Lawyers "Step in It" Through Social Media Incompetence

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We often bemoan that lawyers don't take seriously their duty to understand e-discovery. Today we tackle another subject that attorneys seem to avoid, often to their peril as they step on virtual cow pies. Social media is so pervasive that ignoring its legal implications is (we think) simple incompetence. Now that the active Facebook user population is more than 500 million globally (more than the U.S. population), it is clear that the social media phenomenon is here to stay.

Not only do lawyers need to understand the upsides and downsides of social media for their clients – they need to understand the interplay between their ethical duties and their own use of social media.

Some examples:

1. Suppose a divorce client comes to you and says she is sure there is wonderful evidence on her spouse's Facebook page to assist in her child custody dispute. You suggest getting a third party to "friend" the husband, right? No, no and again no, but we've seen it happen. Attorneys cannot ethically be a party to a deception.

2. Recently, there has been a lot of buzz about LinkedIn recommendations. In many jurisdictions, you cannot have a client recommend The Law Office of Jane Doe by saying "Jane is the finest lawyer in the city." There is no objective basis on which to make that comparison so in many jurisdictions, including ours, you cannot have that recommendation on a site which you control and clearly you control your LinkedIn page.

3. From North Carolina: A judge "friends" one of the counsel in a pending case – the two Facebook buddies begin to chat about the case, including querying whether one of the parties involved was having an affair. The judge also checked the website of the opposing party. For this, the judge earned a reprimand from the North Carolina Judicial Standards Commission.

4. A lawyer/blogger/juror in California had his law license suspended for 45 days and was placed on two years' probation after he blogged about a trial while serving as a juror. He rather haplessly noted, "Nowhere do I recall the jury instructions mandating I can't post comments in my blog about the trial." Yeah, right. He also failed to disclose to the

court that he was an attorney.

5. In 2009, The Illinois Administrator filed charges against an assistant public defender that alleged, in part, improper disclosure of confidential client information on a blog, sometimes using their first names or sometimes their jail identification numbers. The information posted was not just personal, but extraordinarily personal and the violation of client confidentiality exceedingly clear.

6. In yet another case of lamentable judgment, Florida attorney Sean Conway posted a comment in his blog that a particular judge was "an evil, unfair witch." Perhaps she was but the Florida bar authorities were not amused and fined him $1,200. Not a great sum of money, but Mr. Conway appealed the matter all the way to the Florida Supreme Court, which upheld the fine. Many commentators have suggested that was an overreaction, but the case certainly points out the need for caution, even in informal online settings.

7. Next up at bat is the "trial from Hell," so named by the media. Here we have another Florida case (is it the water?) in which a prosecutor sought to display his skill at summarizing a trial through a ditty posted on Facebook and meant to be sung to the tune of "Gilligan's Island." If you are already shaking your hand, you have good reason. At the very, very least it was immature – his supervisor ruefully commented that it would provide for a good training moment. As he noted, we shouldn't be talking about cases on Facebook. D'oh. The case resulted in a mistrial, not because of the lawyer's actions but because jurors were texting one another and making cell phone calls during deliberations. To add to the mischief, during a 'smoke break,' a bailiff helpfully assisted the jury with its deliberations, illustrating his points with a pen. No wonder the press dubbed this the "trial from Hell."

We have only scratched the surface of attorneys and their unfortunate interactions with social media. Our own informal polls of conference attendees tend to confirm studies that roughly 60% of attorneys (and growing) participate in social media, generally split half and half between Facebook and LinkedIn with a few Twitterers thrown in. All other forms of social media run a distant fourth.

While no one doubts the benefits of social networking to lawyers (and that's an article in and of itself), certainly the lawyers need to know the rules of the game. They need to be aware of the advertising, client confidentiality and other professional conduct rules which may govern their online behavior. These posts are not ephemeral. They live, approximately, forever. Even if you delete something, you have no idea whether someone else has preserved your foolish post on

Facebook showing you demonstrating the finer points of using a beer bong (or worse). And now that the Library of Congress has announced its acquisition of Twitter's archive of public tweets, lawyers may now be chagrined to find an ill-advised tweet becoming a historical artifact.

When we present at CLEs, we always close with the ultimate common sense rule that should govern lawyers when using social media:

DON'T BE STUPID.

Be careful out there . . .