



# Ethical Risks and Pitfalls of Social Media

**T**oday, social media encompass a broad sweep of online activity, all trackable and traceable. These networks include not only the blogs you write and those you comment on, but also social networks.

Each day seems to bring a new online tool, and new advances introduce new opportunities to build your virtual footprint.

At a law firm, social media can help drive business initiatives and support professional development efforts. In basic business terms, social

media can be considered an inexpensive form of large-scale advertising.

Of course, social media are not used by law firm personnel exclusively for business. Merely expressing opinions about anything having to do with the law requires employees to operate under certain limitations. Statements in public forums may inadvertently create an attorney-client relationship and may also violate the rules prohibiting law firm advertising. The wrong communication may be construed as exposing firm or client secrets,

invasion of privacy and defamation, and trademark violations; and it can even lead to wrongful termination claims. Therefore, a law firm must provide reasonable guidelines for online behavior by its employees.

Following are five ethical areas that all law firms should address when drafting internal social media policies. These can also be utilized by law departments when dealing with lawyer and nonlawyer employees. All are simply an extension of model rules of professional conduct and state rules of ethics. The overarching principles remain the same as new social media sites and technologies emerge.

## ADVERTISING

Marketing and advertising are key functions for the survival of any business. However, lawyers, especially in law firms, are held to a higher standard when advertising through electronic means. Model Rules of Professional Conduct are professional standards that serve as models of the regulatory law governing the legal profession. Additionally, each state board of professional responsibility has additional or supplemental states rules of ethics. State rules should be considered prior to policy drafting. Model Rule of Professional Conduct 7.2 states a lawyer or law firm may advertise through written, recorded or electronic means. This includes all social media sites.

*Example: A law firm creates a site on Facebook, MySpace, LinkedIn, Twitter, etc. using the firm name. Is this advertising?*


*Example: An employee of a law firm uses the firm name or firm e-mail address on a personal Facebook site. Is this advertising?*

State ethics boards consider the true crux of the advertising issue to be not in who creates the site or the intent of the site; instead, whether the site can be considered to be used for professional use. If being used for professional use, social media presence and communication can be considered to fall within the advertising rules.

Here are a few guidelines to include in firm policies to teach your employees (lawyers and nonlawyers) in posting to social media sites:

- **Employees should not associate the firm name or firm e-mail address with the site unless it is intended for professional use. This includes stating they are an employee of the law firm.**
- **Firm assets should not be used to update personal sites. This includes any firm owned laptop or computer, iPhone or BlackBerry, firm IP address and e-mail address. Using the firm e-mail address implies the employee is acting on the firm's behalf.**
- **An advertising disclaimer must be used to help employees specifically state whether their use is personal or professional.**

This subject is difficult to approach with employees. Many will argue that online posts referencing the place of employment are no different from telling someone about employment at a specific law firm. However, state boards have compared the online activity to a law firm website versus verbal



communication. The best approach is to help employees understand how not to blur the lines of professional/personal sites for their own protection. As an employer, you want employees to use social media sites to broaden and help the firm brand. You also want them to do it in the most ethical way.

## QUICK REFERENCE

### DO

- Have a personal social media site.
- Have a professional social media site.
- Use appropriate disclaimers as needed.

### DO NOT

- Use the organization's name or e-mail address on a personal site unless using the appropriate disclaimers.
- Use the organization's assets to update personal sites.

## ATTORNEY-CLIENT RELATIONSHIP

The attorney-client relationship is one of the oldest legal ethical standards. It creates a certain set of duties the lawyer owes the client. The model rules of professional conduct set forth a series of guidelines that help regulate the creation and existence of this important relationship. In the electronic world, especially when utilizing social media, the important issue is whether any electronic communication creates an attorney-client relationship inadvertently.

*Example: A lawyer of firm ABC is blogging on a social media site regarding new tax laws. A nonclient posts a comment to the blog inquiring about his specific tax situation. The lawyer in turn comments by discussing how the new tax laws apply to the nonclient. Has an attorney-client relationship been created?*

Law firms presently use disclaimers for e-mail messages and firm websites to verify no implied relationship is created. But how do we instruct employees to this standard when social media sites are interactive by nature? Following are a few key policy guidelines to help employees navigate this difficult area:

- **Employees should never post legal advice.** This does not mean employees cannot comment or post to social media sites; it relates only to publishing or posting anything that might be construed as legal advice or opinion. If the subject matter is related to a legal or ethical situation, attorneys and staff may only discuss the legal standards; they should not apply those standards to any particular fact situation.
- **Firms should provide a disclaimer for employees to utilize when posting or commenting on professional social networking sites.**
- **When using social networks with firm e-mail addresses and professional identification, employees should not “friend” anyone they do not know or with whom they have not previously corresponded.**

Some states have even gone so far as to explicitly

state that lawyers and judges cannot be “friends” on any personal or professional social media sites. State ethics rules should be consulted prior to drafting guidelines.

### QUICK REFERENCE

#### DO

- Post nonlegal comments or blogs on any personal or professional site.
- Use appropriate disclaimers as needed.

#### DO NOT

- Post legal advice.
- “Friend” anyone on a professional site unless previously corresponded with or known.

### CLIENT CONFIDENTIALITY

Client confidentiality and business privacy are two of the largest concerns for employers when dealing with social media communication. Generally, a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. In addition, privacy of the organization, the business processes, the firm brand and the IP of the firm are important for business continuity.

*Example: A lawyer begins discussing a case he is handling on his personal Facebook blog. Although not referencing the client name, details of the case are discussed. Has client confidentiality been broken?*

*Example: A law firm employee tweets about a firm staff meeting discussing salary and new hires. Has the privacy of business been destroyed?*

Law firms must address confidentiality and privacy standards in social media policies. In addition, consequences for breaking these standards should also be detailed. Below are a few policy considerations to navigate this area.

- **Employees should never use a client’s name without written permission.**
- **Employees should never disclose confidential or private business information.**

Sharing this type of information, even unintentionally, can result in legal action against the employee, the firm and/or the client.

- **Outside the workplace, rights to privacy and free speech protect online activity conducted on personal social networks used with personal e-mail addresses.**

However, what is published on personal online sites should never be attributed to the firm and should not appear to be endorsed by or originated from the firm.

- **Employees should avoid forums where there is little control over what is known to be confidential information.**

In the world of social networking, there is often a breach of confidentiality when one e-mails an attorney or posts a comment congratulating

him/her on representation of a specific client or on a specific case.

- **Respect the privacy of other attorneys and staff and the opinions of others.**

Before sharing a comment, post, picture or video about a client or other attorney through any type of social media or network, his/her consent is not only a courtesy — it is a requirement.

- **Get marketing and public relations departments involved when responding to certain inaccurate, accusatory or negative comments about the firm or any firm clients.**

- **Be careful with the use of presence features of social media when used for professional purposes.**

## QUICK REFERENCE

### DO

- Discuss job.
- Avoid uncontrolled forums.
- Be respectful of the privacy of others and the company.
- Get approval when responding to certain requests.

### DO NOT

- Use the client's name.
- Disclose specifics related to the business.
- Disclose confidential information.
- Use presence features for specific and detailed professional discussions.

## EXPERTISE

Many lawyers are considered by their peers to be experts or specialists in select areas of law. However, using the expert designation can only be done with appropriate approval. Model Rule of Professional Conduct 7.4 generally states that a lawyer may communicate that the lawyer does or does not practice in particular fields of law. In addition, a lawyer may promote the engagement in specific areas of practice. However, a lawyer shall not state or imply that a lawyer is an expert or a certified specialist unless the lawyer has been certified by an organization that is accredited by the ABA or the state bar.

This model rule affects the use of credentials and recommendations on social media sites. What are the key areas to include in law firm policies?

- **Employees should never be false and misleading in online credentials.**

All staff should maintain complete accuracy in all online bios and ensure no embellishment.

- **Recommendations should be used carefully.**

Employees should review all recommendations created for them for any embellishment (e.g., use of the words “better” and “the best”), expertise, certification or specialization listing. Edit recommendations as needed.

- **Employees should not include the words “expert,” “certified,” or “specialized” in their credentials unless authorized to do so.**

Expertise and specialization are heavily regulated at the state level. Some states have gone further in

their restricted verbiage. State rules of ethics should be reviewed prior to any policy drafting.

### QUICK REFERENCE

#### DO

- Allow recommendations.
- Review and monitor all recommendations carefully.
- Edit or hide recommendations as needed to remove any verbiage that states you are “better,” “the best,” “expert,” “specialized,” “certified” or other such claims.

#### DO NOT

- Be false or misleading in online credentials.
- Use the words “better” or “the best” in credentials or when recommending others.
- Use the verbiage “expert,” “specialist” or “certified” to describe experience unless certified by an organization that is accredited by the ABA or the state bar.

### GENERAL COMMUNICATIONS

The final social media ethics concern revolves around general law firm and lawyer communication. All communication, especially professional communication, must be truthful and accurate.

Law firms and law departments should consider the following general policy guidelines when drafting social media policies.

- **Identify all copyrighted or borrowed material with citations and links.**

When publishing any material online that includes another’s direct or paraphrased quotes, thoughts, ideas, photos or videos, always give credit to the original material or author, where applicable.

- **Ensure material is accurate, truthful and without factual error prior to posting.**
- **Check all spelling and grammar.**
- **Correct any mistakes promptly.**
- **When participating in social media sites in a professional manner, disclose identity and firm affiliation.**

Never use a false name, alias or be anonymous. Many courts have looked poorly on law firms and lawyers using alias names while on social media sites.

- **Follow all firm policies and procedures regarding online communications.**

Be respectful, and do not make statements that are defamatory, racially, sexually or otherwise insensitive or offensive. Likewise, avoid statements that are in any way improper or likely to conflict with the interests of the firm, its employees, clients, affiliates and others, including competitors.

- **Follow the site’s terms and conditions of use.**
- **Do not post any information or conduct any online activity that may violate applicable local, state or federal laws or regulations.**

- **Avoid personal attacks, online fights and hostile communications.**

- **Employees should never solicit or use commercial speech.**

Employees should not use a site as a way to directly solicit business for the firm. While a blog itself is not subject to the limitation on commercial speech, the content of a blog can be. The content must be informative only, and nothing in the content should propose a commercial transaction or be for the purpose of directly gaining a commercial transaction.

## QUICK REFERENCE

### DO

- Credit appropriately.
- Fact check.
- Check spelling and grammar.
- Correct errors promptly.
- Be transparent.
- Follow firm policies.
- Obey the law.

### DO NOT

- Personally attack, become involved in online fights or hostile communication.
- Solicit or use commercial speech. The content must be informative only. Nothing should propose a commercial transaction.

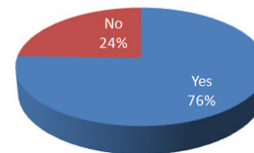
## CONCLUSION

There are many ethical considerations when law firms and their employees use social media sites. Just as e-mail emerged as the main form of business communication 10 years ago, social media is how the next generation of leaders communicate now and in the foreseeable future. The legal community must embrace the new technology, and they must educate employees about its proper use. **ILTA**

## LAW DEPARTMENT POLL

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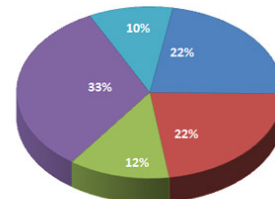
Do you have access to any social networking sites/tools (e.g. Facebook, Twitter, LinkedIn etc.) at your company or government entity?



Examples of which specific sites/tools used by law department/government entity

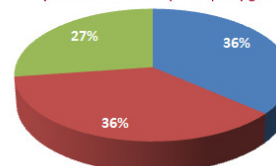
- Facebook - used for marketing purposes.
- LinkedIn - used for business networking & recruiting purposes.
- Attorneys are allowed access to social networking sites, but other staff are blocked from accessing it.
- Company has a presence on several sites as a part of their marketing and communications functions.
- Sites are accessible, certain advertisements are not allowed via the firewall, along with some links to other sites.

Please select the statement(s) that best describes your organization's use of social networking sites/tools



- We have no firewall restrictions of social networking sites, and we do not have a corporate policy governing their use.
- We have no firewall restrictions of social networking sites, however, we do govern their use via corporate policy.
- We allow limited use of social networking tools, managed by firewall restrictions, but we do not have a corporate policy governing their use.
- We allow limited use of social networking tools, managed by firewall restrictions, and we do have a corporate policy governing their use.
- Our company blocks access to all social networking sites/tools using technology.

If you do not have a corporate policy governing the use of social networking sites/tools:



- You are currently working on developing one
- You have plans to work on this in the future
- You do not feel the need to have one

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