

The Social Networker



Gino Dal Pont
Professor, Faculty of Law,
University of Tasmania

WHEN SOCIAL NETWORKING SITES CAN PROVE ETHICALLY DANGEROUS

The rise of social networking sites (such as Facebook, MySpace, Twitter and the like) over the last decade has proven little short of a phenomenon. I am constantly amazed at the sheer level and detail of information, both written and pictorial, that users upload onto social networking sites. That the vast bulk of this information is banal, to say the least, does not prevent other users from seeking to quench an ostensibly insatiable appetite for knowledge pertaining to the minutiae of the life and times of their 'friends'. The trend to multiply 'friends', coupled with various networking sites that can be viewed by all and sundry, seems to relegate notions of individual privacy as passé.

Curiously, though, the surge in social networking via the internet has occurred at a time when there have emerged heightened concerns over individual privacy. There is a push in Australian law to give individual privacy a legal foundation in substantive law, whether by way of a dedicated privacy tort (as exists in the United States and, more recently, New Zealand)¹ or by statute (as recommended by the Australian Law Reform Commission).² Lawyers are often at the forefront of calls for privacy protection but at the same time utilise social networking sites, for both private and professional ends, no less, it appears, than others in the population.

Whatever may be the tensions between publicity and privacy in this environment, social networking (and associated blogging) has more than its fair share of perils for the lawyer. What may appear on a lawyer's private social networking site (and this may include comments from others) has the capacity to compromise the lawyer's professional obligations or at least present a professionally unflattering persona. The perils are magnified for at least two reasons. Firstly, there is the very informality that underscores these websites, especially where they are used in a personal capacity. Just as there is a tendency to be less vigilant with framing the content of an email than the content of a formal signed letter, more so the nature of written comments and pictorial representations on social networking sites often hardly reveal a considered expression. Secondly, unlike traditional oral or written communications, which are ordinarily addressed to a limited class of persons, where those (often unguarded) communications appear on the internet, their potential audience is far broader. And while this outcome is exacerbated where the communications appear on a public site, that many social networkers seem to view the number of their 'friends' as a barometer of their own popularity means that 'friendship' in this context is a loose term indeed. The foregoing has prompted the Victorian Bar to issue an *Ethics Committee Bulletin*, reminding its members that the rules of professional conduct "apply equally to their activities on social networking sites ... as they ordinarily do in other aspects of their day-to-day professional and personal lives".³ It warns members to eschew publishing anything on a social networking site that:⁴

- discloses confidential information
- expresses an opinion on the merits of a potential or current proceeding

- reflects an opinion of the professional characteristics of fellow barristers in such a way as to impugn the dignity and high standing of the profession
- expresses an opinion that is likely to diminish public confidence in the legal profession or in the administration of justice or which otherwise brings the legal professional into disrepute.

The *Bulletin*, by way of example, warns against posting a flippant or sarcastic comment about a fellow member of the Bar, the judiciary, a client or a matter in which counsel is briefed.⁵ The United States has already witnessed lawyers who have been disciplined for inappropriate use of their own sites, including for criticising a judicial officer or inadvertently disclosing confidential information.⁶

Social networking sites have also seen use in the professional arena. Beyond the apparent marketing objectives that they may serve (many law firms in Australia have Facebook sites, for instance), these sites may serve as evidence-gathering tools. When the sites in question are public, there is no ethical impediment to using their content to discover evidence unfavourable to an opposing client or witness.⁷ Ill-considered postings of words or photographs can provide fertile ground for discrediting the claims of an opponent. The ethical position is likely to diverge when the site in question is open only to the relevant person's 'friends'. To encourage a third party to 'friend' an opposing client or witness, with the express intention of unearthing material contrary to that person's interests, borders on the dishonest.⁸ When the opposing client's site is involved, a breach of the 'no contact' rule⁹ may also be triggered.

Social networking sites, for all their benefits, therefore present professional challenges to members of the legal profession. Being too social can have a price, and so it behoves lawyers to exercise some restraint in personal expression on social networking sites, as well as encouraging clients to exercise corresponding restraint.

NOTES

1. See, for example, *Hosking v Runting* [2005] 1 NZLR 1.
2. See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108, August 2008. It recommended that: "[i]ndividuals should be protected from unwanted intrusions into their private lives or affairs in a broad range of contexts, and ... that a statutory cause of action is the best way to ensure such protection": para 74.117.
3. Victorian Bar Inc, *Ethics Committee Bulletin* No 2, 2010, cl 1.
4. *ibid.* cl 2.
5. *ibid.* cl 3.
6. See Seidenberg S, "Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous." Available at: www.abajournal.com/magazine, accessed 1 March 2011.
7. The New York State Bar Association has issued an ethics opinion to this effect: see Op 843 (10 September 2010).
8. The Philadelphia Bar Association's Professional Guidance Committee has issued an ethics opinion to this effect: see Op 2009-02 (March 2009).
9. See Legal Profession Conduct Rules 2010 (WA) r 37(4).