

SOCIAL MEDIA AND YOUR PRACTICE: PLAYING IT SMART

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By Lucy Williams and Julia Clemente

A growing number of lawyers are turning to platforms like Facebook, Twitter, LinkedIn and blogs to promote their practices and themselves. While social media can provide lawyers with new opportunities, there are inherent professional and ethical risks.

Confidentiality

Lawyers posting work-related comments on Facebook run the risk of breaching the duty not to disclose confidential information acquired during a client engagement (*Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 9.1 ('Conduct Rules')).

No significant cases have arisen in Australia to date, but it is still prudent to take heed of some examples of social media misuse by lawyers in the United States. In *In the Matter of Peshek* No. 6201779, Comm. No. 09 CH 89 (Aug 25, 2009) (*Peshek*), an Illinois disciplinary tribunal recommended that an assistant public defender be disbarred after she discussed her cases on her blog. In the process, she breached her obligation of confidentiality to her client and made comments about the judiciary that were found to be prejudicial to the administration of justice. In *In re Skinner* Ga, No. S13Y0105 (3 August 2013), the Georgia Supreme Court found that a lawyer who revealed confidential information about a former client when responding to negative online reviews by that client should be subject to sanction.

Inadvertent retainer

Lawyers should take particular care to avoid creating unintended solicitor-client relationships both online and on social media. Sites such as JustAnswer.com allow users to ask questions about Australian law, and lawyers to give informal legal advice online. Similarly, lawyers may answer legal questions on social media sites such as Facebook. Care needs to be taken that retainers are not established inadvertently and that responses are not unintentionally construed as legal advice. While the

Snapshot

- Lawyers should be careful to ensure that their social media usage does not breach their professional obligations.
- Firms should carefully consider the use of social media and implement policies, practices and procedures to minimise risks.

increasing use of online and social media sites as marketing tools gives rise to opportunities, lawyers need to be aware of and manage the inherent risks.

Breach of the 'no contact' rule

A lawyer must not deal directly with the client of another lawyer without consent or reasonable grounds (*Conduct Rules*, r 33). Lawyers who 'friend' another lawyer's clients or jurors in order to gain access to their Facebook page are potentially in breach of this rule. An example from the United States highlights the potential risk Australian lawyers should avoid. In a fraud trial, *US v Bank of America Corp*, United States of Appeals, District Court of Columbia Circuit, 2014, a juror complained that the defence had cyberstalked him on LinkedIn after a first-year associate unintentionally left an electronic calling card recording his visit. The judge rebuked the defence lawyers, stating that while lawyers were allowed to collect information about jurors that was available online, they were prohibited from communicating with jurors.

Duty to the administration of justice and inappropriate publications

Lawyers have a duty to the court and the administration of justice (*Conduct Rules*, r 3.1) and they should not publish comments that are prejudicial or that diminish public confidence in the administration of justice. Rule 28.1 of the *Conduct Rules* also prohibits solicitors

from publishing material concerning current proceedings which may prejudice a fair trial or the administration of justice. Lawyers should always refrain from commenting on current proceedings in any manner that could be construed as prejudicial.

Other risks

- Defamation – as demonstrated by the recent case of *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652, in which two twitter posts about former treasurer Joe Hockey were found to be defamatory;
- Vacation of proceedings – as demonstrated by the vacation of the Jamie Gao murder trial in August 2015 after an accused's counsel, Mr Waterstreet, posted an image and a caption (now suppressed) on Instagram and Twitter. The trial judge referred the matter for investigation (*R v Rogerson; R v McNamara (No 14)* [2015] NSWSC 1157);
- employee liability, eg for bullying or discrimination; and
- risk to reputation.

Practice pointers

A Guide on Practice Issues: Social Media (May 2013), published by the Office of the Legal Services Commissioner, also advises that lawyers should:

- put in place a policy on use of social media;
- keep up to date on technological changes;
- have procedures and systems to ensure that staff are competent in their understanding and use of social media, and that those services are appropriately supervised;
- ensure communications with clients through social media providers are as clear as communication in other mediums; and
- make it clear, when providing information, that it is not legal advice and the information cannot be relied upon for that purpose. **LSJ**