

WHITE PAPER



David Jargiello
October 1, 2010



ABOUT THE AUTHOR

David Jargiello runs a sophisticated law firm management practice that includes the full range of professional and business matters that confront lawyers and law firms. The general counsel and a management partner of Heller Ehrman, Venture Law Group and Virtual Law Partners (and member of the founding team of the latter two), he is among the most experienced law firm general counsel in the country. Contact Information: email (david@jargiello.com), direct (650.472.3994), and cell (650.833.8641).

An earlier version of this paper appeared in THE BEAZLEY BRIEF, Issue 20, February 2010.

THOUGHTS ON THE BUSINESS OF LAW AND LAWYERING



Websites for lawyer networking abound¹ and their use is a new staple of the profession. Notwithstanding their prevalence, views about the ethics and risk implications of social networking remain fluid. With very little law to inform the ongoing discussion, some practical risk management ideas follow below.

Perspective. There was a time – not so long ago – when it was said that lawyers should use encryption or scrambling technology when using a cell phone to speak to clients.² Similar admonitions were made when fax machines, email and extranets were new, so the fact that a crazy quilt of reasoned discussion and hyperbole surrounds lawyers’ social networking should come as no surprise. However, proper management of risk requires perspective, and in this case the fact of the matter is that lawyers’ social networking is neither unethical nor problematic *per se*. It does, however, present some bona fide risks for which common sense is the order of the day.

Discussion. There is modest authority on the subject of lawyers’ social networking, as well as a good deal of anecdotal material. The decision in a North Carolina child custody matter was recently vacated as a result of the Facebook antics of the presiding judge,³ and at least two state bar ethics advisory

1 A sampling of sites includes: Above the Law <abovethelaw.com/>; Attorneys Online <www.attorneyonlineinc.com/lawyer.html>; BlawgSearch <blawgsearch.justia.com>; Counsel.net <counsel.net>; ESQChat <www.esqchat.com/site/>; FreeAdvice <forum.freeadvice.com/>; Facebook <www.facebook.com>; LawLink <www.lawlink.com>; Lawyer-Link <www.lawyer-link.com>; Lawyrs.net <www.lawyrs.net>; Legal OnRamp <www.legalonramp.com>; LinkedIn <www.linkedin.com>; Martindale-Hubbell Connected <www.martindale.com/connected>; MyPractice <www.mypracticelaw.org>; PivotalDiscovery.com <www.pivotaldiscovery.com>; TweetLaw <tweetlaw.com/>; Twitter <twitter.com/>; and WSJ Law Blog <blogs.wsj.com/law/>.

See *Law Sites, Tracking New and Intriguing Web Sites for the Legal Profession, Social Networking for Lawyers (Part Two of Two)*, Robert Ambrogi (March 20, 2009) <www.legaline.com/2009/03/social-networking-for-lawyers-part-two.html> for a summary discussion of certain sites.

2 **See** Advisory Opinion #1991-92/6, New Hampshire Bar Association Ethics Committee (April 16, 1992) <www.nhbar.org/pdfs/FO91-92-6.pdf>:

“In using cellular telephones or other forms of mobile communications, a lawyer may not discuss client confidences or other information relating to the lawyer’s representation of the client unless the client has consented after full disclosure and consultation. . . . An exception to the above exits, where a scrambler-descrambler or similar technological development *is used*.”

See also Advisory Opinion No. 90-7, Illinois State Bar Association (November 26, 1990) (Lawyers using cell phones should inform their clients that (1) such use could result in loss of the attorney-client privilege, and (2) the client should therefore refrain from discussing confidential matters.).

3 **See** *Public Reprimand of B. Carlton Terry, Jr., District Court Judge*, Judicial District 22, North Carolina Judicial Standards Commission, Inquiry No. 08-234 (April 1, 2009) <www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-



committees have cautioned against the possibilities for ethically improper online connections.⁴ In a different vein, researchers at the UC Berkeley School of Law – working on behalf of the Santa Clara County (California) Office of the Public Defender - created guidelines for conducting research using social networking sites in a “do and don’t” format.⁵ Unpublished anecdotes also abound as to lawyers who have communicated improperly with represented parties, “friended”⁶ adverse parties, witnesses or opposing counsel, side-stepped *ex parte* contact rules, revealed client identities or information, and revealed information regarding the nature, scope, status or merit of a particular representation.

All of that said, social networking does not introduce something fundamentally different into the profession. It is instead a new mode of communication/technology whose use in the profession is both inevitable and appropriate.⁷ While – as already noted - lawyers have found many ways to land in hot

234.pdf> (Public reprimand of a North Carolina judge for (1) “friending” the defense counsel in an ongoing case on Facebook, (2) discussing the case with him online via that site, and (3) doing extra-curricular online research regarding the plaintiff.)

As a result of the public reprimand, Judge Terry’s decision in the subject case was vacated and a new trial ordered (*Judge Reprimanded For Facebook Chats*, WXII12.com, Winston-Salem News (June 1, 2009) <www.wxii12.com/news/19625311/detail.html>.

- 4 **See** Opinion Number: 2009-20, Florida Judicial Ethics Advisory Committee (November 17, 2009), concluding that a judge cannot have “friends” on a social networking site that happen to be lawyers that appear before them in court:

“The committee fears that if a Florida judge is “friends” with lawyers who appear before them in court, it will give the general impression that these lawyers are in a special position to influence the judge. While the committee understands that this may not necessarily be the case, just giving the impression that a “friend” can influence the judge is enough reason to bar judges from “friending” lawyers that appear before them in court.”

See also Opinion 2009-02, The Philadelphia Bar Association Professional Guidance Committee (March 2009) <www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf> (By asking a third person, unknown to a witness in a litigation matter, to “friend” that witness for the purpose of secretly accessing the witness’ online information, a lawyer violates the rules against dishonesty /misrepresentation, and making false statements of material fact or law).

- 5 **See** *Handbook on Conducting Research on Social-Networking Websites in California*, David Lee and Shane Witnov (December 2008) <www.law.berkeley.edu/institutes/bclt/socialnetworking/imgs/SocialNetworkingHandbook.pdf>.
- 6 The term “friending” is used generically here to refer to the process of adding somebody as a friend, link or connection on a social networking site.
- 7 **See** *LexBlog Lawyer Blogs, New Legal Ethics Rules Not Required for Social Networking and Social Media*, Kevin O’Keefe (December 30, 2009) <kevin.lexblog.com/2009/12/articles/blog-law-and-ethics/new-legal-ethics-rules-not-required-for-social-networking-and-social-media/>:

THOUGHTS ON THE BUSINESS OF LAW AND LAWYERING



water via social networking, the problems created by (or feared in) social networking really fall into five categories, each of them well known:

- ✓ the breach of client confidences through the online exchanges of information that characterize social networking sites,
- ✓ the creation of online contacts via the network that are ethically improper,
- ✓ the creation of inadvertent and unintended attorney client relationships via the network,
- ✓ the violation of rules regarding advertising and solicitation, and/or
- ✓ the use of such sites to improperly gather information.

Like the new technologies that have come before it, the risks posed by social networking should be addressed by a thoughtful, informed use of the new medium. Ten suggestions for doing so follow:

1. **Know where you are and who you are talking to.** When discussing the propriety of lawyers' social networking, there is a tendency to treat the practice as monolithic when in fact it is not. There are sites that are purely for communication among lawyers (e.g., Legal OnRamp), sites that skirt the edges of an attorney client relationship (e.g., FreeAdvice.com), as well as the better known social and professional networking sites (e.g., Facebook, LinkedIn). In short, know your audience.
2. **Watch what you say.** Online social networking is like email: it is a conversational mode of written communication in which special rules and conventions apply. The most obvious and least problematic of these is the use of internet acronyms, emoticons and other online jargon. More subtle and more dangerous is the fact that people will tend to say things in email, blogs or chats that they would never say in a written letter with their signature at the bottom. Of course, there is nothing wrong with casual discussion *per se*. However, if you are "friending" professional colleagues, clients or judges then remember that they are reading what you are posting. If you

"Just like lawyers began to use the phone to meet people, build relationships, and conduct work, lawyers now use blogs, Twitter, LinkedIn, and Facebook. And they'll be using 19 other things via computers we've never heard of in the next ten years - all to build relationships with people. We have core ethical principals we must follow as lawyers, whether using a phone, schmoozing at a conference cocktail party, writing a letter, blogging, posting to Facebook, or Tweeting."

THOUGHTS ON THE BUSINESS OF LAW AND LAWYERING



wouldn't say it in a conference room filled with those people, then don't post it on your Facebook page because they are functionally the same thing.

3. **Think Before You Click.** An extension of the prior point is this: do not put anything on a social networking site that you don't want on the front page of the newspaper. Again, from a functional standpoint, that's what social networking does. Corollary: Don't assume that the privacy and restricted access features of any particular site work 100% of the time (or that they even work at all).
4. **Watch the When.** If you would not introduce yourself to – and share information with – a represented party in an ongoing matter in person, then why would you do it online? Be sensitive to who you “friend” and when. Opposing counsel may be someone that you want to add to your network, but avoid the appearance of impropriety and wait until the matter is concluded. Ditto witnesses, experts, parties and others with whom an online connection in the middle of a representation would be improper, or, would be perceived as improper.
5. **Common Sense, Common Sense, Common Sense.** In the *Reprimand of B. Carlton Terry, Jr., District Court Judge, Judicial District 22*,⁸ the North Carolina Judicial Standards Commission did not punish the judge for using Facebook. He also was not, necessarily, reprimanded for simply friending a lawyer then appearing before him. He was, however, certainly reprimanded for friending counsel in an ongoing case, and then discussing the case with him online via that site, as well as doing extra-curricular online research regarding the plaintiff based on those online conversations – both of the latter being clear violations of the applicable rules of judicial conduct.
6. **Respect Client Confidences.** The duty of confidentiality is not waived because you are online. You have no more right to post confidential client information on your Facebook or similar page than you do to in person, on the phone or in the press. If you wouldn't say it in person at a cocktail party (or the like), then don't post it online.⁹

8 **See** Note 3 above.

9 LISTSERV was the name of the first electronic mailing list software application. The term eventually took on a more generic meaning, referring to any set of email addresses for a group in which a sender can send one email to reach all members of the “list.” Regarding the participation in a listserv by lawyers and judges, the Los Angeles County Bar Association made an observation apropos here:

“ . . . [M]embers of the bench do not foreswear participating in society when they become judges. The legal community benefits from having judges remain active in bar affairs. . . . Judges may accidentally overhear counsel discussing cases in hallways or around the courthouse. Such random inadvertencies are not unusual and do not mandate judicial recusal unless significant details are imparted or actual prejudice inures. . . . [Nevertheless] while judges may speak



7. **Don't Practice Law on Facebook – Part I.** Social networking sites are not an appropriate place for attorney client communications. While, in general, it is perfectly fine to “friend” your client on a networking site, you should not use that site as a vehicle to provide legal advice or communicate with your client about the representation.
8. **Don't Practice Law on Facebook – Part II.** Resist the urge to wax poetic on matters of law that pop up in online chats. Remember that it is easy to inadvertently create an attorney client relationship. Objectively reasonable reliance on your online posts can be sufficient. You might get away with giving “casual” legal advice at a cocktail party, but online you are opining in writing. Just say no.
9. **Don't Lie to Get Information.** Social networking sites can be a treasure trove of information regarding counsel, witnesses, experts and judges, and there is no shortage of sites detailing how to mine the most prurient material available.¹⁰ You may of course search for and use publicly available information, as well as information that is not obtained through misrepresentation (e.g., from your own social networking account or online groups). However, just because it is easier to lie online than it is in person doesn't make it right. Do not set up fictitious accounts or identities to friend or research witnesses, adverse parties or the like.

in and write to public forums, through bar associations or otherwise, they should approach this opportunity with caution. . . . Accordingly, any judge communicating on a listserv must remain aware that he or she is communicating (even as a passive reader) with an unknown segment of the public—a public which includes persons who may appear as parties or advocates before that judge.”

Formal Opinion No. 514, Ethical Issues Involving Lawyer and Judicial Participation in LISTSERV Communications, Los Angeles County Bar Association Professional Responsibility and Ethics Committee (August 19, 2005).

- 10 **See e.g.**, 50 Terrific Social Sites for Law Students and Lawyers, Criminal Justice USA (April 21, 2009) <www.criminaljusticeusa.com/blog/2009/50-terrific-social-sites-for-law-students-and-lawyers/>:

“Thanks to social media sites, lawyers can enjoy unique access to people’s records and evidence through Facebook and other sites. . . . This list of social networks are [sic] great for information gathering. . . . Find incriminating photos and more on MySpace. . . . Facebook is a popular site for members to put up photos of partying and other scandalous behavior. . . . Find hard evidence through pictures on Flickr accounts. . . . Confirm professional and social relationships by exploring a client’s LinkedIn profile. . . . Find out information about someone’s accounts and investments on [Cake Financial]. . . . Browse YouTube for videos of your clients or others caught in compromising situations. . . . Find out where someone is going to be at a designated time by following them on Meetup, a social site that helps groups organize meetings in real life. . . . Use [Geni] for organizing family trees and genealogy records to confirm family ties. . . . “



10. **Finally, Don't Overreact.** Just because you are online friends with opposing counsel, a judge, a witness or an adverse party doesn't necessarily mean that you are irrevocably conflicted. It just means that you know the person in the same way you might know someone from a bar association, a social group, a country club or Saturday basketball league. The usual touchstones still apply: how well you know the person in question, your relevant history with that person, and the nature of your interactions while the matter is active. An online connection with whom you communicate daily might create a conflict; an online connection that is highly attenuated (such as being members of the same online group) may not.

* * * *