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Sample Social Media Policy & Commentary

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Lawyers and legal staff, whether in a law firm, government agency or in-house legal department, will participate in social media sites. A LexisNexis survey in September 2009 found that 86 percent of lawyers age 25 to 35 participate in social media and over 70 percent of all lawyers participate.¹ Indeed, firms and organizations themselves have a social media presence. A December 2009 survey of the 100 largest American law firms found that 29 had a Twitter presence and 82 had some social media platform.² Undoubtedly, many more firms are tweeting today, since the survey showed that only 3 of the firms were on Twitter only a year before. For purposes of this paper, social media is broadly defined as traditional social networks (Facebook), work networks (LinkedIn), microblogs (Twitter), on-line collaboration sites (wikis), content sharing sites (Flickr) and specialty networks for specific practice areas or industries.

Firms and employers should provide guidance to lawyers and employees regarding how to participate in the employer-provided social media platform. Additionally, both employers and individuals may want guidance for personal use of social media and how it may affect the employer or firm as well as the individual's professional standing. Even inadvertent misuse of social media may negatively affect the company/firm or run afoul of ethical codes. While being mindful of not interfering with an employee's personal life, a well crafted social media policy may help an

¹ 2009 Networks for Counsel Study,
http://www.leadernetworks.com/documents/Networks_for_Counsel_2009.pdf

² *Twittering Classes: Lessons For and From the AmLaw100*, MyCorporateResource.com,
<http://mycorporateresource.com/content/view/35128/548/>

employee or attorney avoid ethical and legal dangers. Moreover, ABA Model Rules 5.1 through 5.3 obligate lawyers to supervise support staff, so a social media policy can provide necessary guidelines for a law firm or legal department staff.

This term in *City of Ontario v. Quon*,³ the Supreme Court acknowledged the fast changing nature of communication and technology and how employers adopt to those changes:

Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. See Brief for Electronic Frontier Foundation et al. 16-20. Another *amicus* points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. * * * At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve. * * * [E]mployer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.⁴

What follows is an annotated sample social media policy. It draws in large part from a policy adopted by the firm Baker & Daniels⁵, but in no way should the commentary be attributed to that firm.⁶ The policy below expands on the Baker & Daniels model and adds provisions which may be more applicable to in-house counsel settings than to law firms. Not all of these provisions may be relevant to every firm or employer and the unique features of certain enterprises will require other provisions. Of course, states have adopted different ethic codes and what may be proper in one state may violate the code in another. Sample language is listed in bold type with commentary following.

³ 560 U.S. ____ (June 17, 2010).

⁴ *Id.* Slip opinion at 11.

⁵ Baker and Daniels has offices in Indianapolis, Fort Wayne, South Bend, Chicago, Washington and Beijing. www.bakerdaniels.com

⁶ A copy of the Baker & Daniels social media policy may be found at: http://www.bakerdstreamingvid.com/publications/Baker_Daniels_Social-Media-Policy.pdf

While many of the guidelines implicate the Canon of Ethics, others touch on issues of best practice on social network sites, address proper netiquette, or simply give guidance on good behavior. Before explaining the social media guidelines and the legal risks associated with using social media to staff covered by the guidelines, it may first be necessary to explain to some staff what social media is. Common Craft creates 3-minute videos that simplify complex subjects, including many on computing, technology and social media.⁷ You may view these videos for free and purchase a license for presentations.

Sample Guidelines

1. Remember that the internet is not anonymous, nor does it forget.

Everything written on the web can be traced back to its author, often very easily. Information is backed up often and repeatedly and posts in one forum are replicated in others through trackbacks and reposts or references.

Pursuant to John Doe suits and other subpoena enforcement, an internet service provider or social network host may be required to disclose the identity of an anonymous or pseudonymous poster.⁸ An Oregon attorney created a false entry on Classmates.com pretending to be a high school athletic coach and implying that the coach had sexual contact with students. The attorney was aware that similar rumors were circulating about the coach and the attorney claimed he made the post as a practical joke. He was disciplined under Or. DR 1-102(A)(3) which prohibits lawyers from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation.”⁹

The Cleveland Plain Dealer reported that a county judge using the name “lawmiss” was posting comments about court matters and lawyers on its website. The judge denied posting the comments and said that her adult daughter using her account

⁷ Common Craft presentations are found at: <http://www.commoncraft.com/socialmedia>

⁸ However, see *Crispin v Audigier*, No. CV 09-09509 (May 26, 2010, C.D.CA), where enforcement of a subpoena on social network sites to disclose identities was denied as violating the Stored Communications Act, 18 U.S.C. 2701(a)(1).

⁹ *In re Carpenter*, 95 P.3d 203 (Or. 2004).

posted the comments.¹⁰ State supreme court justice Paul Pfiefer reassigned the judge in a murder case due to an appearance of impropriety caused by these postings and their widespread dissemination.¹¹

2. There is no clear line between your work life and your personal life. Always be honest and respectful in both capacities.

With the ease of tracing authors back from their posts and the amount of information online, finding the actual identity of a poster from a few posts and a screen name is not impossible. This creates an avenue for outside parties to link your personal writings to those you've done in a professional capacity. Always write as if everyone knows you. Never write anything you wouldn't say out loud to all parties involved.

As employees use hand held mobile devices to conduct personal issues at work and perform work at home, on vacation and in the middle of the night, the line between "at work" and personal time blurs. Moreover, the web can expose private behavior to a wide audience quickly. Third parties searching for individuals' non-work activity will sometimes implicate the employer because of the employee's off duty actions. The ability and desire to regulate an employee's off duty activity raises issues too large to address in this paper.¹² However, if they are not already aware, employees should be educated that their seemingly private behavior has a great chance of being discovered and widely distributed, and that these disclosures have the potential of affecting their employment.

3. Avoid hazardous materials.

Do not post or link to any materials that are defamatory, harassing or indecent.

A Florida attorney posted an entry on a blog maintained by a county criminal defense lawyers group. He critiqued a judge claiming her efforts to schedule criminal trials with one week rather than the usual one month notice was an attempt to coerce

¹⁰ Cleveland.com *Judge Shirley Strickland Saffold is removed from the Anthony Sowell murder trial*, (April 22, 2010) http://blog.cleveland.com/metro/2010/04/judge_shirley_strickland_saffo_2.html

¹¹ *Ohio v Sowell*, Common Pleas Case No. CR-530885, (April 22, 2010). <http://media.cleveland.com/pdextra/other/DOC042210.pdf>

¹² The constitutional implications of regulating public employee's off duty acts is analyzed in "*Constitutional Implications of Disciplining Public Employee Off-Duty Conduct and the Role of the Internet*" by Paul R. Klenck in the 2009 Proceedings of the National Academy of Arbitrators, due to be published by BNA.

defendants into waiving their right to a speedy trial. He repeatedly referred to the judge as an “evil, unfair witch,” wrote she was “seemingly mentally ill” and had an “ugly, condescending attitude.” He said she was “clearly unfit for her position” and “there’s nothing honorable about that malcontent.” The bar fined and reprimanded him for making a false statement about the qualifications or integrity of a judge. The state supreme court issued an order to show cause as to whether the comments should be protected speech under the First Amendment. The attorney and an *amicus* brief by the ACLU argued that it was protected speech. Without an opinion, the court upheld the discipline.¹³

Additionally, posters could be sued for invasion of privacy, defamation or other tortious statements. The website host may be immune from liability for the posts of third parties, however, the host may be liable for material it produces.¹⁴ Notwithstanding these various immunities, a firm or employer may desire insurance protection for coverage against torts, infringements, errors and omissions that may result from on-line publishing. The insurer will review the practices and may insist certain standards be met.¹⁵

4. Respect other’s intellectual property.

Many erroneously believe that material posted on the web can be freely copied and distributed. Original works of authorship are protected by copyright the moment they are fixed in any tangible medium. Copyright owners have the *exclusive* right to copy, distribute, display and publicly perform their work.

Organizations dealing with securities or tax advice may want to provide more detailed guidance on avoiding improper postings.

¹³ *Florida Bar v. Conway*, (Case No. SC08-326) (unpublished decision). John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, New York Times, September 13, 2009.

¹⁴ The Communications Decency Act states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. Section 230. The Act further provides that no cause of action may be brought under state law inconsistent with that immunity.

¹⁵ An analysis of some of the common terms of these policies and major insurers can be found in the *Annenberg Online Journalism Review*, February 20, 2004, [Online Publishing Risks Create Need for Libel Insurance](http://www.ojr.org/ojr/law/1077150111.php) by Michael Rothberg. <http://www.ojr.org/ojr/law/1077150111.php>

5. Provide a disclaimer.

Where you are identified as an employee or you comment on matters associated with the firm, be clear that you are expressing your opinion and not the opinion of the firm.

Even organizations that encourage employees to engage in social media will not want the individual to assume they speak on behalf of the organization. Additionally, the individual will often want to limit the connection to the workplace and adverse comments that could reflect negatively on them as employees. Where the person is already identified as associated with the organization, or when they are commenting on matters directly related to the organization, they should clearly state that they are not speaking for the organization but for themselves.

6. Keep confidentiality.

Do not post any confidential or proprietary information in regards to the firm or its clients.

A touchstone of lawyer ethics is not to reveal client confidences. ABA Model Rule 6(a) provides, “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.” The informal manner of social media communication or the perceived security of discussion within a professional network, might result in relaxed communication. An Illinois public defender published a blog on the “Irreverent Adventures in Life, Law, and Indigent Defense.” It was publicly available and she referred to clients by first name or a derivative or by their jail identification number. She disclosed that a client tested positive for drugs after testifying that he was clean. She wrote that another client disclosed she had an addiction just after telling a judge she did not. The state attorney registration and disciplinary commission determined she disclosed client confidences as well as failed to rectify a fraud on the court. The supreme court suspended her license.¹⁶

¹⁶ *In the Matter of Peshek*, Ill.Atty.Reg. and Disc. Comm., 09 CH 89 (Aug. 25, 2009), Ill. S.Ct. M.R. 23794, (May 18, 2010).

7. Don't pad your own stats.

Do not create anonymous or pseudonym online profiles in order to pad statistics on page views or links. Also, do not comment on your own or another's posts in order to create a false sense of support.

A quick way to lose credibility on line is to puff or pad statistics of your online activity.

8. Always trackback.

When reposting or referencing a post on one of the firm's online sites, provide a link to the original post or story.

The organization will want to measure the success of its social media efforts. By providing links back to the original post, the organization can measure the traffic to its posts as well as measure where visitors are coming from.

9. Identify yourself.

When relevant, identify your affiliation with the firm and your area of concentration.

Disclosure of identity and connections enhances both the credibility of the individual and the organization. The organization may specifically authorize that the employee can link back to their biography on the organization's website.

10. Use of the organization's logos or service marks

The organization's service mark and logo are not to be used except with the written approval of the firm administrator.

The organization, company, law firm will want to protect its intellectual property and message embodied in its logo, service marks or trademarks. The organization may wish to allow certain individuals to use the mark or logo or only allow the use in approved situations.

11. Do not pat yourself on the back.

Do not post self-laudatory statements regarding your work or the firm's.

12. Do not approve recommendations or testimonials.

Recommendations and testimonials violate the ethics rules under which the firm operates. Individuals with the firm do not need to discourage others from posting promotional materials about the firm; however, the firm cannot link to them or have them posted on the firm's sites.

13. Do not promote successes.

Don't report firm results or outcomes or use words like "successfully", "favorably", "won", or "prevailed" in describing the firm's representations. The promotion of successes is prohibited for law firms. It also violates the ethics rules under which the firm operates.

ABA Model Rule 8.4(a) prohibits a lawyer from violating any of the Rules or from knowingly assisting or inducing others to do so. Therefore, it is possible a lawyer could violate a state rule prohibiting testimonials even if the lawyer did not post a testimonial on the firm's page but merely provided a link to a client's page and the client had a testimonial about the lawyer's achievements.¹⁷ Some jurisdictions may even require the lawyer to review a client's website to determine whether there may be improper advertising for the lawyer.¹⁸ The arena of testimonials, advertizing and solicitations varies greatly among states, so a careful study of what is permissible in your state is warranted.¹⁹ Florida's new rules barring online testimonials have been delayed to allow for more comment and are being challenged as violating the First Amendment.²⁰

¹⁷ S.Ct. Ohio Board of Commissioners on Grievances & Discipline, Ohio Adv. Op. 2000-6 (Dec. 1, 2000).

¹⁸ S.Ct. Ohio Board of Commissioners on Grievances & Discipline, Ohio Adv. Op. 2004-7 (Aug. 6, 2004) and Pa.Bar Association Commission on Legal Ethics and Professional Responsibility 2007-13.

¹⁹ A 120 page comparison of state advertising rules is found at *Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, (March 12, 2010).

<http://www.abanet.org/cpr/professionalism/state-advertising.pdf>

²⁰ *Florida Law Firms Protest Bar's Online Ad Rules*, Daily Business Review (July 12, 2010).

<http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202463422851>

ABA Model Rule 7.1 provides: “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.” Some states prohibit a lawyer from reporting outcomes without also having a disclaimer that results may vary in different cases.

14. Do not return fire.

If a negative post or comment is found online about the firm or yourself, do not counter with another negative post. Instead, publicly offer to remedy the situation through positive action. Seek help from the media relations department in defusing these types of situations.

The sometimes impersonal and distant nature of online communication can encourage inappropriate behavior that one would likely not engage in during face-to-face meetings. Such conduct could lead to charges of incivility. In addition, the conduct may reflect poorly on the organization as a whole.

One of the benefits to a firm or organization participating in social media is knowing when others are saying bad things about you. The criticisms will occur whether or not you are participating in social media. By participating, you can be aware of them. The organization may then have a strategic response to ignore or respond to the negative posts.

15. Personal blogs and social media sites directly related to your job must be registered with the firm administrator.

Neither the title of your site nor the URL may include the organization’s name. If you receive a media inquiry about your site, you should consult the media relations department.

The employer will want to exercise greater control of personal sites where the employee is overtly discussing work related issues. No ethics opinions were found providing guidance on how to name blogs or what user names (other than the

individual's own name) might be permitted for social networking. However, several state ethics bars have issued opinions regarding what domain names law firms may use for their website. The consensus appears to be the firm is not restricted to using only the formal firm name but may use other monikers as long as they are not false or misleading.²¹

Furthermore, exercise caution that the employer is not prohibiting or restricting communication about an employee's terms and conditions of employment. Such restrictions could violate Section 7 of the National Labor Relations Act or related state labor acts. Even employees who are not organized may have rights to engage in collective activity including making derogatory comments about their employer. While the employer is likely able to restrict disparaging comments about the employer's services or products, it may be illegal to restrict comments about how it acts as an employer.

16. Do not offer or appear to offer legal advice.

Individuals with the firm should not give legal advice or otherwise form attorney-client relationships while using social media. Formation of these relationships must be done through the firm's regular procedures to avoid conflicts and other ethical problems.

Where a lawyer begins giving fact specific legal advice in a social setting, whether in person or on a social network site, the lawyer may be implying that an attorney client relationship exists. Discussions of general principles or presenting different viewpoints on legal issues will generally be safe. The lawyer can advise an individual to seek their own counsel to apply the law to their situation. Additionally, the lawyer or firm may want to post a general disclaimer that no attorney-client relationship exists unless there is an explicit agreement to form one.

The D.C. Bar has provided the following advice:

In light of these general principles, lawyers seeking to avoid formation of attorney-client relationships through chat room conversations would be well

²¹ *Lawyers and Law Firms' Selection and Advertising of Internet Domain Names*, 12 N.J.L. 1135 (June 6, 2005) which references the determinations made in several states. http://lawlibrary.rutgers.edu/ethics/caa/caa32_1.html
Identifying Information in URL for Law Firm Website, 2005 Formal Ethics Opinion 14 (N.C. State Bar).
<http://www.ncbar.com/ethics/ethics.asp?page=7&from=1/2006&to=6/2006>

advised to avoid providing legal advice in such communications. The relevant distinction is that between legal advice and legal *information*. Providing legal information involves discussion of legal principles, trends, and considerations—the kind of information one might give in a speech or newspaper article, for example. Providing legal advice, on the other hand, involves offering recommendations tailored to the unique facts of a particular person’s circumstances. Thus, in discussing legal information, lawyers should be careful to emphasize that it is intended as general information only, which may or may not be applicable to an individual’s specific situation.²²

²² D.C. Bar Legal Ethics Commission Opinion 316 (2002).
http://www.dcbarethics.org/for_lawyers/ethics/legal_ethics/opinions/opinion316.cfm