LEGAL DANGERS OF SOCIAL MEDIA

By Sarah Vallance

'Social media' refers to any website or application that allows users to create and share content or to participate in social networking.[1] In the last decade, the use of social media has grown exponentially and has transformed the way we use the internet.

Image manipulation ASZZ.

There are now over one billion Facebook accounts, 200 million active Twitter users and four billion views on YouTube each day.[2] While the benefits of social media cannot be denied, one of the dangers stems from the fact that content created by users can be viewed by, shared, or published to a potentially unlimited number of other users.

Social media has had a significant impact on the legal profession. It is now common for lawyers to write blogs or 'blawgs' and network on LinkedIn, Twitter and Facebook. Law firms have also succumbed to the new wave and are utilising social media to recruit staff, advertise their services, build their external reputation and share information.

Despite social media being increasingly relied upon by law practices and lawyers, there is little guidance as to how to use social media responsibly and avoid the many dangers inherent therein. In 2012, the Law Institute of Victoria published guidelines on the ethical use of social media.[3] However, there are no Australia-wide guidelines for legal practitioners.

While there are frequent reports of lawyers misusing social media,[4] the solution is not as simple as refusing to use it. It is crucial for lawyers to understand social media, how it is being used and the far-reaching consequences that may arise, because ignorance could otherwise place them at risk of breaching their ethical duties.

COMPETENCE AND DILIGENCE

One of the fundamental ethical duties of a lawyer is to be 'competent' and 'diligent'.[5] A lawyer who is unfamiliar with social media and fails to take into account information from a party's social media pages during a claim may not be acting in a competent or diligent manner.

In the USA, it has been reported that 66 per cent of divorce lawyers use Facebook as a primary source of evidence.[6] This trend has also been seen in family law matters in Australia, with the Family Court handing down a number of decisions where evidence has been led from Facebook.[7] In personal injury claims, it is now common for defendants to investigate plaintiffs by performing searches through Google and viewing a plaintiff's public social media pages.

Thus, plaintiff lawyers need to thoroughly understand the relevant privacy laws relating to social media and ensure their clients also comprehend the effect of those laws. If a lawyer lacks a basic understanding of social media, it is unlikely that they will be able to advise their clients appropriately as to how their use of social media may impact on their claims. In addition, a lawyer may not be able to utilise social media to their client's advantage if they do not understand what it is and how others are using it.

DISCLOSURE

Evidence on social networking sites should be equated with other electronic or documentary evidence. One of the challenges facing lawyers is to identify what social networking sites may contain information relating to their client and whether any of that information is relevant to their client's claim.

In personal injury claims in Queensland, the disclosure obligations of each party differ depending on which piece of legislation applies to the claim.[8] Under ss45(1)(a) and 47(1)(a) of the *Motor Accident Insurance Act* 1994 (MAIA), the parties both have an obligation to co-operate and to provide copies of reports and other documentary material about the circumstances of the accident or the claimant's medical condition or prospects of rehabilitation.

Section 279 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) (WCRA) imposes the same obligation on parties to co-operate in relation to a claim, in particular by providing copies of relevant documents about the circumstances of the event resulting in the injury, the worker's injury and the worker's prospects of rehabilitation.

Sections 22(1) and 27(1) of the *Personal Injuries Proceedings Act* 2002 (Qld) (PIPA) do not impose a general obligation on the parties to co-operate in relation to a claim. Under s22(1)(a) of PIPA, a claimant must give a respondent reports and other documentary material about the incident alleged to have given rise to the personal injury to which the claim relates; reports about the claimant's medical condition or prospects of rehabilitation; and reports about the claimant's cognitive, functional or vocational capacity. A respondent has a similar duty under s27(1) of PIPA, but only if the reports and documentary materials are directly relevant to a matter in issue in the claim.

The disclosure provisions in the MAIA and the WCRA have been given a broader interpretation than the disclosure provisions in PIPA, due to the general obligation on the parties to co-operate.[9] Despite these differences, there could be circumstances under each of the Acts in which a plaintiff could be required to disclose material from their social media pages. For example, if a plaintiff is injured in a motor vehicle accident after drinking at a pub, should any photographs posted on the plaintiff's Facebook page showing the plaintiff drinking at the pub be disclosed to the defendant? If the plaintiff posts comments on their Facebook page or sends a tweet describing an accident minutes after the accident occurred, will that material need to be disclosed?

It is unlikely that a plaintiff will understand the scope of their disclosure obligations under the various Acts and they may disregard content on their social media pages that may be relevant to their claim. Therefore, it is incumbent on lawyers to carefully consider the facts of each claim and determine what type of material will need to be disclosed. Lawyers should obtain detailed instructions from their client about what social networking sites they access and the content of those sites, so that they can advise their clients appropriately as to what material will need to be disclosed.

Evidence on social media pages may have a positive or negative impact on a plaintiff's claim. If a plaintiff perceives that information contained on their social media pages may have a negative impact on their claim, they may be tempted to remove or delete that evidence. If a lawyer becomes aware of material that may have a detrimental impact on their client's claim, a significant ethical question arises: is it >>

appropriate for that lawyer to instruct their client to remove the offending material from their social media pages?

This issue was considered in the US case of *Lester v Allied Concrete Company*.[10] In that case, the defendant made a request for production of documents, including the contents of the plaintiff's Facebook account. Attached to the request was a photograph obtained by the defendant from the plaintiff's Facebook account. After receiving the request, the plaintiff's lawyer instructed the plaintiff to 'clean up' his Facebook account and subsequently directed him to deactivate his account. A document was then prepared and signed, which stated that at the date the document was signed, the plaintiff did not have a Facebook account. The defendant filed a motion to compel discovery. The plaintiff's lawyer sought legal advice and then instructed the plaintiff to reactivate his Facebook account and provide screen-shots of his account. The plaintiff complied with the request but without the knowledge of his lawyer, he deleted 16 photographs from his account before producing the screen-shots. The defendant subsequently hired an IT expert who confirmed that spoliation of evidence had occurred. The plaintiff's lawyer was ordered to disclose all communications between himself, his paralegal and the plaintiff. The communications were disclosed. However, the lawyer intentionally omitted one email from his paralegal to the plaintiff and later blamed another paralegal at his firm for the oversight. The lawyer was sanctioned $542,000 and referred to the Virginia State Bar for possible disciplinary action.

Although there is no specific rule contained in the Australian Solicitors Conduct Rules 2012 (ASCR) as to whether a lawyer can advise their client to remove information from their social media pages, lawyers should not forget that their paramount duty is to the court and the administration of justice.[11] Accordingly, lawyers should not advise their clients to 'clean up' their social media pages or be a party to any proposal by a client to destroy or remove documents that may be needed in litigation. Instead, clients should be advised to preserve any information or documentary material that is relevant to their claim and they should be specifically advised not to destroy any evidence, regardless of whether it will assist their claim.

CONTACT WITH OPPONENTS

It is well established that a lawyer must not deal directly with the client or clients of another lawyer, except in very specific circumstances.[12] However, if a lawyer accesses information about an opponent on the internet that is publicly available, they will not have breached their duty not to make direct contact with another lawyer's client. For this reason, it is recommended that lawyers give careful advice to their clients about their use of privacy settings on their social media pages. Even if material on a client's social media pages does not have to be disclosed under the various Acts, where it is publicly available and is discovered by the defendant, it could nevertheless have a negative impact on a client's claim.

If it is necessary to obtain permission from a party to access their social media pages, it would be unethical for a lawyer on the opposing side to initiate contact with that person. For example, it would not be appropriate for a lawyer to send a 'friend request' on Facebook to another lawyer's client. It would also be inappropriate for a lawyer to direct another person to send a 'friend request' or to accept a 'friend request' from a person they know is another lawyer's client.

However, would a lawyer be in breach of their ethical duties if they asked an employee of their firm to search for an opponent on the internet and that employee subsequently sent a 'friend request' to the opponent without the lawyer's knowledge? This situation has occurred in the US and two lawyers are currently facing ethics charges after their paralegal sent a 'friend request' to the plaintiff in a personal injury case.[13]

In Australia, rule 37 of the ASCR states that a solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter. In order to comply with this rule, it is recommended that all firms that use social media have a social media policy and provide appropriate levels of training to their staff members regarding the use of social media.

CONFIDENTIALITY

A lawyer must not disclose any information that is confidential to a client and was acquired by the lawyer during the client's engagement.[14] There can be serious consequences for a lawyer who breaches their duty of confidentiality. In 2009, the Legal Practice Tribunal in Queensland recommended that a lawyer be removed from the roll of legal practitioners after the lawyer publicly disclosed and commented on confidential information during a television interview.[15]

In the US, there have been a number of reports of lawyers breaching their duty of confidentiality through their use of social media. In May 2010, a lawyer's licence was suspended for 60 days after she was found guilty of misconduct for disclosing information about her clients on her blog.[16] The lawyer frequently referred to clients by their first names, nicknames or jail identification numbers. She described in detail her clients' cases and made derogatory comments about judges. At the time, the lawyer did not believe she was at risk of breaching her clients' confidences, as she believed she had adequately concealed her clients' identities. She later realised and regretted her mistakes.

In September 2012, a judge declared a mistrial after a lawyer posted a photograph on her Facebook page of her client's leopard print underwear with a caption suggesting the client's family believed the underwear was 'proper attire for trial'.[17] Although the lawyer's Facebook page could be viewed only by friends, somebody who saw the photograph notified the judge involved in the case. The lawyer was subsequently fired.

While the above breaches of confidentiality may seem obvious, lawyers could be at risk of inadvertent breaches of confidentiality through their use of social media. For example, if a lawyer is given access to their client's Facebook

pages, they may breach their duty of confidentiality if clients are able to identify each other through the lawyer's list of Facebook 'friends'. A lawyer may also inadvertently breach their duty of confidentiality if they tweet that they are in a certain location using geotagging features, if that information enables someone to identify who their client is.

Lawyers must therefore remain acutely aware of the potential consequences of engaging in social media in both their professional and personal lives and, just as importantly, understand that there is not necessarily a neat delineation between the two.

INADVERTENT RETAINER

Lawyers should be wary of creating unintended solicitor-client relationships through their social media pages or networking sites. If a person posts a legal question on a lawyer's Facebook wall or sends a 'tweet', any answer posted by the lawyer may be construed as legal advice, for which the lawyer may become liable.

DISREPUTABLE CONDUCT

Lawyers should keep in mind that any information they post on social media pages has the potential to be viewed by an unlimited audience, despite any privacy settings they set. A flippant or careless remark has the potential to go viral and could bring the profession into disrepute, diminish public confidence in the legal profession or otherwise demonstrate that that lawyer is not a fit and proper person to practise law.[18] If you would not feel comfortable making a statement in public, it would be wise not to post a similar remark on your social media pages.

CONCLUSION

As the use of social media increases rapidly and its form changes and evolves with equal zeal, it is important for lawyers to closely examine their practices in the context of online media and networking to ensure that they are complying with their ethical duties. If lawyers choose not to use social media, they should at the very least be familiar with its uses and have a working knowledge of its potential dangers, so they can competently, diligently and comprehensively inform their clients about its potential implications on their claims. As social media continue to evolve, lawyers are likely to be confronted with situations where it may not be clear how to comply with their ethical duties. If a circumstance like this does arise, it is recommended that lawyers seek advice from their local law societies. ■

Notes: **1** Refer to <http://oxforddictionaries.com/definition/english/social%2Bmedia>. **2** Refer to websites such as http://expandedramblings.com/index.php/resource-how-many-people-use-the-top-social-media/; or <www.statisticbrain.com/social-networking-statistics/>. **3** <http://www.liv.asn.au/PDF/For-Lawyers/Ethics/2012Guidelines-on-the-Ethical-Use-of-Social-Media.aspx>. **4** Refer to <http://www.nytimes.com/2009/09/13/us/13lawyers.html?_r=0>. **5** Rule 4.1.3 of the Australian Solicitors' Conduct Rules 2012 (ASCR). **6** <http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey-.> **7** Refer to *Lackey & Mae* [2013] FMCA (family court) 284 (4 April 2013); *Mallery & London* [2012] FMCA (family court) 145 (29 February 2012). **8** Disclosure provisions vary from state to state. This article refers only to the situation in Queensland. **9** Refer to *Haug v Jupiters Limited trading as Conrad Treasury Brisbane* [2007] QCA 199 (15 June 2007). **10** Nos. CL.08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011); Nos. CL08-150, Cl90-223 (Va. Cir. Ct. Oct. 21, 2011). **11** Rule 3, ASCR. **12** Rule 33, ASCR. **13** Refer to <http://www.dailybusinessreview.com/PubArticleDBR.jsp?id=1346577169254&Hostile_use_of_friend_request_puts_lawyers_in_ethics_trouble&slreturn=20130413222911>. **14** Rule 9, ASCR. **15** *Legal Practices Tribunal v Tampoe* [2009] QLPT 14 (5 June 2009). **16** In Re: Disciplinary Proceedings Against Kristine A Peshek, Attorney at Law: Office of Lawyer Regulation, Complainant, v Kristine A Peshek, Respondent, No. 2011AP909–D, June 24, 2011. **17** <http://www.miamiherald.com/2012/09/12/2999630/lawyers-facebook-photo-causes.html>. **18** See, for example, <http://www.theaustralian.com.au/national-affairs/behrendt-repents-for-twitter-slur-on-black-leader/story-fn59niix-1226039396368>.

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