

Social Networking — A Legal Minefield

by Teresa Robison

The use of social networking tools, such as blogs, Facebook, Twitter, and so on has expanded exponentially. In the face of such a rapid increase, the law continues to struggle to keep pace, a situation which calls for cautious use to avoid unintended consequences. Sites such as Facebook and MySpace imply some level of privacy for the user, enticing them to imprudent communications. Similarly, sites accessible by anyone with a computer, such as blogs or Twitter, invite authors to share whatever thoughts might be running through their heads at the time. These communications are being utilized more and more by employers, law enforcement, litigants in legal actions, and others to gather information which would formerly have been difficult to come by. The Attorney General of New York recently wrote an article on this phenomenon, in which he characterized these uses as "electronic exhibitionism" and "electronic voyeurism." Here are a few of the issues you should be aware of when using these sites.



Employers are using social networking sites for the entire range of employment actions; a recent poll indicated that 43% of private employers are looking at these sites to gauge prospective employees. (Parents beware—some colleges are also looking at these sites). Tales of negative hiring decisions because of partying, alcohol consumption, drug use, or other undesirable behavior reported on social network sites abound. Employers are accessing these sites to collect "dirt" on problem employees, gather evidence in legal proceedings such as discrimination actions and workman's compensation complaints, or make internal decisions regarding promotions, transfers, and so on. The practice is a double-edged sword: employees are also accessing these sites to gather evidence on employers believed to be discriminatory or otherwise engaging in wrongful conduct, with some success.

Some legal protections exist, such as the Stored Communications Act, 18 USC §§ 2701 to 2712 (SCA). While the question of a reasonable expectation of privacy in these sites is still evolving, it is clear that using false pretenses to access a site which requires tacit permission for entry, such as Facebook, will prevent use of gathered information in legal proceedings, and may result in criminal penalties for such violations under the SCA. Use of these sites in the workplace, and whether there is an expectation of privacy in the workplace, are also on-going legal issues. Legal scholars strongly advise employers to publish a policy on such use, and ensure that all employees are familiar with the terms of that policy.



Federal employees face many of the issues outlined above, plus other issues specific to federal employment. In August 2010, the Office of Special Counsel (OSC) issued an advisory opinion on how the Hatch Act affects social network use by federal employees. The Hatch Act sets forth rules on political activity by federal employees. The opinion specifies that the following are inadvisable for federal employees on social networking sites: engaging in political activity in the workplace or using workplace resources, even if they are working through a private social network site; using official titles or authority in supporting candidates or causes on social networking sites (or elsewhere); or soliciting contributions for political causes on their sites, to include simply providing a link to a contribution site. OSC indicates that, if employees discover violations of these rules, there is no affirmative obligation to report a violation. Finally, there are "Further Restricted Employees," such as those who work for law enforcement agencies, who are bound by even more stringent rules.



For the lawyers in the audience, social networking offers an abundance of ethical landmines. A Florida attorney, frustrated with perceived unfairness by a judge, blogged that the judge was "unfit for her position and knows not what it means to be a neutral arbiter." The lawyer was sanctioned for violation of five ethics rules. A public defender in Illinois was terminated for blogging about her cases, and revealing confidential information in the process. Accessing the site of an opponent represented by counsel may constitute an ethical violation IF the attorney must interact with that party to access the site (for example, if the attorney requests to be "friended" by the represented party). However, if the site is accessible to anyone, such as a blog, then accessing the site is not considered a violation. The situation is greatly complicated by the fact that state bar associations have issued varying opinions on these questions, such as whether a judge can friend an attorney who practices in front of the judge, which may lead to accusations of conflict of interest or *ex parte* communications, and whether an attorney can "mislead" an unrepresented person to access their Facebook page. The ABA is currently working on draft revisions for the Model Rules of Ethics to address these issues, but attorneys should research their state bar opinions before utilizing social networking in a legal capacity, friending members of their profession, or discussing any aspect of their cases. When it comes to social networking, watch where you step!