

Tweet This, Not That A Guide to Social Media and Legal Ethics

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Changing Technology & Social Media Landscape

- ABA Model Rules of Professional Conduct Rule 1.1 Comment [8]
- “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology...**” (emphasis added)

ABA Model Rules of Professional Conduct Rule 1.1 Comment [8]

- Does this new rule impose new requirements for lawyers?
- What do you think this means?
- Rule reminder - “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology...**” (emphasis added)

2 Schools of Thought

Argument
#1

- New requirements have not been added and this rule merely clarifies previous rules to understand technology

Argument
#2

- New requirements have been added to provide for a heightened sense of familiarity with technology

Application to Georgia Lawyers

- Georgia does not have a specific rule that mirrors ABA Rule 1.1 Comment [8]
- Common Sense Conclusion – Georgia lawyers should ensure they that they understand the benefits and risks that emerging technologies and social media present to adhere to our client duties

Confidentiality of Information



Relevant Georgia Rules

Rule 1.6 – Confidentiality of Information

- 1.6(a) – A lawyer shall maintain in confidence all information . . . unless the client gives informed consent
- 1.6(e) – The duty of confidentiality shall continue after the client-lawyer relationship has terminated

Confidentiality Examples

In re Skinner, 295 Ga. 217 (Ga. 2014)

- Attorney responded to a negative client review on a website.
- She identified the client by name, discussed where the client's divorce was filed, and stated the client had a boyfriend.
- The GA Supreme Court publicly reprimanded the attorney and ordered to consult with the State Bar regarding internal office procedures.

Confidentiality Examples

In re Disciplinary Proceeding Against Peshek, 334 Wis. 2d 373
(Wis. 2011)

- Attorney shared information about her clients on her blog.
- She identified clients by name or jail identification numbers.
- Her license was suspended for 60 days in both Illinois and Wisconsin.

Confidentiality Examples

In re Quillinan, 20 BD Rptr 288 (Or. 2006)

- Attorney sent an email to a listserv disclosing personal and medical information about a former client.
- She characterized the client as “difficult” and suggested the client was now “attorney shopping.”
- The attorney was suspended for 90 days.

Confidentiality Examples

Dana Snay

- After her father negotiated an \$80,000 settlement regarding his age discrimination suit against her high school, Dana posted on Facebook:

"Mama and Papa Snay won the case the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT"

Confidentiality Examples

Dana Snay

- The Court invalidated the settlement because Mr. Snay violated the confidentiality agreement when he told his daughter.
- "His daughter did precisely what the confidentiality agreement was designed to prevent."

What should I do?



What should I do?

- DO avoid describing past, present, or future clients to friends, family, and on social media.
- DO get consent before disclosing the identities of current or former clients.
- DO carefully monitor posts or photos (including social media geo-tagging) that may reveal your geographical location when traveling on confidential client business.
- DO keep ALL confidential information confidential, even around family and friends!

Legal Advertising



Relevant Georgia Rules

Rule 7.1 – Communications Concerning a Lawyer’s Services

- 7.1(a) – Legal advertising must not be “false, fraudulent, deceptive, or misleading.”
- 7.1(c) – A lawyer retains ultimate responsibility to insure that all communications concerning the lawyer or the lawyer’s services comply with the Rules.

Relevant Georgia Rules

Rule 7.2 – Advertising

- 7.2(b) – A copy or recording of an advertisement or communication shall be kept for **two years** after its last dissemination along with a record of when and where it was used.

Advertising Examples - Florida

- The Florida State Bar overhauled its rules to include online and social media.
- Florida Rule 4-7.11(a): Lawyer advertising rules apply to all media, including . . . electronic mail, Internet banners, pop-ups, websites, social networking, and video sharing sites.

Advertising Examples - Florida



- Along with the rule changes, the State Bar provided guidelines for using social media:
 - Pages of individual lawyers that are used solely for social purposes are not subject to the lawyer advertising rules.
 - However, pages that are used to promote the lawyer's or law firm's practice are subject to the lawyer advertising rules.

Disclaimers Continued

Law firms and companies are requiring employees to include a disclaimer on social media sites where the individual names their employer.

The opinions expressed here are the personal opinions of [employee's name], but do not constitute legal advice. Content published here is not reviewed or approved by [employer] before it is posted and does not necessarily represent the views and opinions of [employer]. [employee's name] is expressing personal opinions and not legal opinions and disclaims any and all legal responsibility and liability for his/her personal comments posted on this site.

What should I do?

-  DO keep records of any advertising, including when and where it was used for two years.
-  DO include a disclaimer if using social media to advertise or identifying yourself with a particular company or law firm.
-  DO consider requiring such a disclaimer for your employees.
-  DO make sure to segregate personal and professional social media accounts and contacts.

False or Misleading Statements

True



False



Relevant Georgia Rules

Rule 7.1 – Communications Concerning a Lawyer’s Services

- 7.1(a) – Legal advertising must not be “false, fraudulent, deceptive, or misleading.”
- 7.1(c) – A lawyer retains ultimate responsibility to ensure that all communications concerning the lawyer or the lawyer’s services comply with the Rules.

Relevant Georgia Rules

Rule 7.4 – Communication of Fields of Practice

A lawyer may communicate that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by **expertise**, specialized **training** or **education**, or is **certified** by a recognized and bona fide professional entity, may communicate such specialty or certification.

False or Misleading Statements Examples – South Carolina

- Any endorsements of a lawyer on social media are subject to the advertising rules, and therefore must not be “false, fraudulent, deceptive, or misleading.”
- If a lawyer chooses to participate in sites such as LinkedIn or Avoo, the lawyer assumes responsibility for the content of the listing.
- Therefore, if a lawyer does not remove an endorsement for a field of law, but is not a specialist in that field, the lawyer is in violation of the Rules.

What should I do?

- DO ensure that you do not hold yourself out as an expert or specialist on social media without the appropriate qualifications.
- DO block or hide any third party endorsements that label you as an expert or specialist if you do not have the appropriate qualifications.
- DO carefully monitor any endorsements or comments by third parties, and edit or delete those that could constitute a false statement.

Prohibited Solicitations



Relevant Georgia Rules

Rule 7.3 – Direct Contact with Prospective Clients

- 7.3(a) – A lawyer shall not send . . . a written communication to a prospective client for the purpose of obtaining professional employment if:
 - (1) it has been made known to the lawyer that the person does not desire such communications;
 - (2) the communication involves coercion, duress, fraud, over-reaching, harassment, intimidation, or undue influence.

Relevant Georgia Rules

Rule 7.3 – Direct Contact with Prospective Clients

- 7.3(b) – Written communications to a prospective client, other than a **close friend, relative, or former client** . . . shall be plainly marked “Advertisement.”
- 7.3(d) - A lawyer shall not solicit professional employment as a private practitioner for the lawyer, a partner, or associate through direct personal contact or through live telephone contact, with a non-lawyer who has not sought advice regarding employment of a lawyer.

Prohibited Solicitation Examples – ABA Model Rules

- A simple LinkedIn invitation to a non-lawyer with whom the lawyer does not have an existing relationship may be a solicitation.
- LinkedIn automatically sends reminders of an invitation, each of which could be a violation.

Prohibited Solicitation Examples - Florida

- The Florida Bar also addressed invitations to connect on social media: “Invitations sent directly from a social media site . . . on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business **are solicitations.**”

What should I do?

- DO exercise extreme caution if sending an invite to connect to your professional social media page to a non-lawyer that is not a relative, close friend, or former client.
- DO carefully monitor privacy settings of social media accounts to ensure automatic notifications of your profile or page are not being sent to non-lawyers.
- DO think about whom the intended recipient of any communication is and why you are communicating with that person before contacting them on social media.

Communication with Unrepresented Third Parties and Witnesses



Relevant Georgia Rules

Rule 4.1 – Truthfulness in Statements to Others

- 4.1(a) – In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Relevant Georgia Rules

Rule 4.4 – Respect for Rights of Third Persons

In representing a client, a lawyer shall not use ... methods of obtaining evidence that violate the legal rights of a third person.

Relevant Georgia Rules

Rule 5.3 – Responsibilities Regarding Non-Lawyer Assistants

- 5.3(c)(1) – A lawyer shall be responsible for the conduct of a non-lawyer employed, retained by, or associated with such lawyer that would be a violation of the Rules if engaged in by a lawyer if the lawyer orders, or with the knowledge of the specific conduct, ratifies the conduct involved.

Relevant Georgia Rules

Rule 8.4 – Misconduct

- 8.4(a) – It shall be a violation of the Rules for a lawyer to:
 - (1) violate or knowingly attempt to violate the Rules, knowingly assist or induce another to do so, or do so through the acts of another; . . . or
 - (4) engage in professional conduct involving dishonesty, fraud, deceit, or misrepresentation.

Communication with Witnesses

Philadelphia Bar Association Professional Guidance Committee

- Lawyers seeking to connect a witness on social media in order to gain access to information about the witness that is not otherwise available to the public have an affirmative duty to disclose their reasons for communicating with the witness.
- There is no distinction between communicating directly with a witness or through an intermediary.

Communication with Witnesses

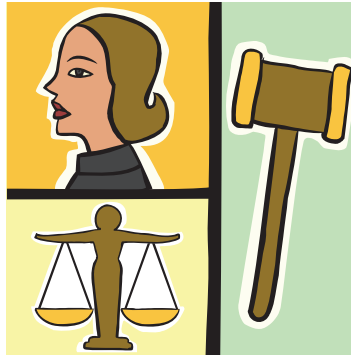
New York City Bar Association on Professional and Judicial Ethics

- Lawyers, or lawyers' agents, are not permitted to use deceptive means to access otherwise non-public information about an individual on social media.
- It is **not** a violation to access information that is public: "The lawyer may ethically view and access [social media] profiles of a party . . . as long as the party's profile is available to all members in the network."

What should I do?

- DO communicate these guidelines to any employees or agents that may access a witness's social media profile.
- DO use caution when accessing information on a third party's social media page.
- DO only use information that is publicly available.
- DO avoid seeking access to non-public information by inviting a third party to connect or sending a friend request without disclosing your role in a case.

Jurors and Judges as “Friends”



Relevant Georgia Rules

Rule 3.5 – Impartiality and Decorum of the Tribunal

A lawyer shall not, without regard to whether the lawyer represents a client in the matter:

- (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; or
- (b) communicate ex parte with such a person except as permitted by law.

Juror Research on Social Media Examples – New York

- An attorney may use social media to research jurors, but cannot engage in direct communication with the jurors.
- Prohibited communication includes a juror receiving an invitation to connect on social media or otherwise learn of the attorney's viewing or attempted viewing of the juror's page, posts, or comments.
- An attorney may not pretend to be someone else to gain access to information about the juror that would not otherwise be available.

Juror Research on Social Media Examples – ABA Formal Opinion

- Lawyers may research jurors on social media, but cannot connect with or 'friend' jurors in order to access non-public information.
- If viewing a juror's public profile social media would cause a juror to receive a message or notification on from the network, such a notification would **not** be a prohibited communication.
- The trial judge should instruct jurors that the lawyers may be viewing their public profiles.

Online Judicial Ethics – “Friendly Judges”

Anyone friends or follow a judge on social media?

Online Judicial Ethics - “Friendly Judges”

- Two views on judges connecting with attorneys and parties on social media:
 - Connection-by-Connection view
 - Restrictive view

Online Judicial Ethics – Connection-by-Connection View

- A judge may participate in online social networking and social media, but in doing so must comply with the Code of Judicial Conduct.
- Ethical obligations must be considered on a case-by-case (or connection-by-connection) basis.
- Followed by ABA, CT, KY, MD, NY, OH, SC, and TN.

Online Judicial Ethics – Restrictive View

- A Judge may not add lawyers who may appear before the judge as 'friends' or connections on a social networking site.
- Lawyers may not add the judge as a 'friend' or connection.
- Followed by FL, CA, MA, and OK.

Online Judicial Ethics

- What if a “friendly” judge’s social media presence creates a conflict in a case?

Online Judicial Ethics – Examples of Conflicts

- North Carolina
 - A judge, along with an attorney involved in a case before the judge, made comments on a social networking site about the case.
 - The judge was publicly reprimanded
- Florida
 - A judge was forced to recuse himself because he was Facebook friends with the prosecutor.

What should I do?

- DO take extreme caution if using social media to research jurors.
- DO ensure jurors will not receive communications or notifications disclosing your research of their social media pages or profiles.
- DO use your best judgment when considering connecting or friending judges on social media.
- DO avoid using an online connection with a judge to influence clients, opposing counsel, or jurors.

51

Attorney-Client Relationships and Related Issues



52

Relevant Georgia Rules

Cleveland Campers, Inc. v. R. Thad McCormack, P.C., 280 Ga. App. 900 (Ga. Ct. App. 2006)

- An attorney client relationship may be implied from the conduct of the parties.
- The client must have a reasonable belief that an attorney client relationship exists. A reasonable belief is one that is reasonably induced by representations or conduct on the part of the attorney.
- An attorney client relationship may be found to exist where no fee is paid.

Relevant Georgia Rules

Rule 1.7 - Conflict of Interest: General Rule

1.7(a) - A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, unless otherwise permitted.

Attorney Client Relationship Examples - Pennsylvania

- The Philadelphia Bar Association encourages attorneys interactively communicating online to clearly state that there is no attorney client relationship.
- Answering specific legal questions could still create an attorney client relationship.

Attorney Client Relationship Examples – South Carolina

- Attorneys must be clear with disclaimers.
- Using buried language to disclaim and attorney client relationship in advance of providing specific legal advice in a specific matter is unfair and misleading.

Attorney Client Relationships Examples – Social Media “Groups”

- Attorneys should avoid using group names such as “Joseph Rosetti is My Trial Lawyer.”
- A member of this group could assume that an attorney-client relationship exists.
- Members of the group may need to be considered in a conflicts check.

Conflicts of Interest Examples

- Inadvertently creating an attorney client relationship gives rise to duties and obligations, such as to avoid conflicts of interest.
- If you do not know who your client is, it is very difficult to avoid possible conflicts of interest.

What should I DO?

- DO be cautious about the things you are saying on social networking sites, so as not to be construed as legal advice.
- DO avoid providing fact-specific advice. Only provide legal information in broad terms instead of answering specific legal questions.
- DO create a disclaimer clearly stating you are not giving legal advice and not developing an attorney-client relationship with anybody on the site. Caution users not to provide any confidential information.

What should I DO?

- DO use 'click-wrap' or 'click-through' disclaimers, which require readers to acknowledge their understanding that any information or communication does not form an attorney-client relationship by clicking 'accept' prior to accessing a website.
- DO make membership in any social networking groups conditional upon acceptance by you or your firm.

Unauthorized Practice of Law



Relevant Georgia Law

O.C.G.A. § 15-19-50(3)

The practice of law in Georgia is defined as . . . the preparation of legal instruments of all kinds whereby a legal right is secured.

Relevant Georgia Rules

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

5.5(a) - A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

Relevant Georgia Rules

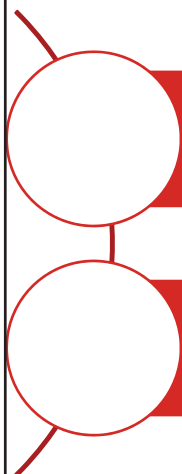
Rule 8.5: Disciplinary Authority; Choice of Law

8.5(a) - A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.

Unauthorized Practice of Law Examples

- The practice of law has different definitions in different states.
- Preparing legal documents, such as wills and deeds, is considered practicing law in some states, but not in others.

What should I DO?

- 
- DO include disclaimers on your website, profile, or page that clearly states where you are licensed to practice.
 - DO avoid any activities that could be construed as the practice of law in a jurisdiction where you are not licensed.

Trial Publicity



Relevant Georgia Rule

Rule 3.6: Trial Publicity

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a person would reasonably believe to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Trial Publicity Example - Georgia

- Georgia attorney tried to live tweet his client's jury trial against Atlanta rapper Da Brat.
- The judge issued a gag order and told the attorney that he must stop tweeting until a verdict was reached.
- The State Bar stated that "there is no rule AGAINST tweeting a trial. At present we do not have any plans to create rules to cover this."
- The attorney stated that he plans to tweet future trials, but file a pre-trial notice first.

What should I DO?

- DO seek permission before live tweeting any trial or hearing.
- DO only tweet basic information about a case.

Professionalism



Professionalism Examples - Florida

- A public defender posted pictures of her client's leopard-print underwear.
- She captioned the photo, suggesting the client's family believed his underwear was proper attire for trial.
- Her profile was private, but a "friend" tipped off the judge.
- She was fired and a mistrial was declared.

Professionalism Examples - Florida

- In a blog post, an attorney called a judge “an evil, unfair witch” and described having to endure the judge’s “ugly, condescending attitude.”
- The attorney was sanctioned for five bar violations and fined \$1,200.

Professionalism Examples - Indiana

- A Deputy Attorney General used his private account to tweet that riot police should “use live ammunition” to clear out demonstrators.
- He advocated using “deadly force” against the pro-union “thugs” in other posts.
- He was fired the next day.

Professionalism Examples - California

- A former attorney working for a telecommunications company blogged about his experience as a juror in a felony trial.
- He was suspended for 18 months, placed on two years of probation, and ordered to take the MPRE within one year.
- The Court of Appeals vacated the judgment in the felony trial.

What should I DO?

- DO carefully consider what you publish on social media.
- DO remember that 'the internet never forgets.'
- DO exercise your best judgment when using social media.

Supervising Junior Lawyers & Non-Lawyers

- Do you have responsibility to supervise others concerning the items we discussed today?



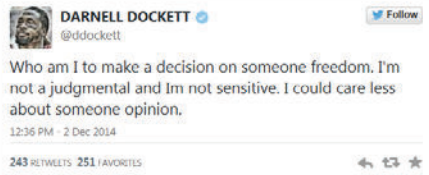
Supervising Junior Lawyers & Non-Lawyers

YES, you have a duty

Georgia Rule 5.1 –
Responsibilities of
Partners, Managers
and Supervisory
Lawyers

Georgia Rule 5.3 –
Responsibilities
Regarding Non-
lawyers Assistants

Jurors & Live Tweeting



Concluding Thoughts

- Use common sense
- Remember – You worked hard for a solid professional reputation
- When in doubt, contact the ethics hotline and ask for clarification from the Georgia Bar

Ethics In Social Media

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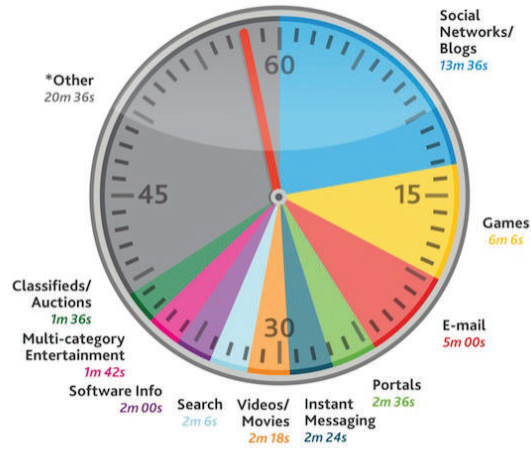
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Fun Facts

- More than a billion tweets are sent every 48 hours.
- Each day 350 million photos are uploaded to Facebook which equates to 4,000 photos per second.
- Every sixty seconds, 293,000 status updates are posted on Facebook.
- YouTube reaches more adults in the United States between the age of 18 and 34 than any cable network.
- If Wikipedia were a book it would be 2.25 billion pages.
- More than 45 million pictures are uploaded to Instagram every day.
- If Facebook were a country it would have the world's third largest population and twice the population of the United States.
- Brands and organizations on Facebook receive approximately 34,722 "likes" every minute.

Internet Usage

If all U.S. Internet time were condensed into one hour, how much time would be spent in the most heavily used sectors?



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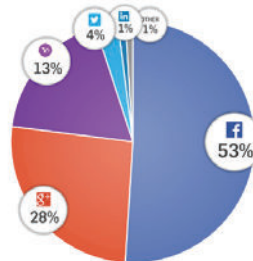
*Other refers to the 74 remaining online sectors visited from PCs/laptops

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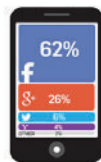
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Social Media Preference

SOCIAL LOGIN PREFERENCES



In the first quarter of 2014, Facebook saw a continued resurgence as an identity provider and maintained a majority of all logins. Google/Google+, meanwhile, remained strong with nearly 30% of all logins. Yahoo, continued losing its share of logins, dipping 2% over last quarter.



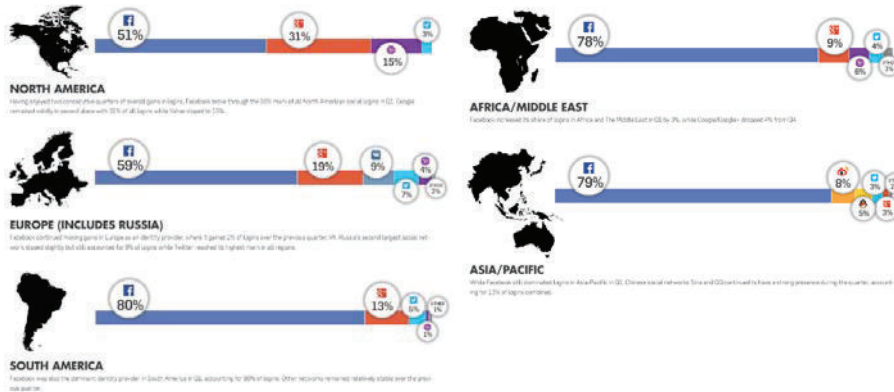
MOBILE DEVICES

Facebook maintained its strong lead in mobile logins in Q1, while Google/Google+ held onto a strong portion of logins as well. Gigya expects Google/Google+ logins to increase in mobile as Android devices evolve to include seamless Google/Google+ authentication into native apps.

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4

Social Media Preference



Why are companies using Social Media?

- Build brand
- Gain insight into customers and industry
- Promote services
- Increase traffic to Web site
- Bring in new business

Issues with Using Social Media

- **Labor and Employment**

- Hiring & Firing
- Employee Monitoring
- Wage & Hour
- Non-Solicitation
- Harassment
- Password Requests
- Privacy

- **Commercial Issues**

- Advertising/ Brand Management
- Antitrust Issue
- Copyright & Trademark

- **Law Firm/Dept Concerns**

- Misconduct (Obtaining information fraudulently)
- Confidentiality, Privacy & Privileged Information
- Duty of Candor & Expertise Listings (Recommendations/ Online Credentials)
- Discovery
- Competent Representation

LABOR & EMPLOYMENT CONCERNS

Hiring/ Firing

- Employers can benefit from the **lawful** use of information obtained from social media. Information discovered while viewing personal social media sites could be equated to questions asked in an interview.
- Areas to watch include *Race, Age, Religion, Marital Status, Sexual Preference, Pregnancy Status or Disability*.
- Best practices:
 - Screen applicants in a uniform manner.
 - Have a neutral party screen information.
 - Never create false personas to gain access to information.
 - Don't "friend" applicants in order to gain access to their non-public profiles.

Employee Website Monitoring

- Employers should not forget their right or obligation to monitor and direct employees with regard to internet use in the workplace or statements regarding the company.
- Local Standards. Be aware of local country monitoring standards.
 - Hong Kong – Require a filing.
 - Malaysia – Government monitoring.
 - Italy – Can't use for background checks.
 - Spain – Can monitor if warn.

Employee Website Monitoring

- Does the employer break the law by terminating an employee for submitting posts about the workplace to a social media website? The short answer is Yes & No.
 - ***Karl Knauz Motors Inc. d/b/a Knauz BMW and Robert Becker, NLRB Case 13-CA-46452*** on October 1, 2012. First Facebook firing upheld. The speech was not protected.
 - ***Hispanics United of Buffalo, Inc. and Carlos Ortiz, NLRB Case 03-CA-027872***. Unlawful for a non-profit organization to fire five employees who participated in Facebook postings about a coworker who intended to complain to management about their work performance. Conversation was concerted activity and protected by the NLRA.
 - A case ruled the use of the “like” button on social media is constitutionally protected speech. ***Bland v. Roberts, Case No. 12 – 1671, 4th Cir., September 18, 2013.***

NLRB Update

- The National Labor Relations Board says workers have a right to discuss work conditions freely and without fear of retribution, whether the discussion takes place at the office or on Facebook.
- Ordering the reinstatement of various workers fired for their posts on social networks, the agency has pushed companies nationwide, including giants like General Motors, Target and Costco, to rewrite their social media rules.

Wage & Hour Concerns

- Time spent promoting the employer's product or service through social media sites is most likely compensable "working time" under the FLSA and applicable state/local wage and hour laws.
- Incorporation of these mediums and practices into an employer's overtime and time recording policies will help protect an employer from potential wage and hour issues.

Non-Solicitation

- **Non-Solicitation Agreements:** Even if allowed to work for a competitor, an employee might have agreed not to solicit employees, customers and/or vendors of the former employer. Some employers are demanding that former employees unlink and de-friend their LinkedIn, Facebook, and other social network contacts connected with the company. And an employee who leaves and starts sending connection requests to their old client list, corporate buddies and vendors can be in a world of hurt if the company thinks they're violating their non-solicitation agreement.
 - ***Amway Global v. Woodward*** – A blog post was evidence of violation of a non-solicitation.
 - ***TEK Systems, Inc. v. Hammernick*** – Complaint in lawsuit alleges employee violated a non-solicitation

Harassment

- **Beware of encouraging the use of social media.**
 - When a supervisor wants to be a subordinate's friend on a social networking site, it can create an awkward interaction between the supervisor and subordinate.
 - If the subordinate accepts the invitation, the supervisor can see the subordinate's other friends, photos, "wall" postings, social activities, etc.
 - If the subordinate doesn't accept the invitation, he or she may be concerned that his or her employment opportunities may suffer.

Password Requesting

- **Recent Developments**
 - California, Massachusetts, Illinois and Maryland passed legislation in 2013 to prohibit employers from pressuring job applicants to provide their Facebook passwords.
 - 2 state senators (Connecticut and NY) have asked the Department of Justice and the Equal Employment Opportunity Commission to investigate whether federal laws such as the Computer Fraud and Abuse Act and the Stored Communications Act are violated by the practice and say they are drafting legislation to make clear that the practice is illegal.
- **Recommendation**
 - Never force the access by requesting the username or password.
 - Never force the connection by requesting friending.

New Wave Privacy Laws

- 12 states currently have laws specifically restricting employers from demanding access to their employees' social media sites when those sites are not fully public. (Arkansas, California, Colorado, Illinois, Maryland, Michigan, New Jersey, New Mexico, Nevada, Oregon, Utah, and Washington.)
- New Jersey (September 2013)
 - prohibits employers from seeking access to “a person account,” such as a friends-only account
 - prohibits employers from “shoulder surfing” or making an employee access a personal account while management watches, from requiring an applicant or employee to change the privacy settings on a restricted account to a less-restrictive setting so that the employer can access it, or by forcing the employee to accept an employer’s “friend” request.
 - prohibits an employer from retaliating or discriminating against a job applicant or employee for refusing to provide log-in information to the employer, for reporting violations

Privacy & Confidentiality

- **Employee Privacy.** Employers must reduce employees' expectations of privacy in the workplace by clearly stating that employee use will be monitored. Courts have stated all social media is considered a public forum & therefore, no expectation of privacy.
- **Company Privacy & Business Confidences.** Regarding confidential and trade secret information, the issue of disclosure, both intentional and accidental, is enhanced through social media sites. In the “twitter” world, where individuals feel compelled to describe every aspect of their day, the likelihood that they may, even unintentionally, leak confidential information about the company while describing their workday is of real concern. Employer's confidentiality and trade secret policies need to recognize and incorporate this medium, and employees must be put on notice and trained that such information is not to be discussed or disclosed without authorization.

Privacy & Confidentiality

- Restrictions on the distribution of "confidential" information. Companies have the right to require employees to keep confidential a good deal of information on business secrets, intellectual property, and other similar information. But "personnel" information that addresses wages, hours, or terms and conditions of employment cannot be kept secret as part of a general ban on the dissemination of "confidential information."
- Confidential information in corporate policies, especially social media policies, ***should be expressly defined to exclude general information on wages, hours, and terms and conditions of employment.***
- Policy must be narrowly tailored to the business needs, and can not sweep so broadly so as to interfere with employee rights under federal labor law.

Employer Recap

- ***What can an employer do?***
 - Maintain consistent protocols to screen applicants' social media profiles & information regardless of their race, gender, or other protected class status.
 - Develop a basic understanding of the activities protected by the NLRA.
 - Educate screeners/ HR on the requirements of the Fair Credit Reporting Act & its state equivalents.
 - Access private employee information resources only with proper employee authorization.
 - Comply with the terms of use of all social media websites.
 - Ensure that employment decisions are made with accurate information, as false and misleading information is prevalent in social media.
 - Avoid retaliatory employment actions (terminations, demotions, etc.) against protected activities.

COMMERCIAL ISSUES

Advertising & Brand Management

- By identifying oneself as an employee, a social networker becomes a representative of that company. Therefore, everything posted has the potential to reflect on the company and its image.
- Be careful with sweepstakes. For any promotion involving a sweepstakes or contest, the company should include a provision(s) setting forth the scope of permissible participants (by state) and terms and conditions for any contest or sweepstakes.

Antitrust Issues

- Seemingly innocent inquiries about salaries, what fees or prices are charged for a service, or discussion of vendors may lead to allegations of antitrust activities. Employees should understand this issue.
- Include a provision within your policy regarding the enforcement of existing antitrust policies as well as a reminder not to communicate via social networking to make an anticompetitive agreement (such as price fixing or market allocation), share competitively-sensitive information, or disparage vendors, suppliers, or other members.
- Monitor social media channels to interrupt any illegal or inappropriate activity.

Copyright and Trademark Concern

- Companies should also consider monitoring social media sites for infringement of a company's intellectual property. Misuse of trademarks and improper use of copyrighted material exists on social media sites.
- A failure to police and take action to prevent and stop such misuse can significantly diminish the value of the company's intellectual property rights.
- Additionally, when creating a social media presence, companies need to consider their responsibilities to prevent infringement of other's intellectual property either by the company or third-parties that can post on the company's social media site.

Copyright and Trademark Concern

- NLRB
 - The current acting general counsel of the NLRB has explained on multiple occasions that regardless of intellectual property rights in company logos and trademarks, employees have the right to use company logos and trademarks in connection with discussions or protests over wages, hours, or terms and conditions of employment.
 - Examples provided to the employer community include the right to make protest T-shirts with company logos, or alternatively to take pictures of company stores or sites and use those pictures in posts related to section 7 "activities."
 - ***Thus, social media restrictions on the use of company logos or trademarks should expressly indicate that the restriction does not apply to activities that could fall under section 7.***

Who owns content posted to Social Media sites?

- Who owns User Generated Content? Not clear if a company can use anything posted on their Facebook page.
 - Facebook & Instagram: You own the content you post, but we get a license to use it.
 - Twitter : You own what you tweet.
 - Twitpic: You own it, but grant us the right to sell your pictures to other websites and keep the profit.
 - LinkedIn: LinkedIn has a perpetual license to all email messages; pictures; messages to and from Connections; recommendations and PowerPoints posted.
- **Companies need to be careful that they don't post or use anything that they do not own.** Posting content that belongs to another person is copyright infringement.
- **Who owns the company account** should be included within a **social media policy.**

Protect your Brand - Everyone is critic!

- GAP spent millions designing this new logo, but scrapped it after a groundswell of anger against the change, mostly propagated by twitter.
- Tropicana succumbed to criticism of its new carton and changed it back to the original.
- After Netflix raised their prices recently, many of the comments on their Facebook page were actually recommendations for competing services.
- **Turn off comments on your website if you expect them to be critical.**

LAWYER SPECIFIC ISSUES

Misconduct (To Friend or NOT to Friend)

- Example – Ex Parte Communication
 - PA Attorney had a 3rd party “friend” opposing counsel witness to learn more information. This was considered the same as interviewing the witness with no attorney present. Attorney reprimanded.
 - FL Judge sent friend request to attorneys and actual litigant. When request ignored, judge ruled in the opposing favor.
- Rules
 - Friending considered communication in the eyes of the court. Falls under Communications Act of 2003.
 - Judges and Lawyers should not be “friends” online.
 - In 2012, Florida's Fourth District Court of Appeal held that it was improper for a judge to "friend" attorneys.
 - ABA takes a more permissive avoid-the-appearance-of-impropriety-and-use-your-best-judgment stance.

Confidential & Privileged Information

- Lawyer. In April of 2006, a California Judge reprimanded a prosecutor for discussing a misdemeanor case he was handling on his Facebook blog. The judge called the prosecutor **juvenile, obnoxious and unprofessional**. Quoting sections of the blog where the prosecutor referred to his opposing counsel as **“chicken”** and other **obscene comments**. Attorney argued the site was private. The judge sent a written ruling to the State Bar. The blog was taken down the next day.
- Nurse. A nurse on her first day of work, began texting to her personal social media site about the days events. She described in detail patient injuries.

Duty of Candor & Expertise

- 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 affects online credentialing & recommendations.
 - Board of Ethics require review and monitor all online credentials and recommendations carefully for compliance with rules of professional conduct. The expect edit or hide items that contain the verbiage “better”, “the best”, “expert”, “specialized” or “certified”.
 - Never be false or misleading in your online credentials.
 - **Philadelphia Bar Association Opinion 2012-8; Florida Bar Advertising Guidelines (April 2013); New York State Bar Associate Committee on Professional Ethics Opinion 972 (June 2013)**

Discovery

- In 2013 13% of companies had to produce SM in discovery. (*Norton Rose Fulbright Litigation survey*)
 - 20% of companies had to collect data from an employee’s social media accounts in response to dispute or investigation.
 - Any social media managed by the company (i.e. company owned blogs), must be backed up on a retention schedule to avoid spoliation claims.
 - Any 3rd party social media site utilized must be captured. Most use 3rd party tools but some are now providing easy production (Twitter) and some are not (Facebook).
- Read all TOS and Privacy Policy for company used social media. Be aware of what is tracked and why information may be shared.
 - Logins

Expectation of Privacy for Discovery

- **Romano v. Steelcase Inc.** Judge ordered delivery of “private postings”. No expectation of privacy. Everything is discoverable. Courts continue to find that when someone posts on Facebook, Twitter, or their equivalents, that individual gives up the expectation of privacy, even if the messages were private messages or restrictions were set on a profile page.
- **Robinson v. Jones Lang LaSalle Americas, Inc., No. 3:12-cv-00127-PK (D. Or. Aug. 29, 2012).** Social media has been compared by a federal court to email. The judge in Robinson wrote: *I see no principled reason to articulate different standards for the discoverability of communications through email, text message, or social media platforms.*

Expectation of Privacy for Discovery vs. “Right to be Forgotten”

- In 2013 California enacted a law that would require social media sites to allow young registered users to erase their own comments from the sites. This is a first step in the United States toward the “right to be forgotten” that has been debated in Europe over the past decade.
- Teens who may have posted embarrassing statements will now have the right to clear those statements from the site’s memory banks. A child can only erase his or her own statements, not the comments, “like” buttons, or other posts surrounding those statements. A teen cannot erase pictures of him or herself that others have posted, or statements about that teen that third parties posted, no matter how embarrassing or offensive those pictures or statements may be.
- The Library of Congress is currently archiving public tweets on Twitter, and other third-party sites archive social media data. These **archive sites are not covered by the California law.**

Competent Representation

- As an attorney, if I don't research the available information on social media sites, am I providing competent representation?
 - Short answer - No
 - As attorneys we can no longer ignore social media and consider it to be not relevant. However, we must be careful how locate and use the information.

What is the greatest risk?

- AN UNTRAINED TEAM
- Draft a policy keeping your audience in mind (140 characters)
- Educate the purpose of Social Media
- Identify the consequences of not complying

Resources

- Case Law - http://www.x1.com/products/x1_social_discovery/case_law_2012.html
- NLRB Decisions - <http://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media>
- Social Media Case Studies - <http://www.simplyzesty.com/Blog/Article/March-2013/50-Social-Media-Case-Studies-You-Should-Bookmark>
- Fun Facts about Social Media - <http://www.iacpsocialmedia.org/Resources/FunFacts.aspx>

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