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Social Media and the Law



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LITIGATION AND ETHICS IN THE CONTEXT OF SOCIAL MEDIA

- AGENDA

- What Is Social Media?
- How Can Social Media Be Used in Litigation and Government Investigations?
- How Can Social Media Impact a Litigation/Investigation Response Plan?
- 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/Investigations?

WHAT IS SOCIAL MEDIA?

- Social Media

- Interactive
- Web-based
- Communications with many people

- Categories of social media

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

- Types of social media

- Facebook
- Twitter
- LinkedIn
- Blogs

WHAT IS SOCIAL MEDIA?

- Facebook

- Boasts more than 500 million users
- 46% of online adults in the U.S. 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?

- Why so powerful?
 - Reach
 - Credibility
 - Nielsen study found that 70% of internet users trust online recommendations
 - Interactivity
 - Speed and ease of use
 - Type of information available
- Digital word-of-mouth marketing is expected to top \$3 billion by 2013

WHAT IS SOCIAL MEDIA?

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

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
 - Divorce
 - Employment
 - Evidence of communications
 - Employment litigation
 - State of mind: intent, fraud, negligence, conspiracy
 - Admissions
 - Evidence of bias
 - Jury Selection

HOW CAN SOCIAL MEDIA IMPACT A LITIGATION/INVESTIGATION RESPONSE PLAN?

- Controlling the information
 - Creation and Implementation of Social Media Policy
 - External-sponsored, internal and personal
 - Consistent with privacy concerns
 - Need input from Legal, Compliance, Information Security, Records Management, Human Resources, Marketing and Business

HOW CAN SOCIAL MEDIA IMPACT A LITIGATION/INVESTIGATION RESPONSE PLAN?

- Controlling the information
 - Creation and Implementation of Social Media Policy
 - Consistent with regulations
 - FINRA Guidance on Blogs and Social Networking Web Sites (Jan 2010)
 - Retention of electronic records related to a firm’s “business as such”
 - Supervision of interactive electronic communications
 - FDA call for Comments: Promotion of FDA-Regulated Medical Products Using the Internet and Social Media Tools (Sept 2009)
 - Accurate, balanced and timely information
 - Prevention of off-label comments
 - SEC Release No. 34-58288
 - Information on a company website is public information for Reg. FD purposes
 - Liability for third-party information

HOW CAN SOCIAL MEDIA IMPACT A LITIGATION/INVESTIGATION RESPONSE PLAN?

- Controlling the information
 - Enforcement and Monitoring
 - Effective procedures
 - Technology
 - Consequences for breach of policies

HOW CAN SOCIAL MEDIA IMPACT A LITIGATION/INVESTIGATION RESPONSE PLAN?

- Develop a legal hold plan that includes social media
 - Guidelines for when to preserve social media sites
 - Reasonably anticipate litigation/filing of complaint/investigation
 - Relevance
 - Evergreen holds (newly created modifications to sites)
 - Personal sites
 - Privacy concerns
 - Procedures for preserving social media sites
 - Snapshots and backups
 - Notice to third-party providers
 - Control over employees

HOW CAN SOCIAL MEDIA IMPACT A LITIGATION/INVESTIGATION RESPONSE PLAN?

- Collection and Production of Social Media
 - Challenges and burdens
 - Lack of legal guidance
 - Lack of technical support
 - Indexing
 - Searching
 - “forensic collections”
 - Difficulties in reviewing for relevance
 - Privacy issues with personal sites—limiting collection to relevant information

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

- “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?

“Adopting” a listing

- Ok, but beware 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 writing of things like testimonials, client endorsements that create unjustified expectations, and comparisons
- So be careful when linking to another site

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

“Recommendations”

- LinkedIn allows parties to “recommend” the work of a user
- What about asking a judge to recommend work while working as a law clerk?
- Asking a client to recommend your work?

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

Puffery

- Model Rule 4.1 (duty of candor) prohibits the making of a false statement of material fact to a third person
 - Beware of exaggerations regarding your biography, experience, etc.
- A related issue, depending on the content of your blogs or tweets, could you be running afoul of your state's restrictions on lawyer advertising?

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

Attorney Advertising and Solicitation

- 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
- What about announcing on Facebook or LinkedIn that you just won a big jury trial. Issues?

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

Attorney Advertising and Solicitation

- 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” or similar language.
- LinkedIn allows users to provide professional information under specialties. Issues?

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

Attorney Advertising and Solicitation

- 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
- LinkedIn allows users to post and answer questions; bloggers and tweeters often address legal issues. Counsel.net allows users to seek answers to legal questions. Any issues?

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

Unauthorized Practice of Law

- Depending on the circumstances, this could run afoul of rules prohibiting the unlicensed practice of law – or create an attorney-client relationship
- Need good policies – things to consider
 - Keep it general
 - Restrict recipients
 - Use a disclaimer (“general informational purposes”)
 - Do not post confidential information

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 recently reported on an attorney who sought a continuance because of the attorney's father's death
 - 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?

Protect Confidential Information

- Duty to protect client confidences, avoid waiver of attorney-client or other privileges
- One attorney has already faced disciplinary action for publishing information on her blog about her cases (and disparaging comments about judges)
 - Disparaging judges is a frequent theme (“Evil, Unfair Witch,” “Judge Clueless”)

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* (May 29) 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?

Friending Issues

- “Deceptive” friending?
- Whom can you friend?
 - Judge before whom you practice?
 - Opposing counsel?
 - Parties to a dispute in which you are counsel?
- Can you try to “friend” a party to get personal information about her from Facebook, MySpace, or similar sites?
 - If you ask her directly?
 - Have a third-party, such as PI, try to friend her without divulging that the PI works for you?
 - Create a false persona and try to friend her?

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

Friending Issues

- Philadelphia Bar Op. No. 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
 - Result? Multiple violations: deceptive communication, making a false statement to another. Model Rule 8.4(c), involving dishonest conduct
- NY City Bar Op. No. 2010-02 (Sept. 2010)
 - Accessing social networking page of a party

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

Friending Issues

- Florida Op No. 2009-20 (Nov. 17, 2009)
 - A judge can maintain a social networking site
 - A judge cannot “friend” lawyers who may appear before them
- The issue is that 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
- S.C. Advisory Committee on Standards of Judicial Conduct Op. 17-2009 (Oct. 2009)
 - “A judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge’s position as a [M]agistrate”

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

Friending Issues

- N.C. 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?

Fake Profiles

- What about creating fake profiles?
 - An attorney was reprimanded because he hid his real identity and posed as a teacher and posted on classmates.com that another teacher had engaged in sex with students. *In re Carpenter*, 95 P.3d 203 (Or. 2004)
 - Fake patient profiles in the healthcare space

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

Blogging, Other Interactive Issues

- What risks are there with blogging, engaging in interactive sites, checking out an opponent's web site, etc.?

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

Conflicts of Interest

- With whom are you communicating?
 - What if it is with a party with an adverse interest to a client of the firm (Model Rules 1.7, 4.2)
- What if you learn information from a non-client that must be kept confidential because it is a prospective client (Model Rule 1.18)
 - Obtaining this confidential information could lead to disqualification with respect to existing clients who would like to know that information

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

Interactive Issue Summary

- Very little risk with passive review, but the more interactive, the more dangerous:
 - Contact with represented party
 - Do not discuss subject matter of your cases!
- *See Oregon Bar Ass'n Op. No. 2001-164*

WHAT ARE THE ETHICAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA?

- 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

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