

# Social Media and the Law



June 30, 2011

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# Speakers



**Anthony Diana** focuses his practice on commercial litigation, electronic discovery, internal and regulatory investigations and bankruptcies. As a co-leader of Mayer Brown's Electronic Discovery and Records Management group, Anthony has counseled large financial institutions, pharmaceutical companies and manufacturers on all aspects of the discovery and management of electronic information. Anthony is editor of the *Electronic Discovery Deskbook*, a treatise published by PLI, and co-author of six chapters in this treatise. He is also a member of the International Association of Privacy Professionals (IAPP) and has passed the IAPP certification exam for a certified information privacy professional (CIPP).



**Mike Lackey** serves on Mayer Brown's Partnership Board. Mike also co-leads the firm's Electronic Discovery and Records Management Practice, co-leads the Washington DC office litigation practice, and chairs the firm's Electronic Discovery Services Group. Mike's practice focuses on civil and criminal litigation and electronic discovery. He represents major companies and individuals in state and federal proceedings, including multi-district and class action litigation, government contract disputes, and appeals. Mike also has represented numerous defendants in grand jury proceedings and governmental investigations.



**John Nadolenco**, a partner in Mayer Brown's Los Angeles office, is an experienced civil litigator whose practice is focused on class-action defense, including defending consumer, securities and employment class actions. John also has experience advising clients on privacy issues and defending clients in privacy-related cases. For example, John is currently representing a well-known Internet search engine against allegations that it is a "consumer reporting agency" under the Fair Credit Reporting Act. And John is advising an application developer whether its practice of sharing information with advertisers violates any applicable laws or website terms of use. John served as co-editor of *The Social Media Revolution: A Legal Handbook*. Prepared by lawyers from across our litigation practices, this handbook provides insight into the risks this developing area presents to business, catalogs the present legal environment related to social media and offers suggestions for how to proceed.



# Litigation and Ethics in the Context of Social Media

## Agenda

- What Is Social Media?
- How Is Social Media Being Used in Litigation and Government Investigations?
- What Are the Ethical Issues Associated with the Use of Social Media?
- What Are the Likely Future Developments for Social Media and its Use in Litigation and Investigations?

# What is Social Media?

## Social Media

- Interactive
- Web-based
- Communications with many people

## Categories of Social Media

- Organization-sponsored, outwardly-facing, site
- Internal sites, blogs, work space
- Employees' personal sites

## Types of Social Media

- Facebook
- Twitter
- LinkedIn
- FourSquare
- Blogs

# What is Social Media?

## Facebook

- Boasts more than 650 million users
- 46% of online adults in the US reported visiting Facebook within the last 30 days
- Fortune 100 companies average 3.6 wall posts per week

## Twitter

- More than 75 million users
- 82% of Fortune 100 companies on Twitter “tweet” once per week or more

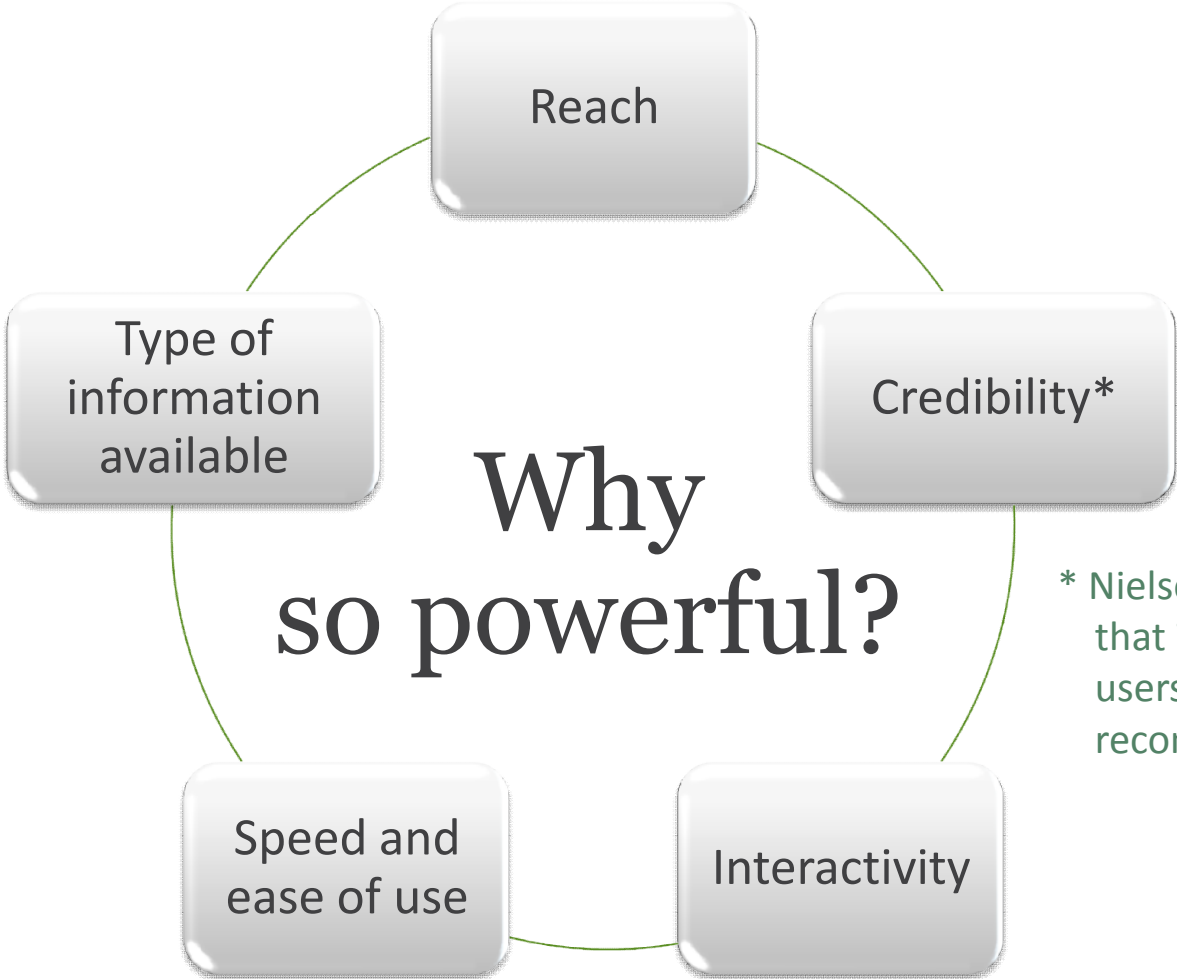
## YouTube

- 50% of Fortune 100 companies have a YouTube account
- Those companies average 10 video uploads per month

# What is Social Media?

- Proliferation of outlets:  
Facebook, Twitter, MySpace, LinkedIn,  
Legal OnRamp, YouTube, Avvo, Plaxo, Digg
- More than 70% of lawyers are members
- For millennials, email is now passé;  
some universities no longer giving email accounts

# What is Social Media?



\* Nielsen study found that 70% of internet users trust online recommendations

Digital word-of-mouth marketing  
is expected to top **\$3 billion**  
by 2013

# How Can Social Media Be Used In Litigation and Government Investigations?

## Sponsored External Sites

- Evidence of communications with customers
  - False Advertising Claims
  - Securities Fraud Claims
  - “Records” for regulatory purposes?
- Evidence relating to employees or potential employees
  - Employment-related litigation
  - Employment decisions
- Evidence of an organization’s self-image
  - Themes or narrative
  - Punitive damages



# How Can Social Media Be Used In Litigation and Government Investigations?

## Internal Sites

- Evidence of communications with and among employees
  - Employment litigation (discrimination, workers comp, hiring and firing decisions, etc.)
  - State of mind: intent, fraud, negligence, conspiracy
  - Admissions



# How Can Social Media Be Used In Litigation and Government Investigations?

## Personal Sites

- Evidence of time and place
  - Criminal cases
- Evidence of actions and extent of injuries
  - Divorce, Employment, Personal Injury
  - “Day in the Life” postings
- Evidence of communications
  - Litigation regarding employment issues, conspiracy claims
  - State of mind: intent, fraud, negligence
  - Admissions
- Evidence of bias
  - Jury selection



# The Power and Risks of Social Media

- Powerful tool
  - Creation and protection of brand
  - Reach clients and potential clients
- Investigative tool
  - Parties, witnesses, jurors
- But use with care
  - A legal “wild west” that can raise ethical issues



# What Are the Ethical Issues Associated with the Use of Social Media?

- ABA is considering promulgating guidance
- “Adopting” information about you or your firm on an independent web site that collects comments from peers and/or clients
  - Ethical issues?



# What Are the Ethical Issues Associated with the Use of Social Media?

- Ok, but be aware of issues like those discussed in SC Ethics Advisory Op. 09-10
  - The lawyer must monitor the “claimed” listing to make sure all comments are in conformity with the ethical rules (especially the rules for attorney advertising, testimonials, client endorsements that create unjustified expectations) and comparisons
- So be careful when linking to another site
- What if a third party posts something about you, but you have not adopted the listing?
- LinkedIn allows “recommendations,” issues?

# What Are the Ethical Issues Associated with the Use of Social Media?

- Be mindful of rules that place limitations on the use and content of testimonials and endorsements
- Be alert to exaggerations; Model Rules 4.1 (duty of candor) and 7.1 (restrictions on making false statements or providing false or misleading information)
- What about announcing on Facebook or LinkedIn that you just won a big jury trial or negotiated a big deal?

# What Are the Ethical Issues Associated with the Use of Social Media?

- Depending on the rules in your jurisdiction, this could require you to add a disclaimer along the lines of “results will vary in each case”
- A related issue, depending on the content of your blogs or tweets
  - Could they be governed by your state’s regulations on lawyer advertising?
  - If so, what are some of your obligations?

# What Are the Ethical Issues Associated with the Use of Social Media?

- Texas: Must file video postings seeking clients with the Advertising Review Committee
- Connecticut: Sending LinkedIn invitation that links to page describing law practice is an advertisement subject to all relevant rules
- LinkedIn allows users to provide professional information under “specialties.” Issues?



# What Are the Ethical Issues Associated with the Use of Social Media?

- Depending on the content it could run afoul of bar rules, such as Illinois Rule 7.4(c) and NY Rule 7.4(a), that prohibit attorneys from claiming they are “specialists” in a certain field
- Other risks in posting information about your matters?

# What Are the Ethical Issues Associated with the Use of Social Media?

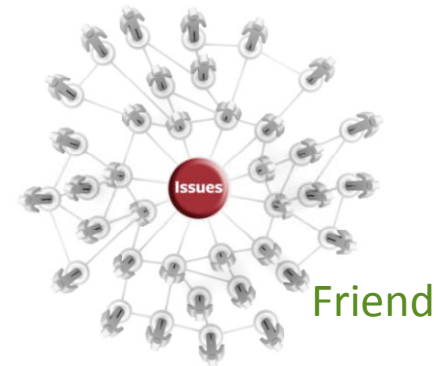
- Duty to protect client confidences, avoid waiver of attorney-client or other privileges
- One attorney, an assistant PD in Illinois, has already faced disciplinary action for publishing information on her blog about her cases
- Disparaging judges is a frequent theme (“Judge Clueless,” “Evil,” “Unfair Witch” by a Florida attorney)
  - Beware of ethical rules, such as Florida Rules 8.2 and 8.4, which prohibit attorneys from making false or reckless statements about the judiciary or taking actions that prejudice the administration of justice

# What Are the Ethical Issues Associated with the Use of Social Media?

- Lying to a Tribunal
- Model Rule 3.3 prohibits attorneys from making a false statement of fact to a tribunal
- ABA Journal reported on an attorney who sought a continuance because of the death of her father...
  - But the Judge checked the attorney's Facebook page and learned that during that time the attorney had a busy social schedule to attend to—not a funeral

# What Are the Ethical Issues Associated with the Use of Social Media?

- Friending Issues
- What are the issues with respect to whom an attorney can friend?
  - Judge before whom you regularly practice?



# What Are the Ethical Issues Associated with the Use of Social Media?

In most jurisdictions that have weighed in on the issue, a judge and attorney who appears before the judge can be “friends”

- NY Op. 08-176 (2009)
- SC Op. 17-2009 (2009)
- KY Op. JE-119 (2010)
- Ohio Op. 2010-7 (2010)

But NOT in Florida, Op. 2009-20

- A judge cannot lend the prestige of office to advance the private interests of others or convey an impression that some are in a special position of influence

# What Are the Ethical Issues Associated with the Use of Social Media?

- Other friending issues with judges?
- *Ex parte* communications, Model Rule 3.5(b)
- *In re Public Reprimand of Terry*, Inquiry No. 08-234 (2009)
- NC child custody case
  - Judge friended defense counsel and saw information posted by the defense counsel about the case:
    - Asking how he could prove the negative that his client did not have an affair
    - Noting that he had a wise judge (to which the judge responded that he had two very good parents to choose from)
    - Asking how long the trial would last

# What Are the Ethical Issues Associated with the Use of Social Media?

- Investigative issues
- How is it being used?
  - Employment background check?
  - Learn about opposing counsel? Judge?
  - Learn information about parties? Witnesses? Jurors?
- Front page article in *The Washington Post* about the increasing use of subpoenas to obtain information from social networking sites

# What Are the Ethical Issues Associated with the Use of Social Media?

- Deceptive friending issues
- Can you try to “friend” a party to get personal information about a party or witness from her social networking site?
  - If you ask her directly?
  - If you ask a third party, like a PI, to do it for you?



# What Are the Ethical Issues Associated with the Use of Social Media?

- Philadelphia Bar Op. 2009-02 (Mar. 2009)
  - Want to obtain information to impeach witness
  - Ask third party to try to friend third-party witness
  - Would not disclose relationship between third-party and counsel
- Multiple violations: deceptive communication, making a false statement to another.  
Model Rule 8.4(c), involving dishonest conduct
- Other possible issues?

# What Are the Ethical Issues Associated with the Use of Social Media?

- Improper contact with a represented party, *see, e.g.*, Model Rule 4.2
- San Diego County Bar Op. 2011-02 (May 24, 2011)
  - Plaintiffs’ lawyer sends “friend” request to high-ranking employees at client’s former employer
  - Looked at context of the request and the attorney’s motive in seeking to be “friends”
  - Analogous to asking, “plaintiff wants to have access to information you are sharing on your page”
  - It is “about the subject of the representation”

# What Are the Ethical Issues Associated with the Use of Social Media?

- Engaging in interactive conduct, including blogging, is a particularly risky area.
- For example, LinkedIn allows users to post and answer questions, bloggers and tweeters often address legal issues, and sites like “Counsel.net” allow users to seek answers to legal questions
- Issues?

# What Are the Ethical Issues Associated with the Use of Social Media?

- With whom are you communicating?
- What if it is with a party with an adverse interest to one of your clients (Model Rule 4.2) and you learn non-public information from the communication?

# What Are the Ethical Issues Associated with the Use of Social Media?

- You may have an obligation to keep that non-client information confidential if the person with whom you communicated is later found to have been a “prospective client” under the rules (Model Rule 1.18)
- Moreover, your possession of that confidential information could lead to your disqualification with respect to the representation of an existing client who would have an interest in knowing that information
- ABA Formal Op. 10-457 provides some helpful guidance
- Other issues?

# What Are the Ethical Issues Associated with the Use of Social Media?

- Depending on the circumstances, you could run afoul of rules prohibiting the unlicensed practice of law
- It could also expose you to malpractice liability
- Need good policies – things to consider
  - Keep it general
  - Restrict recipients
  - Use a disclaimer (“general informational purposes”)
  - Do not post confidential information...

# Social Media Summary

- Social media is a powerful tool
- Beware of advertising issues
- Keep confidences confidential
- Be careful with judicial relationships
- Avoid deception and act transparently



# What Are the Likely Future Developments for Social Media and its Use in Litigation/Investigations?

- Key source of evidence in all types of litigations and investigations
- Law will always be a step behind technology—so increased legal risk
- Technology developed to help with monitoring, compliance, preservation and production
- Privacy laws and information security, particularly when involving foreign data, becoming more important in litigations and investigations

# Questions?

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