Social Networking
Dos and Don’ts
For Lawyers and Judges

BY JUDGE GENA SLAUGHTER AND JOHN G. BROWNING

With nearly 60 percent of adult American Internet users maintaining a social networking profile and Americans spending increasingly high percentages of their online time on sites like MySpace, Facebook, and Twitter, it’s pretty safe to say that social media is here to stay. The legal profession has embraced social media to a degree that parallels its dramatic spread among the population at large. A 2008 Networks for Counsel Survey by LexisNexis Martindale-Hubbell revealed that nearly 50 percent of lawyers belonged to online social networks; by 2009, that figure had jumped to 86 percent of attorneys between the ages of 25 and 35, and 66 percent of those age 46 or older. Nearly half of those surveyed in 2008 believed that such networking had the potential to change the business and practice of law over the next five years.

Yet just as every journey is bound to encounter some potholes or bumps in the road, your path to making social networking sites an integral part of your professional life is likely to hit some rough patches. Here are some dos and don’ts to smooth your travel on the information superhighway.

LAWYERS

**Do** embrace social networking as a means of marketing yourself and your practice. From sole practitioners to big firms, lawyers are using Facebook to connect with others and tout their prowess. Roughly one-third of the “AmLaw 100” top law firms are on Twitter. In fact, many clients and prospective clients in our wired world have come to expect a degree of tech savvy and willingness to stay on the cutting edge from their lawyers. One company, FMC Technologies, recently held a “beauty contest” for law firms via a request for proposals posted on a social networking site, requiring a response via a Tweet on Twitter stating why FMC should hire the law firm.

**Don’t** use your social networking profile to reveal anything you wouldn’t want a potential client — or your own mother, for that matter — to see. Just as teachers, police officers, and people from all walks of life have found themselves in hot water over questionable content on their MySpace or Facebook pages, lawyers must also be careful about what they post. The Florida Board of Bar Examiners made headlines when it recently adopted a policy of investigating the social networking profiles of certain categories of bar applicants, including those with a history of substance abuse or “candor concerns.” Besides licensing issues, photographs of certain conduct could jeopardize a job offer. And, for attorneys already practicing, informa-
tion and images posted online could put them at risk of disciplinary action, especially since fellow Facebook “friends” can post photos and other information to an account holder’s profile. Conceivably, photos of a lawyer with drug paraphernalia could provide evidence of a violation of Texas Disciplinary Rule of Professional Conduct 8.04(a)(2), which prohibits an attorney from committing a “criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.”

*Do* use social networking sites to exchange information and ideas with colleagues. At LawLink, a social networking site for the legal community, members can post documents, link to their blogs, participate in discussion groups, and post or answer questions. LinkedIn and Martindale-Hubbell Connected offer similar features, as does Texas Bar Circle (a social media network restricted to members of the State Bar of Texas, where you can also post job openings and event announcements). Legal OnRamp, which describes itself as a “collaboration system for in-house counsel and invited outside lawyers and third party service providers,” provides similar opportunities.

*Don’t* use social networking sites to betray client confidences, badmouth judges, or otherwise interfere with the administration of justice. In 2006, a prosecutor in San Francisco was disqualified for blogging about a pending case; his statements ranged from calling his opposing counsel “chicken” when she requested a continuance, alluding to her in blog titles that contained obscenities, and mentioning evidence that hadn’t been ruled admissible at trial. A 19-year assistant public defender lost her job after her blogs referring to one jurist as “Judge Clueless” and discussing thinly veiled case facts, defense strategy, and client identities was discovered. In Florida, the Supreme Court corrected an attorney, who claimed his blogged rants against a judge he referred to as an “evil, unfair witch” were protected free speech.

*Do* use social networking sites for valuable information in litigation. A surprising proportion of social networking users make limited or no use of the privacy control settings that sites like Facebook and MySpace offer. As a result, a digital goldmine awaits the enterprising lawyer. Whether you’re a family lawyer looking for evidence that will affect a custody or property settlement, an employment lawyer discovering that a sexual harassment plaintiff isn’t as innocent as he or she purports to be, or a personal injury litigator seeking evidence that a plaintiff isn’t as physically limited as he or she claims to be, social networking sites are a virtual treasure trove of information for both sides. Prosecutors have used Facebook and MySpace photos to impeach murder and drunk driving defendants, and criminal defense attorneys are using everything from YouTube video footage to Facebook status updates to clear their clients.

*Don’t* take any ethical shortcuts in obtaining such information. Social networking pages that are private will require more formal discovery steps. As a March 2009 Philadelphia Bar Association ethics advisory opinion points out, using deceptive means to “friend” a witness — such as having a third party do it without disclosing an affiliation with the lawyer — is unethical. Such tactics violate the Rules of Professional Conduct prohibiting a lawyer from engaging in behavior that involves dishonesty, fraud, deceit, or misrepresentation.

**JUDGES**

*Do* use social networking sites for professional development and political advantage. A recent issue of *Case in Point*, the National Judicial College’s magazine, suggested that participating in social media provides judges with a low-cost means of staying informed while simultaneously enhancing public understanding of the judiciary. A January 2009 New York judicial ethics opinion saw no problem with a judge joining and making use of an Internet-based social network, provided that the jurist “otherwise complies with the Rules Governing Judicial Conduct” and remains “mindful of the appearance created when he/she establishes a connection with an attorney or any-
one else appearing in the judge’s court through a social network.” Quite a few federal and state judges have profiles on sites like LinkedIn, and judges are increasingly making use of sites like Facebook and Twitter, in their political campaigns. As the 2008 Obama presidential campaign illustrated, a candidate’s online presence helps with fundraising, keeps supporters updated on campaign developments, and exposes the judicial candidate to entirely new audiences and potential voters.

Don’t use social networking to engage in *ex parte* communications or other improper conduct. Judge B. Carlton Terry, Jr. was publicly reprimanded in 2009 by the North Carolina Judicial Standards Commission for friending a lawyer on Facebook during a pending case, posting and reading messages about the litigation, and accessing the website of the opposing party. After a discussion of Facebook in chambers during a child custody/child support case (in the presence of opposing counsel Jessie Conley), Judge Terry and lawyer Charles Shieck friended each other. Shieck then began posting messages referring to aspects of the case, including how long trial would last, whether or not one of the litigants had been guilty of an affair, and even noting “I have a wise judge.” Judge Terry not only responded to these postings, but also used the Internet to independently gather information, including Googling the photography business run by Conley’s client and finding various poems written by that client. After the conclusion of the trial, Judge Terry disclosed to both parties that he visited the website of Conley’s client, and later disqualified himself and vacated his child custody/child support order at Conley’s request (a new trial was also ordered). The Commission found that Judge Terry’s *ex parte* communications and independent gathering of information reflected a “disregard of the principles embodied in the North Carolina Code of Judicial Conduct,” and constituted conduct “prejudicial to the administration of justice that brings the judicial office into disrepute.”

In December 2009, Superior Court Chief Judge Ernest “Bucky” Woods of Georgia retired after his relationship with a defendant, Tara Black, was revealed. The 57-year-old jurist had contacted Black through Facebook and initiated a relationship in which he advised her on how to respond and plead in his court. He negotiated a deferred prosecution agreement with the prosecutor and signed an order allowing her to be released on her own recognizance. Other emails within the 33 pages turned over as part of an open records request described visits the judge made to Black’s apartment and the money he loaned to her.

Do use social networking to keep the lawyers and parties before you on the straight and narrow. Michigan Judge A.T. Frank uses social networking sites to monitor offenders on probation under his jurisdiction, occasionally finding photos on MySpace or Facebook pages in which the defendants are engaged in drug use or other prohibited behavior. Galveston juvenile court Judge Kathryn Lanan employs a similar tactic, requiring all juveniles under her jurisdiction to “friend” her on Facebook or MySpace so that she can review their postings for any signs of inappropriate conduct that might warrant a return to her court. Also in Galveston, Judge Susan Criss finds her presence on Facebook helps her in keeping lawyers honest. On one occasion, a lawyer had asked for and received a continuance because of a supposed death in the family. When another lawyer from her firm asked that the continuance be extended, Criss pointed out that she had photographic evidence on Facebook that the first lawyer had been “partying that same week,” and denied the request.

Do be careful about having a social networking profile if you’re a judge in certain jurisdictions. In a Nov. 17, 2009, opinion, the Florida Judicial Ethics Advisory Committee ruled that judges may not friend lawyers who might appear before them, or permit such lawyers to friend them. The central concern for the committee was the impression that such friends might have influence over the judge. A minority on the committee, pointing out that the term “friend” in the social networking context merely conveys that a person is a contact or acquaintance rather than an actual friend, would have permitted judges to have more of a social networking presence. An October 2009 ethics opinion from South Carolina said that a judge can be a member of Facebook with court employees and law enforcement personnel as friends, provided that they don’t discuss anything related to the judge’s work. The same opinion, however, noted that “a judge should not become isolated from the community in which the judge lives,” and that allowing a judge to belong to a social networking site “allows the community a better understanding of the judge.”

The brave new world of social media offers lawyers and judges new ways to stay connected with colleagues, stay up to speed on the latest developments in their fields, to reach out to prospective clients or voters, and to do their jobs more effectively. Lawyers and judges, in turn, need to stay within the lines and avoid the ethical potholes.

GENA SLAUGHTER is presiding judge of the 191st Civil District Court in Dallas. She is a graduate of Southern Methodist University School of Law.

JOHN G. BROWNING is a partner in Thompson, Coe, Cousins & Irons, L.L.P. in Dallas. He serves on the *Texas Bar Journal* Board of Editors.