

Navigating the professional landmines of social media

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Social networking and Web 2.0 have become the “standard” in business to business professional networking. They also have become the norm in the way in which we stay connected to friends and family.

LinkedIn has more than 50 million registered users across all industries; all Fortune 500 companies maintain individual profiles at the executive/director level; and it is viewed as the premier connection

resource for U.S. professionals above other Web 2.0 sites.

Facebook is even more widely used. With more than 80 million registered users worldwide, Facebook has established itself as the way to stay connected to personal contacts.

Other social media, such as YouTube and Twitter, also have become part of our daily

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lives. For attorneys, sites like Legal OnRamp and Martindale-Hubbell Connected are specifically designed to facilitate communication between in-house and outside counsel.

While social media influences the way in which we identify business opportunities, build a network, optimize our online presence, and generally stay connected to one another, it poses unique challenges for in-house attorneys and their corporate constituents.

The following are some “dos and don’ts” for you and your company to keep in mind when venturing into the world of social media.

DO be clear about your identity and role in a matter or transaction.

ABA Model Rule 8.4(a) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. In March 2009, the Philadelphia Bar Association Professional Guidance Committee issued an advisory opinion finding that Rule 8.4(a) would be violated if an attorney hired a third party to become a Facebook “friend” of a potential non-party witness so that the attorney could obtain information about the witness for use at trial.

DON'T disclose any confidential or proprietary information.

Sites like Legal OnRamp and Martindale-

Hubbell Connected provide in-house counsel with the opportunity to ask questions and pose hypothetical problems to outside counsel. If the questions or hypotheticals are not crafted carefully, or if the conversations get too specific, they could inadvertently reveal sensitive information about your company.

DO limit the group of people who can view your Facebook page and the number of recipients to whom your Twitter communications are sent.

The use of Facebook and other sites for personal purposes can be problematic professionally. A good rule of thumb is to avoid posting anything that you don't want your colleagues or adversaries to see. Also remember that any of your “friends” on Facebook can post (potentially embarrassing) information about you. Therefore, it is a good idea to make sure your privacy settings are set properly so that only your “friends” have access to your posts.

DON'T violate copyright or other intellectual property laws.

One of the key benefits of social media is how easy it is to access and share information with large audiences. Be careful, though, when referring to or attaching other materials that you do not violate any copyright or other intellectual property laws.

DO consider developing a policy for employees regarding social media sites.

By now it is standard practice for companies to have e-mail and Internet usage policies. Although these policies can

be the starting point for social media policies, they often do not cover all the issues raised by the use of social media — a relatively new technology — by employees.

Indeed, recent lawsuits over the use of social media have highlighted the need for more direction and clarity. When dealing with non-competition and non-solicitation provisions among executives or contract employees, questions have arisen as to whether an employee's online contacts are the property of the company in the same way a customer list or Rolodex assembled on company time and using company resources is, or whether those contacts are personal to the employee because they were somehow created and continue to exist in cyberspace.

Barriers are likewise blurred by colleagues who "friend" each other on more casual social networking sites. Does the organization bear some responsibility if inappropriate conduct occurs within the confines of those sites? Is the company liable for the publication of questionable content? Does it matter whether the company has a policy that prohibits or allows the use of social media on company time?

Alternatively, who owns the content or web address of employees who blog in an effort to generate business for the company?

There are no ready answers to these questions, which are just now beginning to emerge.

For some industries or positions, the use of social media might be appropriate for business development, but for others, an outright ban may be appropriate because the work force has no business reason to use social media at work or while using the company networks, facilities or equipment.

DON'T exaggerate your experience or qualifications.

ABA Model Rule 7.1 prohibits a lawyer

from making a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as whole not materially misleading.

Although this rule is particularly relevant to the use of social media sites for marketing purposes, it is also important to keep in mind when preparing your profile on LinkedIn or other professional networks.

DO make sure that you and your company are not involved in a matter before commenting on it.

Although this may sound obvious, don't post a message or comment on any matters that your company is involved in. ABA Model Rule 3.6 prohibits a lawyer from commenting on any investigation or litigation in which the lawyer is or has been involved and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter except in certain limited situations.

Perhaps less obvious, you also should not take a position in a blog that may be inconsistent with a position you (or your outside counsel) are taking in a pending matter.

DON'T comment negatively about the judiciary.

This issue has become a popular one on legal blogs due to a September 2009 New York Times article about a handful of lawyers who have gotten themselves in trouble for making derogatory comments about judges.

Although it is rarely a good idea to post negative comments about other members of the legal profession, ABA Model Rule 8.2 specifically prohibits a lawyer from making a

statement the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or a magistrate, or of a candidate for appointment to judicial or legal office.

DO include a disclaimer.

When blogging about legal issues, it often is a good idea to include a disclaimer stating that any posts made by attorneys do not constitute legal advice and do not create an attorney-client relationship. Although not foolproof, they can be helpful in establishing the parameters of your participation in a particular blog or website.

DON'T communicate with represented parties.

ABA Model Rule 4.2 provides that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyers has the consent of the other lawyer or is authorized by law to do so or by a court order."

Be careful not to unwittingly communicate with a represented party by "friending" them or adding them to your Twitter network.

DO use common sense.

It is important to remember that although the use of social media may be relatively new to lawyers, the same good old-fashioned rules of common sense apply.

Legal and ethical issues continue to evolve in the face of increased use of social media. As a result, in-house counsel should be aware of the potential for conflict created by the social web and institute policies that address ongoing use within their organization.

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