

5 Social Media Land Mines Lawyers Should Avoid

By **Keith Goldberg**

Law360, New York (July 31, 2015, 2:04 PM ET) -- Social media contains plenty of opportunities for attorneys to boost their profile, and ultimately, their business. It also contains plenty of potential land mines that can derail a career.

The latest lawyer to publicly trip one: outspoken U.S. District Judge Richard G. Kopf, who could face disciplinary action over a post on his personal blog in which he called Sen. Ted Cruz a “wacko” unfit for the White House.

“The more you're involved in social media, the closer you inevitably get to the third rail,” says Ron Coleman, an Archer & Greiner PC litigator who specializes in intellectual property and Internet issues and is active in both the blogosphere and Twitter. “It is a risky enterprise.”

Here, experts lay out five social media mistakes that lawyers should heed before firing off that next tweet or Facebook post.

Leaving Your Ethics Offline

The right to free speech and expression is universal, but lawyers and judges are held to higher standards through rules on ethics and professional conduct. Those rules generally don't make any exceptions for online conduct, experts say.

“There is simply no excuse for not following ethics rules, or the law firm/corporate social media policy,” says Jaffe President Vivian Hood.

For example, the New York State Bar Association recently released updated social media ethics guidelines that warn attorneys to be aware that attorney advertising rules may apply to their social media interactions and to watch out for inadvertent attorney-client relationships or unintentional divulging of confidential information on those sites.

“Lawyers that are very thoughtful in their in-person communications need to remember that just because you're tapping something into your phone or taking a video of yourself ... those laws and rules still apply,” says Jeremy Mishkin, who co-chairs Montgomery McCracken Walker & Rhoads LLP's litigation practice and frequently handles Internet and media law issues. “The most common mistake that manifests itself with a lawyer is that they forget they have a duty of confidentiality to their clients. That [social media post] ends up compromising a confidence or disclosure.”

Forgetting to Practice Discretion

Even if an attorney's social media posting doesn't explicitly breach a client covenant or specific rule of professional conduct, it can still cause harm by being a source of professional embarrassment, experts say.

"You'd be amazed how many attorneys, especially attorneys that are familiar with social media, lose focus and unconsciously will respond to personal questions," says Scott Sobel, president of Media and Communications Strategies Inc. "There's no privacy whatsoever on social media. What you say can't be taken back; it's out there."

Again, Judge Kopf can be used as a cautionary tale. Last year, the judge raised eyebrows when he wrote on his blog that it was time for the U.S. Supreme Court to "STFU," following the controversial Hobby Lobby decision that shielded religious for-profits from compliance with the Affordable Care Act's birth control mandate.

That came after another post in which he described himself as a "dirty old man" and noted that he had appreciated an unnamed female lawyer's short skirts and "ample chest."

Attorneys who aren't discreet open themselves up to scrutiny not only from the Internet masses but also from clients, opposing attorneys, judges, even potential jurors.

"If my adversary or a clerk brings this tweet to the judge's attention, or the attention of some future judge in some future matter, will I regret it, or will my present or future clients regret it?" Coleman said. "There's no distinguishing between the personal and professional opinions."

Diverging From the Client or Company Line

For attorneys, social media's promise of widespread, unfettered communication frequently collides with their obligation to represent their client's interests as well as the interests of their firm.

"There's only one online identity," Coleman says. "You have to ask yourself: Is there anything about this social media moment that is potentially detrimental to my clients' interests?"

A tweet or Facebook post that directly contradicts those interests, even if it doesn't deal with a specific client matter, can land an attorney in hot water, experts say.

"I've seen lawyers get in sticky situations posting something that perhaps is inconsistent with the business objective of a client or inconsistent with the firm's business practice," Burr Forman LLP counsel Vincent J. Graffeo says. "While it may not be an exact ethics violation, lawyers can find themselves in bad situations with their fellow lawyers and clients with what they post."

Offering Online Legal Advice

One big question lawyers must answer before putting something online: Could their post be construed as giving legal advice?

"If I'm giving legal advice, I'm crossing a line as to whether it's an opinion or trying to advise clients or

potential clients about a course they should take in a particular legal circumstance,” says Peter Vogel, who chairs Gardere Wynne Sewell LLP's Internet, e-commerce and technology industry team and blogs on Internet and information technology law.

Not only could that breach some ethical boundaries when it comes to attorney advertising, but it also could expose a lawyer to professional liability troubles, Vogel says.

“If someone follows your legal advice and it's bad advice, or it turns out badly, they could sue ... for malpractice,” Vogel says.

Not Examining Your Opponents' Social Media Presence

Chalk this one up as a social media sin of omission as opposed to one of commission: Attorneys that don't scour the social media histories of opposing parties and potential witnesses and jurors are doing their clients a disservice.

“Social media is a virtual treasure chest of discoverable information that can be used in the courtroom,” says Evan Wall, an attorney who runs the consulting firm Social Media Law and Order LLC.

That ranges from simple slip-and-fall cases to complex commercial litigation.

“If you don't use social media to research witnesses and jurors, you're leaving stones unturned for potentially valuable nuggets of information that can be used in your client's favor,” Graffeo says.

But Graffeo says attorneys must closely examine their ethics and professional conduct rules to see whether certain social media detective work constitutes impermissible contact with an opposing party.

--Additional reporting by Andrew Strickler and Lisa Ryan. Editing by Jeremy Barker and Patricia K. Cole.