‘Friend’ or Foe?

Social Media is Calling. How Should Lawyers Answer?

By Suzanne Craig Robertson

You’ve probably never had an actual tiger by the tail, but if you have a Facebook account or a blog, or if you try to follow many people or organizations on Twitter, you have a pretty good idea what it would be like. Social media — these and other technologies that help us stay connected — have exploded into the workplace. Using these tools can help you market your law practice, stay up-to-the-minute on breaking news of interest, and keep you connected to your bar association or your long-lost high school best friend.

But be careful. You need to know what’s good and bad about it, because social media outlets that help you have an evil twin.

Who Uses What for What Purpose?

On the positive side, social media outlets help you get instant information from the courts and your bar association, if you choose to receive it. “Essentially, Twitter, and all social media channels, help the
attorneys, citizens and the media receive important court news quickly and easily,” says the Administrative Office of the Courts’ Public Information Officer Laura Click. “Social media puts information in people’s hands almost instantly instead of forcing them to look for it.”

The Tennessee Supreme Court uses Twitter to provide updates on latest opinions, news and other information about the courts, Click points out, especially time-sensitive issues. “For impending executions, we have used Twitter to keep attorneys, citizens and the media abreast of last minute filings. And during the flood last May, we pointed people to a list on our website of court dockets that were affected by the flood.” The court hopes to add YouTube videos eventually to “share videos that might be helpful for citizens who enter our courts,” she says.

Like most organizations now, the Tennessee Bar Association uses social media both to gather and share information, and to facilitate communication among its members.

The TBA has embraced Facebook, Twitter and LinkedIn — even started one of its own social media channels, TBAConnect — because for many lawyers “they have become a primary means for communicating what is going on in their work and their lives,” according to Barry Kolar, the TBA’s assistant executive director. “There are a lot of dynamic exchanges going on among Tennessee lawyers, and we want to be a part of those conversations.”

That means TBA Twitter posts might carry lawyers’ thoughts on rules changes, information on job openings, congratulations on accomplishments or notices of upcoming events. During the spring flooding in Tennessee, these social media channels were a fast and accessible tool for getting word out to the public about legal clinics and other relief resources for storm victims, Kolar said.

Nashville lawyer Matt Potempa also likes their utility. “Facebook and LinkedIn are great ways to collaborate with other attorneys and experts,” he says. “They can increase online web placement and search engine optimization.”

“For lawyers who follow us,” Kolar adds, “social media outlets often provide almost real time access to news and developments in the legal community. They also gives our members an opportunity to comment, share resources and advocate for positions.”

**Remember, You Are Still a Lawyer When You Get Online**

But while the TBA and AOC are tweeting, texting, Facebooking and friending to push messages, there are some pretty significant risks associated with putting personal information out into the wild blue. Even though the Tennessee Supreme Court’s Board of Professional Responsibility (BPR) does not have admonitions that specifically deal with social media practices, the regular rules still apply. Lawyers should not forget they are lawyers when they get online.

“The BPR has not adopted any rules specific to the recent social networking trends,” says Kevin Balkwill, BPR disciplinary counsel, investigations. “We still do rely on the rules as written, which still pertain to those networks” like confidentiality, conflicts of interest, misconduct and others.

Lucian Pera, a partner with Adams and Reese LLP in Memphis, agrees. “The ethics issues are pretty clear, even if it may be hard for a lawyer to figure out the precise answers to them.” The areas to be especially vigilant, he says, are confidentiality, advertising and embarrassing yourself and others.

“Notwithstanding that some lawyers (just like people) are willing to share the most amazingly intimate details of their lives on Facebook and other social media, nothing about its emergence has changed the rules, just like the telephone didn’t either. Saying things on social media that are confidential is a disciplinary violation. This is particularly true given the very broad sweep of confidentiality under Tennessee Rule of Professional Conduct 1.6(a). Everything...”

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a lawyer knows about a client’s matter, from whatever source, even the public record or a newspaper, is confidential. Blabbing it on Twitter or on Facebook is just as wrong as blabbing it at the barber shop.”

“A social media profile might be considered an advertisement,” Pera says. “If a lawyer will simply think about whether the profile that she posts on LinkedIn complies with the lawyer advertising rules, then she’s way ahead of the game, as many lawyers never consider this.”

Apart from embarrassing or causing worse concerns to yourself, a lawyer can say or do things online that might embarrass or hurt her law firm or the office she works for, Pera says. For instance, “a comment on your Facebook wall that the local plant is a terrible polluter may be just fine … except if your partner represents them in that nuisance suit filed by the city against them.”

Other States’ Weighing In
Few states do have specific rules. But recently two bar associations in New York issued guidelines — with no disciplinary capabilities — about social networking. They allow lawyers to search public Facebook and other social networks for incriminating evidence against an opposing party in a lawsuit, but forbid lawyers to deceptively “friend” someone to gain access to private profiles. The New York State Bar Association also included that lawyers should not “friend” another party in a suit at all.

The South Carolina Bar issued an Ethics Advisory Opinion1 last year that said that all information contained in a lawyer’s website listing (including peer endorsements, client ratings, and ratings) are subject to the rules governing communication and advertising once the lawyer claims the listing.”

Of course it is not just a personal situation. Potempa cautions lawyers to be aware of the social media presence and content of their clients and opponents. (See David and Benjamin Raybin’s article, page 19 for more on this.)

“Being blind-sided with your client’s Facebook information at a deposition or during cross-examination is a position no lawyer wants to be in,” he says.

“Digital files from a few years ago can be fatal to your case.”

And look out if you want to friend a judge. A 2009 Florida Judicial Ethics Advisory Committee opinion made

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What’s Out There?

Facebook
www.facebook.com
The largest and most popular social network with more than 600 million members.

LinkedIn
www.linkedin.com
The largest professional social network. “Over 90 million professionals use LinkedIn to exchange information, ideas and opportunities.”

TBAConnect
www.tbaconnect.com
The Tennessee Bar Association’s social networking site for its more than 10,000 members.

Twitter
www.twitter.com
“Twitter is a real-time information network that connects you to the latest information about what you find interesting.”

GovLoop.com
www.govloop.com
“GovLoop is the ‘Facebook for Government’ — the premier social network connecting more than 25,000 government innovators from federal, state and local government. A great resource to connect with peers, research best practices and find career-building opportunities.”

Lawyrs.net
www.lawyrs.net
“An international law community designed for lawyers and law students,” boasting 6,486 lawyers from 178 countries.

Legal On Ramp
www.legalonramp.com
“Legal OnRamp is a collaboration system for in-house counsel and invited outside lawyers and third-party service providers. There are lawyers participating from more than 40 countries, and a rapidly growing collection of content and technology resources.”

Social network helpers
All have versions for browser and mobile.

TwitPic
www.twitpic.com
Allows users to share photos via Twitter

TwitVid
www.twitvid.com
Allows users to share videos via Twitter.

Tweetdeck
www.tweetdeck.com
Seesmic
www.seesmic.com
Hootsuite
www.hootsuite.com

These three allow users to schedule and manage status updates in Facebook, LinkedIn, Twitter and other social networking sites from one application.

— Compiled by Landry Butler

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Should You Do it?

“Be very careful that you understand what you are doing in using social media, particularly if you are doing it ‘as a lawyer,’” cautions Pera. “For example, review what’s visible … and see whether it complies with advertising rules (e.g., rules on testimonials, claims of specialization, etc.). Also, be sure you understand how private or public something is — know a Facebook wall post v. a Facebook message — before you use those features.”

The BPR’s Balkwill points out three tips “that will keep most people out of most issues that arise through use of social media.” They are:

• Don’t comment about anything you wouldn’t want your mother, spouse or employer to see.
• Be truthful when displaying factual information about yourself.
• Do not use surreptitious means to gain access to someone’s social media information in an attempt to gain an advantage in your client’s civil litigation.

“The moral,” Pera adds, is “Be careful out there.”

In 2010, the Judicial Conference of the United States endorsed new model jury instructions to stem just this sort of activity. In Tennessee, jury instructions for civil and criminal cases were updated in 2010 — by the Tennessee Judicial Conference’s Committee on Pattern Jury Instructions (Criminal) and the Committee on Pattern Jury Instructions (Civil) — to address behavior with electronics.

The instructions are very specific: “... Many of you use cell phones, Blackberries, the internet and other tools of technology,” Tennessee Pattern Jury Instructions — Criminal No. 1.09 states in part. “You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including, but not limited to, Facebook, My Space, LinkedIn, and YouTube.”

Even with the court’s new awareness, enforcing the rules may take extra precaution, Harry A. Valetk, an Internet safety and consumer privacy attorney in New York City, advises in an article on Law.com.

“During voir dire, ask jurors about their use of Facebook, Twitter or similar sites, to establish frequency of use,” he says. And ask the judge to remind jurors of the rules before and after every break, and that they can come forward to report a fellow juror’s misconduct. “Not that you don’t trust them, but you can also use tools like Social Mention,” Valetk suggests. “This site allows you to search blogs, microblogs, networks, videos, and you can set up alerts for your search terms that will be emailed to you every day.”

But if you are just sitting there in court not connected to the proceedings, nothing is stopping you from sending a play-by-play out to the world. “At this time, there is not a prohibition for spectators or the media to use social media while in the courtroom,” the Administrative Office of the Courts’ Public Information Officer Laura Click, says.

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SUZANNE CRAIG ROBERTSON is editor of the Tennessee Bar Journal. Landry Butler and Barry Kolar contributed to this story.

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Notes
4. Id.
5. T.P.I. Criminal 109 (No Independent Research or Discussion); see also 43.14 (No Outside Communication During Deliberation); Civil 1.02 (After Voir Dire and Before Trial); and Civil 15.20 (Prohibited Research and Communication).
6. Valetk, Id.