GUIDELINES ON THE ETHICAL USE OF SOCIAL MEDIA

Introduction

Social media presents both opportunities and challenges for legal practitioners. Various articles have discussed some of those opportunities. The purpose of this guideline is to assist practitioners in addressing some of these challenges.

Social media and ethics

“To guard against potential ethical violations, lawyers should use common sense, not say or do anything online that they would not do in front of a crowd, and review the existing ethics rules for guidance.”

Social media is a form of communication and practitioners should treat it exactly as they would any other communication medium. Be responsible, diligent, and careful. If in doubt, don’t say it or write it.

Ethical risk areas

Confidentiality

Practitioners owe their clients a duty of confidentiality. The use of social media by practitioners may expose them to the risk that client confidential information may be disclosed, albeit by inadvertence. For example, if a practitioner tweets that she is in a certain location, either through text or geotagging, she may unintentionally disclose that she is working with an identifiable client and thereby breach the duty of confidentiality.

Inadvertent retainer

Practitioners should take particular care to avoid creating unintended solicitor-client relationships on social media channels. For example, if one of a practitioner’s Facebook “friends” posts a legal or quasi-legal question on the practitioner’s Facebook wall, any answer posted by the practitioner may be construed by the questioner or other “friends” as legal advice for which the practitioner may become liable. However, there is nothing to stop practitioners engaging in general legal debate through social media.

Duty to the administration of justice

Every practitioner owes a duty to the court and to the administration of justice which is paramount and prevails to the extent of inconsistency with any other duty. Practitioners must be extremely careful not to say or do things in social media channels that could be viewed as bringing the law into disrepute. Whilst this risk exists in all forms of communication, the informal nature of many social media channels such as Facebook, Twitter, and Blogs may greatly increase the risk.

In addition, care must be taken by practitioners to ensure that opinions are not expressed on the merits of potential or current legal proceedings as this could be an interference in the administration of justice and a possible contempt of court. Similarly, adverse or demeaning comments about judicial officers and fellow members of the legal profession should never be made as they would be likely to diminish public confidence in the administration of justice.

Breach of “no contact” rule

A practitioner must not deal directly with another practitioner’s client or clients except in certain urgent and limited circumstances. For example, it would be unethical for a practitioner to make a Facebook “friend” request

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1 Ashe S, Can Law Firms be Friends with Social Media, Lawyers Weekly Vol 541.8 July 2011,pp16-17
3 Chester S & Del Gobbo D, How to create a Law Firm Social Media Policy Law Practice Jan/Feb 2012 pp51-52
4 Robert B. Teuber, Tax Attorney, Milwaukee, USA.
5 Rule 28 of the Law Council of Australia’s (Draft) Australian Solicitors’ Conduct Rules (draft as at June 2011, not yet formally adopted in Victoria) re commenting publicly during proceedings.
6 Rule 25, Professional Conduct and Practice Rules 2005
to another practitioner’s client or to make such a request to another practitioner’s client in order to gain access to their Facebook page. Similarly it would be unethical to accept a “friend” request from a person whom a practitioner knows to be another practitioner’s client and caution should be exercised generally when accepting “friends”.

**Other risk areas**

**Defamation**
Defamation law allows those who believe their character and reputation has been harmed to sue for damages and other relief. The laws of defamation apply to communications made on social media channels.

**Advising clients about social media risks**
In 2011 it was estimated by one lawyer that in 1 in 3 contested family law cases in Australia practitioners had sought to tender evidence of the other party’s Facebook page as it will often contain information and photographs which are not helpful to that party’s case, especially in child custody matters. It is expected that this number will increase. Similarly, investigations in personal injury damages and compensation cases may now seek to discover damaging material.

It is desirable that practitioners have at the very least a basic understanding of social media so that they can advise their clients appropriately. Practitioners must never be party to the destruction of documentary evidence in current or anticipated legal proceedings, and this applies to social media equally.

**Employees’ use of social media**
If a firm uses social media channels, employees of the firm should be given clear guidance and instruction on their use. This can be best achieved by having a social media policy for the firm and providing all partners and employees with appropriate instruction in its implementation and use.

It is important to differentiate between what is placed on a firm’s official social media channels such as Twitter or Facebook and what partners and employees of the firm post on their own personal social media channels. This point should be covered by the firm’s social media policy. In particular, all individuals in the firm should be instructed not to say anything in their personal social media channels which may be interpreted as coming from or representing the views of the firm and/or which may impact adversely on the firm or cause breaches of ethical behavior to occur.

**Risk to reputation**
A practitioner’s reputation is a very valuable asset but can easily be destroyed. This is especially so in the world of social media. For example, if something which is damaging to a practitioner’s reputation goes viral on the internet, it will be extremely difficult for the practitioner to repair the ensuing damage to reputation. Practitioners and all who work with and for them should be conscious of this risk at all times and regular reviews should be undertaken by law firms to monitor what is being placed on their social media channels. Practitioners may also wish to monitor mentions of their name, firm or associated branding that may be posted by other social media users.

**Remember:**
- Don’t say or do anything online that you wouldn’t do in front of a crowd.
- Maintain client confidentiality at all times.
- Avoid creating an unintended solicitor – client relationship.

**How can we help you?**
These are guidelines only and do not have the force of law. A practitioner must comply with the Professional Conduct & Practice Rules 2005 and the Legal Profession Act 2004. To discuss concerns about Social Media, contact the Legal Ethics Manager on (03) 9607 9515.