

### **Ethics Tips for Lawyers Using Social Media**

1. Rule 3-100 and B&P Code § 6068(e)(1) obligate every attorney to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” The duty of confidentiality can be compromised in many ways if an online social networking service is used to communicate with coworkers or co-counsel. With privacy changes on sites such as Facebook introducing more uncertainty than ever, it is best to assume that communications made through social media will not be private.
2. Similarly, communications which would otherwise be protected by attorney-client privilege or attorney work product doctrine can lose the privilege if other parties are included in the communication (Rule 3-100 and Evidence Code § 954).
3. Cutting-edge hosted “cloud computing” services, while exciting in their potential uses as collaboration tools, pose a similar range of risks related to protecting confidentiality and privacy.
4. Location-based services such as Yelp (local services), TripIt (trip planning), Foursquare, Facebook check-ins, Loopt, Blockchalk, or even Twitter (which can tag tweets with latitude and longitude when using a GPS-equipped device such as the iPhone), are becoming increasingly popular. Communications regarding your location can cause an inadvertent violation of the attorney’s duty of confidentiality (Rule 3-100). For example, rating a restaurant in the city in which your company’s primary competitor is headquartered could tip off outsiders to M&A negotiations.
5. Web 2.0 is all about making communication bidirectional, with the result that many lawyers engage in online conversations rather than simply publishing articles. When addressing legal subjects in blogs, forums, or sites such as Avvo (which encourages lawyers to answer questions posed by the public), Quora, or similar sites, take care to phrase discussions in terms of offering general legal information rather than legal advice to avoid inadvertent formation of an attorney-client relationship. This is particularly important for in-house counsel, who are unlikely to be covered by professional liability insurance.
6. Geographic boundaries are nonexistent online. Formation of a long-distance attorney-client relationship can result in the unauthorized practice of law in a state in which you are not admitted to the Bar (Rule 1-300).

7. In case eDiscovery and records retention issues did not induce enough headaches already for in-house counsel, the social Web further complicates things by storing communications in third-party messaging systems such as Facebook messages, Twitter direct messages, etc. The duty to preserve evidence and avoid spoliation presumably applies to these communications whenever litigation appears likely.
8. Social media provide endless opportunities for employees or counsel to make damaging admissions which can come back to bite your company in litigation. It's often impossible to know which communications will prove problematic until after the fact, but training employees to say less rather than more about company-related subjects in their online social lives can only help.
9. The opening of APIs, such as Facebook Connect, by most major online services has dramatically accelerated interoperability. For example, tweets on Twitter can show up as status updates on Facebook, LinkedIn, Google Buzz, Plaxo, etc., and vice versa. It is becoming increasingly difficult for non-technical people to understand exactly what data is being shared between services. Assuming this trend continues, it is likely to increase confusion about which messages are being delivered to which audience, further blurring the boundary between personal and professional conduct online.
10. Photo sharing poses risks that are not always obvious. Although pictures taken in a business setting can appear innocuous, there may be information to be gleaned from them if viewed by competitors or opposing counsel (items in the background, etc.) Real-time posting of photos taken with a camera phone, particularly if recognizable landmarks are visible or if the photos are geotagged on a site like Flickr, poses risks similar to #4 above.

*For links to other materials and resources, see <http://bottomlinelawgroup.com/resources>.*