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Avoiding the Ethical Minefield of Social Media: Do You Know Who Your Friends Are?

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The use of social media has grown to the point that if Facebook were a country, it would be the third or fourth most populous in the world today.

According to the Socialnomics web site, Generation Y will outnumber baby boomers sometime this year, and 96 percent of Generation Y have already joined an online social network. With this explosion of online activity has come a new set of challenges for employers and attorneys alike.

While the media is filled with stories about how corporations are responding to social media issues, there are separate issues particular to attorneys that require additional attention for in-house lawyers. It is more important than ever to remember that while the Internet presents opportunity for business growth, it is also a minefield for ethical violations.

The root of the problem is that while Internet social networking can give the impression that communications are intimate and private, the reality is that posting on the web is more akin to publishing on the front page of *The New York Times*.

The Internet makes communications easy, and perhaps because of the ease, encourages informality. For many, the line between private and public has disappeared as people grow up tweeting or blogging about the minutiae of their lives. With this unprecedented ease of communications come several hazards.

Users do not always know who is reading the web content they are generating, who owns the communications, or even if they can retrieve or delete something that they want to take back. In-house lawyers, privy to highly confidential information and subject to ethical obligations of confidentiality and fidelity, must be extremely careful to avoid the mistakes that are all too easy to make in the world of Facebook, Twitter, and blogging.

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Less vigilant attorneys have seen problems arise in three general areas: the inadvertent disclosure of confidential information; the appearance of impropriety; and disciplinary or bar admission issues.

The first way that lawyers can quickly find themselves in hot water is by disclosing confidential client information in violation of rules of professional conduct. Lawyers who post confidential client information run the risk of violating those rules even when they try to disguise their client's identity.

In 2008, for example, an assistant public defender in Illinois blogged of her client:

> *This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.*

To "conceal" the client's identity, the lawyer referred to him by his jail identification number. Unfortunately for the attorney, it was possible to determine the identity of the client from that number using the web.

The attorney, who also posted confidential information about other clients, was fired when her supervisor found out about the postings, and currently faces a possible suspension of her license. In-house attorneys are just as likely to learn interesting, possibly salacious,

information that is intended to be kept in confidence, and they must resist the temptation to say too much in their online communications.

Online social networking is also a bad conduit for client communications, and may be even more problematic in the case of in-house attorneys who are likely to have friendly relationships with co-workers who are also clients for the purposes of certain communications. Even if the attorney and client are careful not to post confidential information where other people in the social network can see it, the mere act of using sites like Facebook or LinkedIn to communicate with clients can compromise the attorney-client privilege.

On many of these sites, the communications do not belong to the sender or the receiver, but to the web site, and cannot be deleted. When an attorney communicates with a client through a LinkedIn message, for example, LinkedIn (and its employees) has access to and rights over communication. Under these circumstances, the communication was arguably never confidential, and therefore, unprotected by the attorney-client privilege.

Just as online communications to or about clients should be considered with great care, so too should communications between attorneys and other lawyers or even judges.

It is no surprise that lawyers and judges would include other lawyers and judges in their online social networks. This innocuous "friending" between lawyers and judges, however, can give the appearance of impropriety.

For example, a state district court judge in North Carolina received a public reprimand by that state's Judicial Standards Commission because he and one of the attorneys from a matter before him were Facebook "friends." Via posts on their respective pages, the judge and the attorney exchanged messages about the pending case that were otherwise impermissible ex parte communications. The informality of the online social networking lowered their guard against ex parte communications.

Finally, in-house counsel should be aware that failing to exercise discretion when posting information online can result in disciplinary actions and affect their bar membership. There have been a number of well-publicized cases over the past few years of attorneys being reprimanded for exercising poor judgment when posting information online.

Some of these cases have involved lawyers who did not understand that their communications were subject to ethical scrutiny even though they were not made in a professional capacity.

For example, a lawyer in San Diego blogged about a criminal trial for which he was serving as a juror. The defendant's conviction was set aside because of the lawyer's blog, and the lawyer received a 45-day suspension of his license and lost his job.

In another instance, a lawyer in Oregon posed on Classmates.com as a high school teacher, posting that he had had sexual relations with female students. Though the lawyer argued that it was just a practical joke and outside of his professional conduct, the Oregon Supreme Court held that the dishonest conduct reflected adversely on his fitness to practice law and his trustworthiness and integrity to represent clients' legal interests.

Lawyers also cross the line by trying to use social media in ways that would not be permitted offline.

Last year, for example, the Philadelphia Bar Association Professional Guidance Committee told a Pennsylvania lawyer that using a third person to gain access to a third-party witness's Facebook and MySpace pages would violate more than one of the Pennsylvania Rules of Professional Conduct.

The communication would be deceptive because it would omit a "highly material" fact — that the third-person seeking to friend the witness did so on behalf of the lawyer. The committee also concluded that the intended communication would violate Rule 4.1's prohibition on making false statements of material fact or law to a third person, and Rule 8.4(a)'s prohibition on lawyers knowingly assisting or inducing another to violate the Rules of Professional Conduct.

The takeaway is that lawyers need to resist the urge to use the anonymity of the Internet and to use social networking sites as a source of free discovery. In an offline context, what the lawyer sought to do would have clearly been unethical. The fact that the deception would have taken place online does not change that fact.

Ultimately, in-house counsel, like all attorneys, must consider how they can most effectively separate their private and professional communications.

Attorneys who use social networking as a place to share personal information like vacation photographs should consider setting up two social networking accounts, and use one for friends and the other for professional contacts. Attorneys can also use different social media for different purposes, for example, having a Facebook account for friends, and a Twitter account or blog for clients and professional contacts who want to "follow" the attorney.

Ultimately, though, attorneys should always exercise a conservative approach to posting information online, and as a rule of thumb: when in doubt, leave it out.

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