



# LOSS PREVENTION BULLETIN

ISSUE NO. 62

SPRING 2015

*For current and regularly updated loss prevention tips and links, check out eBytes. Subscribe by email, RSS feed or visit our website often: [www.clia.ca](http://www.clia.ca)*

CANADIAN

LAWYERS

INSURANCE

ASSOCIATION

ASSOCIATION

D'ASSURANCE

DES JURISTES

CANADIENS



C B E L A

THE CANADIAN

BAR EXCESS

LIABILITY

ASSOCIATION

ASSOCIATION

D'ASSURANCE

RÉSPONSABILITÉ

EXCÉDENTAIRE

DU BARREAU

CANADIEN



A A R E B C

**Editor:** Karen L. Dyck,  
Loss Prevention Coordinator

36 Toronto Street  
Suite 510  
Toronto, Ontario  
M5C 2C5  
Email: [karen.l.dyck@gmail.com](mailto:karen.l.dyck@gmail.com)

## ■ Bulletin # 225 Navigating the Social Media Minefield

Social media offer numerous benefits to lawyers. Creating and maintaining an active online presence can help you with marketing your practice, developing a reputation of competence in a particular area of law, maintaining your technological competence and keeping abreast of issues and concerns that matter to your clients.

But there are risks as well. One way to think about navigating social media is to compare it to going for a walk in a minefield. While the scenery may be pleasant and it's possible to walk through unscathed, if you take a wrong step, the consequences can be deadly. Some will, for this reason, avoid the social media minefield altogether. But that entails some risk as well – for example, the risk that you won't be seen as relevant or won't be able to connect with potential clients or will miss out on some good referral work.

In order to weigh the risks and the benefits, and then make your own informed decisions about whether and how to use social media in your professional life, you need to know where the mines lie. Social media landmines for lawyers include:

### 1. Breaching client confidences

The Model Code of Professional Conduct ("the Code") requires that lawyers must always "...hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and must not divulge any such information...."

While it should go without saying that lawyers ought not tweet or otherwise post any confidential client information, it may be less obvious that using a geographical or location-based feature when posting could result in inadvertent release of such information. You therefore need to exercise caution and consider turning such features off during your workday, especially when meeting with clients on their premises or at any location other than your own office.

### 2. Unintentionally creating a solicitor-client relationship

You never want to find yourself in the situation of saying: You're not my client, are you? It is possible for a solicitor-client relationship to be formed as a result of informal communications, even where there is no fee or retainer agreement entered into. Similarly, though it may be unintentional, it is also possible to initiate and form a solicitor-client relationship via a social media channel. You might do so, for example, through a Facebook exchange or an exchange of comments on a LinkedIn post.

The guiding principles that apply to other, offline circumstances apply here. Think of the care you would take in entering into a conversation about a legal problem at a party or in answering a cold call. The same level of care, if not greater, should be applied to your online exchanges.

### 3. The temptation to speak out of turn

In the heat of the moment, without the benefit of sober second thought, you type a hasty comment and hit enter.

A research lawyer for a Kansas appeals court learned the hard way that this isn't a good idea when she was fired in late 2012 after posting critical tweets during an ethics hearing she was observing in the State Supreme Court. The lawyer tweeted negative remarks about the subject of the ethics hearing, the State's former Attorney General. Her subsequent statement of apology noted:

"I didn't stop to think that in addition to communicating with a few of my friends on Twitter I was also communicating with the public at large, which was not appropriate for someone who works for the court system. I apologize that because the comments were made on Twitter—and thus public—that they were perceived as a reflection on the Kansas courts."

Although it may seem trite, a guiding principle in respect of online exchanges is to say online only what you would be prepared to say in person. If words could be hurtful in person, assume they will be hurtful online too. If words or activity might expose you to legal action if spoken or conducted in real life, the parallel assumption should follow.

### 4. Navigating online with integrity

One reason why many lawyers are online using social media tools is to obtain information. For example, in the course of an investigation to further litigation, a lawyer accesses an unlocked Facebook account to gather evidence. When faced with a privacy-locked account, there can be a temptation to seek access by subterfuge, either pretending to be someone else or having someone else make the friend request. By this means, a lawyer could potentially gain access to the locked-down Facebook account of an opposing party or of a witness.

Seeking access by subterfuge raises issues of dishonesty and a failure to act with integrity that may attract the attention of your law society. Always keep in mind that the same rules of integrity apply to lawyers in their online activities as offline. Using social media tools in a dishonest manner to glean information to support your case is never appropriate and could result in charges of professional misconduct.

---

---

## 5. Providing legal opinions that others may rely upon

If you volunteer for an ask-a-lawyer event, write public legal information materials or supervise law students, you're likely familiar with the importance of the distinction between providing legal information and giving legal advice. As a lawyer operating in online social networks, you need to be especially wary of that line.

Whether writing blog posts or providing answers to questions posed on forums, there are potential conflicts and liability issues to consider if the legal information you provide strays over the line into provision of legal advice. When providing general legal information via social media, be careful not to provide specific advice, solicit confidential information, or recommend a specific course of action. To be extra careful, clearly state in a disclaimer that you are not the individual's lawyer and that you are not providing specific legal advice.

## 6. Communication with represented parties

There are clear ethical prohibitions in place with respect to communication with a represented party set out in the Code. For most of us, it's a no-brainer that when counsel represents a party to litigation or a transaction, all communications go through the lawyer.

Online you want to be careful that you're not inadvertently communicating with represented opposing parties. For example, seeking to "connect" or "friend" a client of another lawyer may be prohibited communication.

## 7. Bending the advertising/marketing rules

The Code also sets out rules for marketing lawyers' services. These prohibit use of false or misleading means and require that marketing products are demonstrably true, accurate and verifiable and don't contain a claim that the lawyer is a specialist or expert (unless so certified.)

The recommendations or endorsements feature included on your LinkedIn profile might provide false or misleading information, or breach rules regarding holding yourself out as an expert. Similarly, the online profile you create asks that you note your areas of expertise, possibly in violation of advertising rules.

Some lawyers prefer to eliminate the LinkedIn endorsement section in its entirety. This isn't hard to do, but if you leave it in place, it is your personal responsibility to take a proactive approach by monitoring this section of your profile very closely. Remove endorsements from anyone that claims to have worked with you but has not, as well as any endorsement that is misleading or conveys a false statement.

## 8. Conflicts of interest

Conflict of interest rules may also come into play online and you should therefore consider carefully with whom you will connect via social networks, whether judges, former clients or experts.

When you are establishing your online social networks, be careful when inviting others to become a connection if they are current or past clients. Generally, it is a best practice to avoid sending invites to clients and rather allow them to seek to connect with you if they wish.

## Avoiding the Landmines

Knowing where the landmines lie, how can you manage or avoid the risks?

### An effective social media policy

If your firm doesn't have a social media policy in place, how do your staff and lawyers know what the professional parameters are? An effective social media policy will:

- be consistent with firm culture
- distinguish between professional and personal posts and accounts
- be consistent with internal privacy policies and professional obligations, including confidentiality and conflicts rules
- be accessible to all firm members and easily understood
- be a component in the training of all staff and each new hire

### Train your clients

Ensure your clients know that you will not communicate with them via social media, including direct messaging. Then, make certain you don't. Set out your expectations re: online communications in your retainer letter. Let your clients know they can link to you online but you will not to discuss their matters using the same media.

### Think before you tweet

Don't ever respond in the heat of emotion. Allow yourself a cooling off period. When in doubt, don't hit enter. There are online tools that allow you to schedule your tweets and edit them before posting, for example Buffer or Hootsuite. Consider using these tools.

### Take it off-line ASAP

It is best to bring the conversation offline as soon as possible so as to avoid any ethical lapses on your part. The longer you engage via social media, the greater the opportunity to run afoul of the ethics rules. Encourage those you communicate with to call you or make an appointment to meet.

### Err on the side of caution

Lawyers should assume that social media do not permit conduct or communications that would be improper if such conduct or communications were done in-person or through the use of more traditional forms of communication.

If there's a prohibition offline, assume it applies online too. Always err on the side of caution, especially as you become familiar with the tools and how they function.

Finally, keep in mind that as the tools change and develop, so too will the application of the rules of professional conduct to those tools. Don't assume that today's advice will suffice for next year, or even next month. When stepping into the ever-changing world of online social media, it's your obligation to always ensure you know what you're doing.

*(Based on a presentation delivered January 22, 2015 to the Manitoba Bar Association's Midwinter Conference)*