the restrictions retain some bite to them.

We have seen several cases where lawyers have criticized judges, opponents, jurors—you name it—on listservs, blogs, Facebook pages, etc. Judges don't like it.