

Social media: pitfalls to avoid



Although social media sites offer lawyers many interesting new ways to interact with people in both personal and work spheres, there are some risks associated with using them. Some of these risks are obvious, some are not.

Before they venture into social networking, lawyers should consider Section 5.5 of the Law Society's Practice Management Guideline on Technology ("Technology Guideline"). It states, "Lawyers should have a reasonable understanding of the technologies used in their practice or should have access to someone who has such understanding."

This article will help you understand some of the dangers inherent in the use of social networking tools, and help you more safely exploit the great marketing opportunities they offer.

Don't talk about clients or their matters

This should be an obvious one, as it is one of the most basic tenets of the lawyer/client relationship. Blurting out something about a client in any of the social networking tools, in particular anything sensitive or confidential, is a bigger blunder than the proverbial comment on an elevator, as hundreds or even thousands of people can potentially access the information. Keep in mind Rule 2.03 of the Rules of Professional Conduct which states, "Lawyers using electronic means of communications shall ensure that they comply with the legal requirements of confidentiality or privilege." This rule clearly applies to social networking tools.

It is tempting, and potentially very helpful, to toss out a question or seek strategic advice on one of the social networking tools that connect you with other lawyers. But remember, even generic

questions or comments about a matter you are handling could be read and recognized by someone on the other side.

Don't talk to clients about their matters

Some of the social networking tools have no privacy settings (all content and comments are accessible to everyone), some have limited privacy settings, and some have privacy settings that are so complex you are never really sure who can see the content you post. For these reasons, it is probably best to avoid using social networking tools to communicate or post anything about a specific matter you are handling for a client, especially if the information is sensitive or confidential. At the more social end of things, confirming a lunch date is probably not a problem – unless the fact you act for the client is confidential. And in that case you shouldn't even be "friends" with the client.

Know and respect the marketing-related Rules of Professional Conduct

Advertising by lawyers in any form of electronic media, including social media tools, is governed by the following Rules of Professional Conduct:

- Rule 3.01 Making Legal Services Available
- Rule 3.02 Marketing, and
- Rule 3.03 Advertising Nature of Practice.

Section 5.8.2 of the Technology Guideline states that, “Lawyers making representations in generally accessible electronic media should include the name, law firm mailing address, licensed jurisdiction of practice, and e-mail address of at least one lawyer responsible for the communication.” Is this information included on your website, blog, or Facebook page? What about your Twitter bio? You obviously can’t include it in a tweet.

You are free to offer your services via social networking tools, but keep in mind the restrictions on contacting potential clients who, for example, are recovering or are vulnerable as a result of a traumatic experience (Rule 3.01(2) of the Rules of Professional Conduct). You are also not supposed to distribute electronic advertisements directly and indiscriminately to large numbers of people. It is clear how this applies to email, but less clear how it might apply to tools such as Twitter or an RSS feed which can reach large numbers of people.

The Technology Guideline also states, “Where a lawyer is entitled to practise in more than one jurisdiction, and these jurisdictions are identified in representations on electronic media, the lawyer shall ensure that the advertisement complies with the rules governing legal advertising in each of those jurisdictions.”

Avoid the unauthorized practice of law (UPL)

Lawyers need to appreciate that any content they post on the Internet can easily be accessed from anywhere in the world. Ontario lawyers practising law in other jurisdictions by providing legal services on the Internet should respect and uphold the law of the other jurisdiction, and not engage in the unauthorized practice of law. Further to the point made in the previous section, if you include the jurisdiction in which you are licensed to practise in your online content and posts, your clients will understand where you can and can’t practise.

Avoid conflicts of interest

The very nature of social media make you more vulnerable to conflict of interest situations. Much of the information posted on social networking sites is public, and people frequently use an email or online name that is shortened or different from their usual name when communicating online. This could also occur when someone with an ulterior motive contacts a lawyer online. To avoid conflicts of interest when using social networking tools, lawyers should take reasonable steps to determine the actual identity of people they are dealing with and be very careful about what information they share.

Don’t give legal advice aka avoid phantom clients

There is a huge difference between providing legal information and giving legal advice.

Providing legal information is fine, and indeed is helpful when you are looking to market yourself. However, you should be very careful never to give legal advice online. Unfortunately, the information/advice distinction can become quite blurred when a lawyer and non-lawyer communicate using social networking tools, especially when the lawyer is providing answers to specific questions posed by a client. A lawyer-client relationship can be formed with very little formality. To avoid this danger, be cautious about saying anything online that might be construed as legal advice. Include a disclaimer on your blog and within any information you post online or on a social networking site.

And remember, in Ontario the onus is on the lawyer who seeks to limit the scope of the retainer, and if there is an ambiguity or doubt, it will generally be resolved in favour of the client. Having a record of what was said or not said in a social networking exchange could help you defend yourself against a claim that you were in a lawyer/client relationship with someone you communicated with using a social networking tool.

Protect your identity

One of the hidden risks of social networking is identity theft. It is a bigger risk than you might think. Your Facebook, LinkedIn or other social networking site profiles can include information such as your birth date, where you went to university, your mother’s maiden name, or where you articulated and when. In the pre-Internet era only your family, close friends and co-workers might have been privy to this information. Social networking sites make it freely accessible to anyone.



Someone intent on stealing your identity could visit social networking sites and gather information about you. They could then use this information to steal your identity. Do you recognize the personal facts in the previous paragraph? They are the answers to the standard challenge questions that banks, credit card companies and others use to verify your identity.

Having your identity stolen can have severe consequences. It’s not only stressful to have to restore your true identity, but also takes time and money and can leave you – even temporarily – with a bad credit rating. This is not only a personal issue; situations in which fraudsters have assumed a lawyer’s professional identity have occurred in Ontario.

The lesson is clear: Don’t help a fraudster steal your identity. Be careful about how much personal and professional information you post in social networking site profiles, especially where that information might be used to verify or establish your identity.

Be polite and professional

With search tools such as Google, the vast Internet becomes a small town. Everyone can get to know everyone, and what goes

around comes around. With a few clicks your existing and potential clients can easily find almost everything that you ever said or posted on the Internet. It is not comforting that any text, pictures or video posted on the web will usually remain online and accessible for a very long time. It can be extremely difficult if not impossible to delete information once it is posted online.

For this reason you want to be civil and professional in all of your online postings. Use proper spelling and grammar. Avoid using short forms for words. Exercise good manners and be polite. A good rule of thumb: Don't say anything you wouldn't say in person or that you would not want your mother to read on the front page of the Globe and Mail tomorrow morning.

Another good rule of thumb: Count to ten before you hit "post." Every lawyer has dictated an overly aggressive letter in a moment of anger or frustration, only to tone it down later with the benefit of some time to cool off. The instantaneous nature of social networking doesn't give you a cooling off period.

And never ever start or continue a "flame war" – an ongoing sequence of hostile messages between two or more people. By their nature, flame wars attract a lot of attention and are referenced on many different websites, making it even more likely a client will find them.



Making the wrong friends

In the world of social networking, people you have never met will want to be your "friend." It's nice to be popular, but there are differences between real friends and virtual friends.

Social networking tools have the ability to create networks of contacts far larger than most of us had in the past. Knowing more people is great when it comes to marketing, but as the degrees of separation increase from you, two connected friends will know less and less about each other, and the potential for a referral also becomes less likely. Many people have friends in their social networks about whom they know little or nothing and who they have never met (or are unlikely to meet).

Think strategically about whom you want to be friends with and be careful not to be friends with someone who could embarrass you. For example, if you are a litigator, you probably don't want to be friends with any judges or experts, as it wouldn't look good to your opposing counsel. Ethics panels in the United States have said it is not proper for lawyers to become friends with someone to dig up information about them for use in a litigation matter.

To decide whether to accept an invitation to be a friend, you need to consider the nature and purpose of the particular social network. It may be fine to cast a wider net on some networks. However, on more professional or personal networks, you will want to be more selective. Consider these general approaches:

- Invites from people you just don't know: Yes on Twitter; no on Facebook or LinkedIn.
- Invites from people you know by name only: Yes on Twitter and LinkedIn; no on Facebook.

- Invites from people you barely know: Yes on Twitter and LinkedIn; judgment call on Facebook.
- Invites from people you know but don't really like or respect (or want to be associated with): These can be awkward, but it is best to say no thanks or just ignore them.

Don't blur your personal and professional lives

When MySpace and Facebook were almost entirely personal networking sites, it was easier to keep your personal and professional online presences separate. Now that many social networking tools are becoming connected and taking on more of a commercial aspect, it is becoming much harder to have separate online identities.

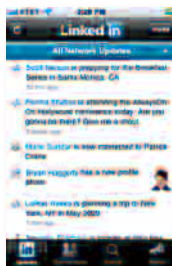


People are using different strategies to deal with this. Some refuse to have a personal presence on a Facebook or MySpace page, as they feel it is almost impossible to keep a private "personal" site. For the personal safety of family and loved ones, most criminal lawyers post nothing personal online. Others will lock everything up and only link to their close personal friends. And some are creating a personal site for only their closest friends, and a fan page for business or professional contacts.

On sites that are more commercial or professional, people will put up business information and be careful about how much personal information they post.

Be aware of employee social networking

In their personal lives, many of your firm's employees are probably active social media users. This can expose a firm to many of the risks identified above, especially if their profiles or the content they post clearly links your employees to your firm.



Staff should be reminded that the confidentiality of firm and client information must be protected at all times. Firms should educate their staff about the risks and create a written policy that clearly establishes guidelines governing the acceptable use of all firm technology resources, including social media tools.

Personal access to the Internet on firm computers is dealt with in many different ways. Some firms allow occasional and reasonable use of Internet resources. Other firms do not allow any personal use of these online resources. And some allow personal access for email and browsing, but block access to social media sites. Many firms are rethinking their policies, as they now want their lawyers or staff to use social media sites for marketing purposes.

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