



YLD Perspective

by Michael J. Zussman and Glen R. McMurry

44 Million Reasons Why You Should Use Social Media in Your Law Practice

Pick up a law journal (or any periodical, for that

matter) and chances are good that one of the articles addresses social media and how most of us fail to appreciate its full potential. In the first few years of the 21st century, developments in social media technology focused primarily on the infrastructure of recreational social networking. However, over the last several years, social media has evolved beyond the fleeting concept of self-promotion and friend-collection to a highly-advanced and necessary tool to disseminate and manipulate information and gain market share. Stated another way, the social media experiment succeeded. Companies and individuals (our clients) actively use multiple social media platforms every day, and prospective clients rely on social media to determine which attorneys to hire and when. Most attorneys have already read articles arguing “you should be using social media.” Now, we can prove why.

Attorneys use the Internet socially every day, but many still consider social media sites as purely recreational. They may have set up profiles on Facebook, Twitter, LinkedIn and even Google+, but might only use the sites for reconnecting with long lost friends, sharing photos from a recent family vacation, or simply posting their professional and educational background. Increasingly, attorneys do use social media professionally to further their careers, and the numbers support this trend.

We are beyond the days of social media use merely as a distraction for the millennial generation. Attorneys and law firms should embrace social media as a platform to highlight their strengths through engagement and interaction. This does not mean allowing associate attorneys unfettered access to Facebook during work hours—administration of social media should be delegated wisely to ensure that the firm’s message is controlled and undiluted—but permitting networking and interaction by employees through social media sites might be encouraged, if regulated. HootSuite, a social media management company that also analyzes social media metrics, argues that your best advocates are actually your own employees.¹

Social Interaction and the Benefits of Twitter

Businesses in all industries, including the legal profession, use social media to advertise and promote goods and services. We find ourselves in an age where active, professional use of social media by attorneys is not only a good idea, it is expected, particularly in the technology industry. While it has been necessary since the 1990s for law firms to build well-designed websites in order to establish an “online presence,” attorneys must move beyond the limitations of a stationary website and reach out to their clients via interactive social media. An online presence now requires incorporating social media interaction in order to appear professional and up-to-date. Unlike most traditional law firm websites, which generally deliver information unilaterally from the firm to the Internet user, modern social media practice demands continuous updates and interaction with consumers, and boasts the ability to capitalize on the interactions and improve marketing techniques by tracking and analyzing the social media data.

To be effective, the volume and frequency of an attorney’s or firm’s updates need not rival those of Lawrence Lessig² or the *Wall Street Journal*³, but law firms should use Twitter as a unique opportunity to publicly brand themselves by publishing brief content at little to no cost. Successful 21st century businesses engage potential and existing clients with thought-provoking news and content. “The biggest opportunity for businesses in 2013 is to be a social business, not simply a business in social.”⁴

Effective use of Twitter also requires its use as a networking and focus group tool. By using hashtags (the “#” symbol placed before a word or phrase), users can create searchable topics. Law firms can poll a large audience with respect to a topic it would like more information about. By asking users to include a specific hashtag in their response, the firm can easily track responses and create a closed universe for discussion. For example, a law firm polling Twitter users on whether they prefer to attend a CLE on trademark litigation or immigration law could request that users respond with

Michael J. Zussman is a corporate, intellectual property, and entertainment law attorney in New York City and works primarily with startups, entrepreneurs, emerging businesses, artists, and musicians. Michael is the delegate for the Southern District of New York Chapter, and he serves as chair of the Social Media Committee and is the Second Circuit liaison on the FBA Younger Lawyers Division’s National Board of Directors. Michael may be reached at michael@zussmanlaw.com. Glen R. McMurry is a litigation attorney at the law firm of Dungan & LeFevre Co. LPA in Troy, Ohio. His primary areas of practice include business and civil litigation. Glen is the current President of the FBA’s Dayton, Ohio Chapter and is the Sixth Circuit liaison on the FBA Younger Lawyers Division’s National Board of Directors, also serving as the YLD’s Publications Editor. Glen may be reached at gmcmmurry@dunganattorney.com.

the hashtag #LawFirmSeminar2013. The firm can then track and view all responses together, and produce a CLE program based on actual need and interest.

Many companies have moved beyond merely “engaging” consumers. HubSpot reports that “technology has caught up with marketers’ need for a sharper way to gauge [return on investment], and many companies are beginning to evolve from measuring more superficial social media metrics like clicks, retweets, and Likes to tracking metrics that are tied more closely to a company’s bottom line... [B]y integrating social tools with a contacts database...and sharing data across platforms, companies...have been able to refocus their strategy on leads generated through social media.”⁵

Social Media By the Numbers

In 2012, 58 million consumers—nearly 20 percent of the United States population—sought attorneys. Of that monumental number, 76 percent, or more than 44 million people, searched using online resources⁶ including search engines, websites, and social media sites like Facebook.⁷ This number will only grow in the coming years, as both the U.S. population and universal access to high-speed wireless Internet increase.⁸

Mobile technology development and use is also rising at an especially fast rate. Consumers increasingly access the Internet from smartphones or tablets rather than desktop computers. Today, software developers often first create software exclusively for mobile devices, and then develop traditional websites, if at all. In fact, by 2014, Internet access by mobile devices “is predicted to overtake Internet desktop usage.”⁹ The logical response for attorneys is to optimize their websites for mobile use, or to go one step further and develop an independent mobile app that provides additional functionality, such as “push notifications” to notify subscribers of law firm news and press releases.

While the innovations of mobile technology make life easier for millions, they raise challenges for law firms, as statistics suggest that mobile device use is unpredictable. The fleeting seconds a mobile user spends researching and accessing attorney information through mobile devices may be the only opportunity for the attorney to land the user as a client. Mobile users are 61 percent more likely to leave a site right away if it does not give them the information they are looking for.¹⁰ Among users who leave such a site, 79 percent say they will search for another mobile site to do the job.¹¹ Furthermore, 57 percent of consumers will not recommend a business with a poorly designed mobile site, and 40 percent of consumers will go to a competitor’s site after a bad mobile experience.¹²

Consequently, law firms that have not properly optimized their websites for mobile technology may actually lose business. Big law firms have increasingly realized the commercial power of mobile content delivery. Many now actively utilize social media and mobile delivery to engage prospective and existing clients. 27 percent of the 2012 Am Law 200 list of law firms now have mobile sites, up 46 percent from 2011. And 29 percent of the firms on the 2012 Global 100 list have mobile sites, an increase of 32 percent since 2011.¹³

As prospective and existing clients change their behavior, attorneys must adapt accordingly. Today, adapting to the customs and habits of clients means finding and delivering engaging content to them where they are—on social media sites, smartphones, and tablets. With the number of lawyers increasing every year,¹⁴ it will only become more difficult to stand out.

One key strategy for successful social media marketing is to become a thought leader or source of reliable content, engaging consumers and then tracking social metrics to focus marketing efforts. Industry leaders do more than post news updates and links—they become a valuable source of information by thinking creatively and delivering cutting-edge content that interests their audience. Twitter is an excellent vehicle for getting a high return on investment. As practicing attorneys, we all keep abreast of new developments in our respective practice fields and in our client’s industries. Sharing brief insight into such news is as easy as typing a text message. Tweeting about news and developments can demonstrate proficiency and engagement in a practice field or client industry. The potential for subscribing to and engaging in conversation with other industry leaders is an added benefit. A retweet or mention of your post by an influential thought leader builds your credibility, reputation, and increases exposure to a vast audience. The honor of being quoted in the *New York Times*, while still impressive, is a 20th century accomplishment, and might be read only by *New York Times* subscribers. Today, the ultimate endorsement may be a retweet by someone like Bill Gates, sharing your brief 140 character message with millions of followers, who, in turn, may share your post. All the more beneficial, we now have the technology to track and measure the electronic paper trail and exploit your shared message’s impact.

Words of Caution – Legal Ethics Behind Social Media Use

Online Disclosures Generally

One pitfall for public companies has been the potential securities laws violations for improper disclosures. Regulation Fair Disclosure (FD) requires companies to distribute material information in a manner reasonably designed to disseminate the information broadly and nonexclusively. It is intended to ensure that all investors have the ability to gain access to material information at the same time. Regulation FD does apply to social media, and the Securities Exchange Commission recently investigated Netflix, whose CEO had posted on his personal Facebook page that Netflix’s monthly online viewing had exceeded one billion hours for the first time. Netflix did not report this information to investors through a press release or Form 8-K filing. However, after its investigation, the SEC determined that companies can use social media outlets like Facebook and Twitter to announce key information in compliance with Regulation FD, provided that the company alerts investors about which specific social media sites will be used to broadcast such information. This ruling permits companies to use social media freely, while simultaneously protecting investors.

Endorsements and Testimonials: An Overview

Online recommendations, testimonials, and endorsements from clients and colleagues are significant marketing opportunities, but must be used cautiously. Every recommendation and endorsement helps increase the firm’s online credibility, or “social currency.” Across industries, consumers are 71 percent more likely to purchase a product or service when referred by social media sources.¹⁵ Attorneys should certainly take advantage of referrals on the various social media sites.

As with any third party review, prospective clients evaluate the authenticity of recommendations and references found through



social media with some skepticism, especially when determining whether to retain the attorney. However, online reviews do provide sufficient reliability of objective information. A 2012 Nielsen study found that 70 percent of respondents trust online reviews, second only to recommendations by friends and family.¹⁶

Testimonials are commonly found on a law firm's website, but social media networks are becoming the preferred outlets for sharing feedback. On a firm's Facebook page, fans may leave testimonials via a comment, or "like" content posted by the firm. Interactions with the Facebook page increase page "impressions"—the number of times other users see the page. On LinkedIn, users can review their connections with recommendations and endorsements. Recommendations are more formal praises in paragraph form, while endorsements allow the rater to endorse the attorney for a specific skill. For example, a client or colleague may write a carefully worded recommendation for a litigator in paragraph form, or simply click a single button to endorse the attorney for a specific skill, such as "commercial litigation" or "securities law." On LinkedIn, the person reviewed has the opportunity to approve recommendations before they post on your profile. Users should activate preapproval of comments in the settings of other social media sites as well. Once posted, recommendations from various sources instantly increase your social currency and improve users' reputation among colleagues, potential and existing clients, and future employers.

Endorsements and Testimonials: Legal Ethics Considerations

The Model Rules of Professional Conduct do not address endorsements specifically, but several states' rules do.

In New York, an attorney's website or social media page constitutes an advertisement if, *inter alia*, its "primary purpose...is the retention of the lawyer or law firm." New York's Rule 7.1 provides, *inter alia*, that "an advertisement shall not: (i) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending; [or] (ii) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor." Furthermore, New York requires attorneys to label all online advertisements as "Attorney Advertising." Other disclaimers may also be required, depending on specific advertising content.

Similarly, the California Board of Governors adopted standard forms of "communication" which are presumed to be in violation of California's Advertising and Solicitation rule, including, *inter alia*, "a communication which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as 'this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter.'"

Reliance on third-party input through online recommendations, comments, or retweets carries inherent risks. Firms must carefully monitor such input and review it for inappropriate or unlawful content. A significant concern for attorneys is the chance that client confidentiality may be breached, or the attorney-client privilege waived, by a client inadvertently, or worse, violated by the attorney. This is a concern particularly on sites like Facebook, where, by default, comments can post directly on a

profile page without preapproval.

Attorneys learn early in their careers that client information must remain strictly confidential, unless the client grants permission or disclosure is permitted or mandated by an exception. Rule 1.6 of the Model Rules of Professional Conduct provides, *inter alia*, that lawyers "shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is [otherwise] permitted," and "(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

While each state defines the attorney-client privilege using slightly different language, the following is an oft-cited and generally accepted definition: "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client."¹⁷

Attorneys must pay close attention to the administration of their social media sites and review all comments. Settings should require all comments to be reviewed and approved by the firm before being posted. Posted comments that are unprofessional, obscene, defamatory, or reveal confidential client or firm information should be deleted immediately. For example, in an attempt to engage fans online, a law firm may post a thought-provoking question, eliciting robust conversation in the comments section. An excited client may respond, anxious about his or her upcoming deal, stating, "Just received your memo! I love that takeover strategy for XYZ Corp., let's move forward!" The client has likely waived attorney-client privilege and also may have violated securities laws.

The firm itself may initiate a breach of confidentiality. For

example, if the firm answers a question relating to its mergers and acquisitions experience by responding, “Our M&A practice is booming! Keep an eye on the law journal this week for an article on ABC Inc.’s merger!” If the attorney posted the comment prematurely, confidentiality has been breached, and the firm also may have violated securities laws.

If an attorney-client privilege waiver does occur, ethical questions arise with respect to the response. There may be a question of whether or not the waiver applies only to the specific disclosure, or to the client’s entire representation. Courts have generally held that disclosure of privileged information is limited to the disclosure itself.¹⁸ However, this rule may vary by state. Additionally, if opposing counsel inadvertently receives or sees privileged information online, Rule 4.4(b) of the Model Rules provides that the receiving lawyer must promptly notify the sender if he or she “knows or reasonably should know that the document or electronically stored information was inadvertently sent.” Finally, attorneys may have an affirmative duty to disclose breaches of privilege to opposing counsel, depending on the nature and extent of the breach, and should review the applicable case law in their jurisdiction.

Attorneys can reap the benefits of recommendations, endorsements and comments from social media, but they must understand how such communication may affect their clients’ right to confidentiality and avoid inadvertent waiver or breaches. Endorsements by colleagues do not carry the same problems of waiver of confidentiality, but should also be handled with caution. While sincere endorsements of colleagues are well received, recommendations among present co-workers may appear dishonest. Several quid pro quo recommendations and endorsements may not violate any ethical rules per se, but may appear inauthentic enough to discourage the prospective clients from initiating contact.

The following is a list of proposed practice tips to help you navigate through the exciting but tumultuous sea that is social media.

1. Know your audience and which clients have connected with you directly via social media.
2. Encourage clients to connect with you via social media, but advise them that all legal communications must be conducted by private e-mail or phone.
3. Ensure that you have received written permission before including a client on a list of “Representative Clients” on your website.
4. Engage fans by commenting, following back, and delivering thought-provoking posts, but do not encourage unwanted disclosures by soliciting specific feedback.
5. Strive to become a legal authority and rich source of information in your practice areas, but do not provide specific examples of how you have accomplished your goals using confidential client-specific information.
6. Monitor your social media posts and comments carefully and frequently for inappropriate content.
7. Immediately contact clients who inadvertently waive privilege or confidentiality, delete the content, and analyze its potential impact.

We live in exciting times where social media and communications technology develop and change virtually every day. While we should be cautious with the communicative abilities afforded by this technology, attorneys’ social media use expands our reach and

affords us opportunities to serve current and prospective clients in ways previously unimagined. Forty-four million Americans looking for attorneys online can’t be wrong. ☺

Endnotes

¹White Paper. Putting Social to Work for Your Business. A Guide to Organizational Models for Scaling Social. library.hootsuite.com/Portals/125827/docs/whitepaper_thebusinessofsocial.pdf

²Prominent Harvard Law School professor, founder of Creative Commons and the Center for Internet and Society, and an active Twitter user with more than 255,000 followers.

³*The Wall Street Journal*’s primary Twitter account has more than 2.8 million followers.

⁴Dell Social Media, “2013 Social Media Predictions” www.slideshare.net/dellsocialmedia/social-media-predictions-for-2013.

⁵Anderson, Meghan Kearney, 6 Ways Social Media Marketing is Changing (For the Better). blog.hubspot.com/blog/tabid/6307/bid/34089/6-Ways-Social-Media-Marketing-Is-Changing-For-the-Better.aspx?utm_source=twitter&utm_medium=social&utm_content=09667dc0-37a6-4947-8dae-c167f39374b9.

⁶LexisNexis White Paper. Top 10 New Year’s Resolutions to Generate More Clients in 2013.

⁷LexisNexis White Paper. Be a Social Media Rock Star With Your Firm’s Blog and Win More Business. Top 10 Tips for Generating New Business Through Blogging and Social Media.

⁸California’s official website shows over a dozen cities with free WiFi access; www.reuters.com/article/2013/01/08/us-google-newyorkcity-wifi-idUSBRE9070PO20130108 (Google offering free WiFi in Mountain View, the location of its headquarters, and in the Chelsea neighborhood of Manhattan, N.Y.).

⁹McGuire, Craig, Feb. 28, 2013, www.lexisnexis.com/community/portal/blogs/mcguirc1/archive/2013/02/28/more-law-firms-launching-mobile-websites-survey-says.aspx?access=1-1914168601&treatcd=1-1914168791.

¹⁰Dusto, Amy. 72 percent of smartphone owners want mobile-friendly sites. www.internetretailer.com/2012/09/25/72-smartphone-owners-want-mobile-friendly-sites.

¹¹*Id.*

¹²LexisNexis White Paper. Top 10 New Year’s Resolutions to Generate More Clients in 2013.

¹³McGuire, Craig, Feb. 28, 2013, www.lexisnexis.com/community/portal/blogs/mcguirc1/archive/2013/02/28/more-law-firms-launching-mobile-websites-survey-says.aspx?access=1-1914168601&treatcd=1-1914168791.

¹⁴The last 5 years saw an average increase of 1.75 percent lawyers per year, lower than the historical average increase of 2.96 percent lawyers per year over the last 50 years. www.americanbar.org/resources_for_lawyers/profession_statistics.html.

¹⁵blog.hubspot.com/blog/tabid/6307/bid/30239/71-More-Likely-to-Purchase-Based-on-Social-Media-Referrals-Infographic.aspx.

¹⁶www.nielsen.com/us/en/newswire/2012/consumer-trust-in-online-social-and-mobile-advertising-grows.html.

¹⁷*United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950) (emphasis added).

¹⁸*See, e.g., John Doe Co. v. United States*, 350 F.3d 299 (2d Cir. 2003); *XYZ Corp. v. United States*, 348 F.3d 16 (1st Cir. 2003).