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The Law Society of Upper Canada | Barreau du Haut-Canada

# 7th Annual Solo and Small Firm CONFERENCE AND EXPO

# The Practical and Ethical Use of Social Media

**David Whelan**
Manager, Legal Information
*The Law Society of Upper Canada*

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# The Practical and Ethical Use of Social Media

David Whelan
Manager, Legal Information
The Law Society of Upper Canada

There are few corners of the universe that will be unaware of social media, either by that generic overarching category label or by the specific products like Twitter and Facebook that belong to it. Lawyers are frequently encouraged to participate in social media, whether by creating a profile, writing an online post or article, or sharing status updates.

It would be a fair question to ask why a lawyer would want to participate. Social media is a diffuse concept. It embraces a wide variety of methods of sharing information, each of which can raise practical and ethical issues.

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You will want to consider why social media is something you want to engage in before you take the plunge and start sharing. It is worth keeping in mind that social media has a consumption component as well, though, and you may find that social media helps you find information even when you don't have any goal of sharing it.

## Ethical Fundamentals

Social media impacts lawyers primarily by creating risks that they will expose information about their clients. Rule 2.03 (1) of the Rules of Professional Conduct and the supporting commentary lays out the scope of information to protect. This could result in a breach of confidential information related to a matter but a lawyer's responsibility extends beyond that. Since the professional relationship indicating that a client has consulted with or retained a lawyer is not to be disclosed, and continues indefinitely, it is important to consider how this can be triggered by your use of social media.

For example:

- You maintain a profile on Facebook, Google +, or LinkedIn. Your client sends you a message to indicate that she wants to join your network, which will display her profile information within your online friends or colleagues. Your approval of her request will be broadcast to your network.

- After a successful meeting with a client, you *check in* to a location-based social media tool like Foursquare or update your status on a micro-blogging service like Twitter to comment about it. Your iPhone attaches your location at his company's head offices as part of the message it distributes to all your followers.

## What Can I Share?

Social media is generally considered to range from status updates on services like Twitter all the way up to long-form writing on blogs. A Twitter message is limited to 140 characters by its technology. In some cases, the messages are updates on what a person is doing. Some of these status messages are sent through what are known as location services, where the entire message is "I am here" with your current address. There are many messages on Twitter, though, that use the brief space to share a link to a longer piece of content.

Other social media, like Facebook or Google+, is profile-based. You create an account that describes yourself in great detail. You post similar status updates or links to longer content but instead of being limited to a single sentence, you have much more latitude for sharing information.

The most expansive social media is the online writing tool known as the blog. Lawyers who enjoy writing for the fun of it can write as much as they want and share it with everyone in the world. Blogs need not be social. They generally support the ability for others to comment on what has been written, but it is the author's option to enable that support. When comments are enabled, thoughtful responses to the original post can actually enhance the blog's content by allowing others, who may have their own expertise to share, to participate.

## Have a Purpose

Marketing is the most common reason lawyers are encouraged to use social media. You can engage with clients, current and potential, as well as other lawyers. You can share your expertise with a broader community and potentially generate business. Those are all great goals but they are not necessarily realistic.

They do underpin a basic concept around social media. Have a purpose for using it. It takes time to do well, especially if you decide you want to engage in the longer-form methods. Your purpose does not need to be related to marketing. In fact, the more you do social media because you are actually enthusiastic about it, the more authentic you will appear to others and the easier it will be for you. If the marketing and business development end of social media is what makes you passionate, that's great. If you just enjoy sharing your thoughts or learning what people with similar personal or professional interests are doing, that's just as reasonable a purpose.

There has to be some energy on your part to participate. If you don't have that passion, then it is probably better to give social media a pass. There is nothing that shows that social media has anywhere near the impact that other methods of business generation for lawyers. The American Bar Association surveyed lawyers in 2011 about their use of social media.[1] Roughly 10% of solos and small firms had blogs. Larger firms were more likely to have them, but only about 35% of lawyers at firms with more than 500 lawyers reported that their firm had a blog.

Lawyers are much more likely to be on social media sites that use profiles, particularly LinkedIn. 59% of solos and 28% of lawyers in firms with 2 to 5 lawyers reported that they had a firm profile on LinkedIn. Facebook was a distant second in all firms. Compare that to Twitter, where 8% of solos and 5% of small firm lawyers said their firm used the service.

The type of social media used may impact whether it generates business for your practice. 62% of solos and 60% of small firm lawyers who had a firm blog said that they had been retained by a client because of their professional blogging. Contrast that with 10% of solos and 25% of small firms using Twitter who have had a client retain them as a result of their use of the service. This is not to say that social media participation had no impact for the other users. But if your primary goal is to generate revenue, it is important to anticipate the likely return on whatever investment in time you make.

If your primary goal is to enjoy participating, then none of this really matters. Social media can be an enjoyable way of reaching out to others who you might otherwise never come across.

## Choosing Social Media

Here is a bit of a decision tree to help you think about how you might participate in social media. The initial question is:

- Do you want to mostly want to share with others?
- Do you want to mostly consume what others share?

This separates those who want to get into social media for business development and interactive purposes from those who just want to listen. In the old days of e-mail discussion lists – which are still an excellent social medium even though they don't tend to be included in discussions about the topic – this sort of participation was called *lurking*.

There is a substantial amount of useful information being shared that provides access directly or via a link to longer form, substantive content. You could use Twitter and follow individuals who share information you are interested in. A quick search on a Web search engine like

[1] 2011 American Bar Association Legal Technology Survey Report, Volume IV: Web and Communication Technology, pp. 28-35.

Google will unearth blogs and other services that you can also follow, using an RSS or newsfeed reader.

A social media consumer faces fewer of the challenges that lawyers who share information have to be mindful of. Since you are not sharing information, your status, or your location, there are relatively few perils to participating in social media. You aren't off scot free – there are still issues related to whether or not you create relationships with others in your social media accounts – but you can't breach confidentiality, client privacy, or privilege when you don't share anything.

> *For more on the nuts and bolts of setting up social media accounts and checklists to help you get started, see The Ethics of Social Media for Lawyers, a free 40 page handout by Phil Brown and David Whelan, January 2012: http://scr.bi/w8Z7Qt .*

## Pick Your Poison

There are dozens, if not hundreds, of social media services. Your social media goal will help you to select from those. In addition, it is important to realize that usage is centered in a handful of products. The major service is Facebook, which accounted for 42.6% of social media traffic in Canada between April 2011 and April 2012.[2] Only one other service – a news aggregation site known as Stumbleupon that is primarily focused on sending you information, rather than having you share it with others – had more than 10% of usage. Most services maintain a relatively steady share of the social media ecosystem, although Pinterest rose above Twitter and Reddit in April 2012 to 7.2%. It's a relative newcomer, though, and its photo-centric nature may make it less useful for professional information sharing. Even if it maintains its strong position, it is unlikely to challenge Facebook's dominance.

This means that if audience reach is an important part of your goal, Facebook may be the social media you want to choose. However, this sort of statistic should not discourage you from a narrower scope. A well-written blog or a conscientiously used Twitter account can create a small but engaged audience that would not be reflected in national social media usage data. What it does suggest, though, is that you may want to stick with large, well-known social media services if you want to reach a large audience.

## Sharing on Social Media

You have decided to use social media. What you say and how you say it will be made available to whatever audience you have selected, by way of the social media tools you have chosen.

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[2] Top 7 Social Media Sites in Canada from April 2011 to April 2012: Facebook: 42.57%, Stumbleupon: 38.2%; reddit: 6.62%; Twitter: 5.5%; Youtube: 4.34%; Pinterest: 0.87%; digg: 0.56%; Other: 1.34%. < http://gs.statcounter.com/#social_media-CA-monthly-201104-201204-bar >

## Blogs

A blog has a long, public life, indexed by Web search engines like Google, and potentially stored for posterity by archival sites. Popular sites for running a blog include Google's Blogger.com and Automattic's Wordpress.com.[3] In the case of the latter, you can download and run the software on your law firm's Web site server or have it hosted by a third party, both options providing more flexibility than using either Google or Automattic's hosted sites.

Since the sharing is long-form, you are probably going to be well aware of what you write and any potential practice implications. You should still be cognizant that what you share on your blog should not implicate your client's confidence or your representation.[4] Particularly in light of the long life of your duty of confidentiality, you would not want to have content published online and then stored beyond your control.[5]

Blog comments are the social aspect of your blog, where your visitors can leave their thoughts on your writing. It can be a valuable complement to your contribution to the Web. It can also create issues if you allow unfettered contributions. This can manifest itself in a number of ways. Comments can contain inappropriate content or links to undesirable web sites. Just as importantly, a client or potential client could post information or a question about their matter without realizing that they are sharing it with the entire world. If you use comments on your blog, use a moderation tool so that you have to approve comments prior to their being posted. On the blog site itself, clarify how you will deal with comments that seek legal advice.

## Micro-blogging (Twitter)

Status update sites are often known as micro-blogging, because they allow a very short post to be shared with followers. Twitter is the best known site and provides an excellent example of how this site might work in your practice. A Twitter message is 140 characters long. Martial would have loved them:

Non amo te, Sabidi, nec possum dicere quare;

Hoc tantum posso dicere, non amo te

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[3] Blogger: http://www.blogger.com. Wordpress: http://www.wordpress.com. Also free, you can download the Wordpress software to use on your own or your hosted service at http://www.wordpress.org

[4] Blogging Assistant Public Defender Accused of Revealing Secrets of Little-Disguised Clients, ABA Journal.com, September 10, 2009 <http://www.abajournal.com/news/article/blogging_assistant_pd_accused_of_revealing_secrets_of_little-disguised_clie/ > Or other matters, as this lawyer found out when he blogged about his experience as a juror and was suspended for 45 days. California Lawyer Suspended Over Trial Blogging While Serving as a Juror, ABA Journal.com, August 4, 2009. < http://www.abajournal.com/news/article/calif._lawyer_suspended_over_trial_blog_while_serving_as_juror >

[5] If you have a Web site or blog already, see what the Internet Archive has already stored on you at their Wayback Machine: http://archive.org/web/web.php

This epigram is 60 characters long, so he would have had just enough space to add a link to his Web site.

Since Twitter is a status update site for many people, they use it for offhand comments about where they are and what they are up to. In this way, you get posts from lawyers like:

> **Day 81 as a PD: caused a mistrial today because I found out after state rested that my client's English wasn't as good as it seemed. Ugh.**
> - @jenpark22, April 19, 2010

> **Client lied to me and the judge about her mother dying so she could get an adjournment of her case. Now I've heard it all**
> - @scdesq, April 7, 2011

Your updates may not breach your duty of confidentiality but can still reflect on your competence or other aspects of your practice that you want to present in the best possible light.

Unlike blogging, you can have a private Twitter account and still share your updates with others. When you lock your account, others can request to follow you and you can authorize them. If your account is not private, anyone who wants to can follow you. These followers can respond or send a message to you, whether on a private or public Twitter account.

A message posted on your Twitter timeline, which shows messages you post as well as those posted to you – using your username or Twitter handle – may raise the same issues as blog comments: inappropriate content, undesirable links. You cannot moderate these updates other than to block your follower and, if it's egregious, report them for spam posts.

Twitter messages are also forever, or at least you should plan on it lasting that long. You may find that you can no longer see your old messages on Twitter but they may still be there. You can use a site like Allmytweets.net to identify all of your Twitter messages. Twitter is licensing this content to third-parties, who are in turn creating competitive intelligence and other data mining services using those posts.[6] However, the reality is that the average reader will read or act on your message only within the first three hours after they see it.[7] From that perspective, you can expect your status updates not to linger too long.

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[6] Twitter Licenses Historic Tweets to Data Firms, John Letzing, Wall Street Journal WSJ.com, February 28, 2012 < http://online.wsj.com/article/BT-CO-20120228-719932.html >

[7] You just shared a link. How long will people pay attention?, Bitly corporate blog, September 6, 2011 < http://blog.bitly.com/post/9887686919/you-just-shared-a-link-how-long-will-people-pay > measuring when people click on a link created and inserted in Twitter messages.

Another aspect of Twitter that is different from blogging is the retweet, which is the same as taking an e-mail you receive and forwarding it to others. A retweet takes a message that appears in your Twitter timeline, because it was posted by someone you follow, and forwards it to your followers. It often will attach both your Twitter handle as well as that of the original poster. Your message may then be retweeted to others.


One of the questions that has arisen is what responsibility you take on when you retweet a message you have received. Are you endorsing the message? Are you endorsing the content to which any link in the message sends future readers?

There is no guidance on this issue for lawyers, although it is being addressed in some non-legal organizations.[8]

### Profile Sites

The same content issues that are created by blogs and micro-blogs exist on profile sites. These are sites where you create an account and then add information about yourself: education, family, hobbies, previous employment and other experience, and so on. You can supplement this information with photos of yourself and your activities, as well as link to information you think is useful. Facebook is the best known of these sites, with Google+ and LinkedIn alternative sites that you might have an account on.

Each profile site revolves around you, the content and information you add, and the network to which you link yourself. On Facebook, the terminology is that you are connected to or *liked* by your *friends*. LinkedIn is a professional rather than personal site, and connections are part of your professional network.

Information you share on these sites can immediately propagate out to people within your network of friends or colleagues on the site. This can include new additions to your network –

[8] See, for example, Are Retweets Endorsements?: Disclaimers and Social Media, Andrew Mirsky, Citizen Media Law Project, April 5, 2012 < http://www.citmedialaw.org/blog/2012/are-retweets-endorsements-disclaimers-and-social-media > This article led to an interesting discussion, in the Slaw blog's comments section, on whether lawyers should be using disclaimers on their Twitter profiles and whether their retweets were endorsements: http://www.slaw.ca/2012/04/16/are-retweets-endorsements/.

which can potentially expose your client relationships – as well as other information you share on social media. The challenge of these linkages is that undoing them can be quite awkward. You will want to have a clear idea of who you are going to connect to, and if you are going to decline invitations to connect, have a well-thought out rationale to share with the person who you are rejecting.[9]

Profile sites go beyond the text-centric blogging and micro-blogging. While you can share a photo in those environments, consumer-oriented profile sites like Facebook and Google+ encourage significantly more sharing of photos and videos. Once you are linked to someone in one of these services, if they have a photo of you, they can link your account to their photo without your input. The way that these social media networks interlink you and the content added and owned by other members of your network may not always be clear at the time that you accept their invitation to connect.

[9] Judging Facebook relationships: Should jurists hear cases involving their 'friends'?, Paul Muschick, The Morning Call, January 14, 2012. < http://www.mcall.com/news/local/watchdog/mc-watchdog-judges-facebook-20120114,0,1816633.column > A judge discusses his choice to unfriend 150 colleagues: "Dumping about 150 people wasn't easy, considering that unlike many Facebook users, he actually knows a lot of the people he was Facebook friends with, including lawyers."

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# Using Social Media Tools In a Practical and Ethical Way

**Antonin Pribetic**
*Steinberg Morton Hope Israel LLP*

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5B

**Solo and Small Firm Conference and Expo 2012**

# USING SOCIAL MEDIA TOOLS IN A PRACTICAL AND ETHICAL WAY

**Antonin I. Pribetic**
**Litigation Counsel**
**Steinberg Morton Hope & Israel LLP**

## Introduction

If, as Marshall McLuhan once wrote, "the medium is the message", then social media is a message that all lawyers need to understand. The message is that in order to use social media in a practical and ethical way, there are a number of legal liability and ethical issues that must be considered when adopting a social media strategy.

## What is Social Media?

Social media is any form of web-based and mobile based technologies used to communicate and interact with the public. Andreas Kaplan and Michael Haenlein define social media as "a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0 and that allow the creation and exchange of user-generated content." [1]

Social media technologies are generally Internet forums, weblogs, social blogs, microblogging, wikis, podcasts, photographs or pictures, video, rating and social bookmarking.

The most popular social media tools relevant to lawyers and law firms are well-known: Law Websites, Law Blogging (or Blawging), Facebook, LinkedIn, Twitter and Google+, among others. Blawging is by far the most effective social media tool for lawyers, as it allows lawyers a platform to demonstrate and promote focused and relevant analysis and legal developments to a targeted audience.

## Building a 'W5' Social Media Strategy

The five (5) questions of journalism apply to social media strategy: Who, What, Where, When and Why?

1. **Why?**
2. **Who?**
3. **What?**
4. **Where?**
5. **When?**

[1] Kaplan, Andreas M.; Michael Haenlein (2010) "Users of the world, unite! The challenges and opportunities of Social Media". Business Horizons 53(1): 59–68.

The first question is the most important. If you don't know ***why*** you are using social media, then the other questions are rendered moot. As the ancient Chinese proverb says: Strategy without tactics is the slowest route to victory. Tactics without strategy is the noise before defeat.[2]

## Why Use Social Media?

The following are my "Ten Rules of Blawging", which also apply to Social Media generally.

1. **Trust no one, not even yourself**. Virgil was on to something when he wrote, "The gates of hell are open night and day; Smooth the descent, and easy is the way:" (The Aenid.6.126-128).

2. **Do not worship false gurus.** It's called 'social media' for a reason. If it were called 'professional media', we would have an established code of ethics and wouldn't need skeptics like U.S. blawgers Brian Tannebaum [3], Scott Greenfield [4] or Mark Bennett [5] pouring cold water over the self-described "social media lawyer marketing experts".

3. **Before you jump on the Twitter bandwagon, make sure the wheels haven't fallen off.** Read Scott Greenfield's post [6] or Brian Tannebaum's post [7] if you have any questions. However, according to Social Media Attorney Marketing Tasseomancer, Randy Wilson: "Twitter can allow someone interested in hiring you to check out what you say and whether it is useful to them." [8]

4. **Aristotle once wrote, "A friend to all is a friend to none".** Remember this when planning your social media law marketing strategy.

5. **Write what you know.** Chances are you don't know very much, if anything at all. Even if you're smarter than the average bore—remember to listen, read, learn, and assimilate. First establish a reputation in the real world, then in the virtual world.

6. **Free speech is not free; it comes with a price.** That price is eternal cynicism and infernal criticism.

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[2] Often misattributed as a quote from The Art of War by Sun Tzu (Sun Zi).
[3] Brian Tannebaum's "My Law License": http://mylawlicense.blogspot.com/
[4] Scott H. Greenfield's "Simple Justice": http://blog.simplejustice.us/
[5] Mark W. Bennett's "Defending People": http://blog.bennettandbennett.com/
[6] Scott H. Greenfield, "No Signs of Intelligent Life on Twitter": http://blog.simplejustice.us/2010/10/23/no-signs-of-intelligent-life-on-twitter.aspx?ref=rss (*Simple Justice* dated October 23, 2010- retrieved May 14, 2012)
[7] Brian Tannebaum, "Twitter: Still The Worst Place To Find A (Real) Lawyer": http://mylawlicense.blogspot.ca/2010/10/twitter-still-worst-place-to-find-real.html (*My Law License* dated October 24, 2012-retrieved May 14, 2012)
[8] Randy Wilson, "Lawyers & the Twitter Backlash": http://rlwilsonconsulting.wordpress.com/2010/10/25/lawyers-the-twitter-backlash/ (*Reading Tea Leaves* dated October 25, 2010-retrieved May 14, 2012)

7. **An opinion is not a statement of fact.** A statement of fact is not fair comment. Until you understand the difference, you're better off not writing anything at all.

8. **An expert is a person who has devoted a significantly greater amount of time and effort reflecting on a complex subject beyond that of an average person.** Whether social media is subject to this rule is self-evident. If the grand total of your legal experience consists of working on one M&A deal or appearing pro se in traffic ticket court , that's fine. Just don't pretend you know anything about how to build and run a law practice or how to get someone more clients.

9. **A blawg post is neither a legal memorandum, a law review article, nor a case comment.** The Facts-Issues-Law-Analysis-Conclusion (FILAC) approach is reserved for 1L students in fourth-tier unaccredited law schools. A thought provoking or original blawg post requires the analytical skill to separate the wheat from the chaff. Consider yourself a millwright (or millwrite).

10. **Take a position.** If you're writing to inspire yourself or others, then you must be willing to challenge your own biases and prejudices. Stealth marketing is like subliminal advertising, it only works on the untrained or distracted mind.

## Don't Be A Flawger

While I do not commercialize my blawg, there is nothing wrong with using blawging to promote or advertise your legal practice, as long as you adhere to the professional, ethical and legal standards required within your jurisdiction. What you should assiduously avoid at all costs is *flawging*: the crass, self-promotional, in-your-face advertising that demeans the integrity and nobility of the legal profession. I coined the term "Flawging" to distinguish it from Blawging as follows:

> Flawg": noun. A legal blog without any substantive legal content that is created, monetized and promoted exclusively for profit. A Flawg will often contain posts about the latest legal tech gadgets, or the how to gain new clients through the awesome power of the internet, in the absence of anything remotely legal to discuss;
>
> "Flawger": noun: someone who flawgs. Usually, a non-lawyer/social media law marketer, (but also a disbarred/suspended/unemployed/underemployed/retired/or failed lawyer who quit) who writes blawg posts about how to write blawg posts, SEO, ROI, iPads, cloud computing, top ten lists, and enjoys attending law marketing conferences and twittering about using #hashtags.[9]

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[9] Antonin I. Pribetic, "My Gift to the Social Media Law Marketers: The Flawg": http://thetrialwarrior.com/2011/01/20/my-gift-to-the-social-media-law-marketers-the-flawg/ (*The Trial Warrior Blog* dated January 20, 2011-retrieved May 14, 2012). See also, Mike Semple Piggot (a.k.a, Charon QC) 'Postcard from The Staterooms: Law blogs – but no *Flawging*?': http://charonqc.wordpress.com/2011/06/19/postcard-from-the-staterooms-law-blogs-but-no-flawging/ (*Charon QC UK Law Blog* dated June 19, 2012-retrieved May 14, 2012); Brian Inkster, "I Blawg. You Flawg. Period?": http://thetimeblawg.com/2011/07/31/i-blawg-you-flawg-period/ (*The Time Blawg* dated July 31, 2011-retrieved May 14, 2012); Scott H. Greenfield, "The Year of the Flawg": http://blog.simplejustice.us/2012/01/05/the-year-of-the-flawg.aspx (*Simple Justice* dated January 5,

If you choose to Flawg, the Blawgosphere (the autonomous global network of legal bloggers) will ridicule you mercilessly.

**Should I Blawg About My Clients or My Clients' Cases?**

I follow the "TMI" rule: Too Much Information. Even altruism is egotistical if the rationale behind disclosing confidential information for the greater good belies poor judgment. The aphorism "the road to hell is paved with good intentions" comes to mind.

While the wording of the ABA Model Rules or various American state bar rules of professional conduct differ from CBA Model Rules or various provincial law society versions, they all share one fundamental rule in common: Confidentiality as the cornerstone of the attorney–client relationship.

In Ontario, this principle is codified in Rule 2.03 [10]of the Law Society of Upper Canada's (LSUC) Rules of Professional Conduct (RPC), which reads:

> 2.03 CONFIDENTIALITY
>
> Confidential Information
>
> 2.03 (1) A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

The LSUC Commentary also adds that:

> "… A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence. This rule must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge. *A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them…*" [emphasis added]

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2012-retrieved May 14, 2012); Jamison Koehler, "Toward a Flawging Quotient: Justifications of a Self-Professed Flawger": http://koehlerlaw.net/2012/01/toward-a-flawging-quotient-justifications-of-a-self-professed-flawger/ (Koehler Law Blog dated January 15, 2012-retrieved May 14, 2012)

[10] Rule 2.03 of the *Rules of Professional Conduct* (available online at: http://www.lsuc.on.ca/media/rpc_2.pdf -retrieved May 14, 2012)

The prohibition against "cocktail party gossip" is often lost on many. As the LSUC Commentary further notes,

> "...Generally, the lawyer should not disclose having been consulted or retained by a particular person about a particular matter unless the nature of the matter requires such disclosure. A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure. A lawyer should avoid indiscreet conversations, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. *Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shop-talk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened.*"[emphasis added]

While there is a recognized exception of disclosing information within public knowledge (e.g. pleadings), the overriding duty is to protect the client's right of confidentiality.

Beyond the general rule of confidentiality, lawyers owe a duty to the public expressed in the form of Rule 4.06 [11] which reads:

> 4.06 THE LAWYER AND THE ADMINISTRATION OF JUSTICE
> Encouraging Respect for the Administration of Justice
>
> 4.06 (1) A lawyer shall encourage public respect for and try to improve the administration of justice.

From a blawger's perspective, as a practicing lawyer, the mere fact that you choose to write a personal blawg, rather than a firm marketing blawg, in no way exempts you from this ethical obligation. In fact, the privilege of membership in the legal profession carries with it heightened duties of honour and respect for the rule of law and its institutions, on the one hand, and promoting the interests of equal access to justice, on the other. As the LSUC Commentary notes:

> "...A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet for the same reason, a lawyer should not hesitate to speak out against an injustice. The admission to and continuance in the practice of law implies on the part of a lawyer a basic commitment to the concept

[11] Rule 4.06 of the *Rules of Professional Conduct* (available online at: http://www.lsuc.on.ca/media/rpc_4.pdf, retrieved May 14, 2012)

> of equal justice for all within an open, ordered, and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it. [emphasis added]

The guiding principles of civility and sound judgment will always offer a clear path to discharging one's duties to the client, the legal profession and the public, generally.

Nevertheless, consider that blawging and online comments fall under Rule 6.06 [12] which states:

> 6.06 PUBLIC APPEARANCES AND PUBLIC STATEMENTS Communication with the Public
>
> 6.06 (1) Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

As the LSUC Commentary points out,

> "Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal, or the lawyer's office does not excuse conduct that would otherwise be considered improper. A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer. *Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that the lawyer's real purpose is self-promotion or self-aggrandizement.* [emphasis added]

From the Law Society of Upper Canada's Rules of Professional Conduct, lawyers are not expected to be "on duty" 24/7 and acting as "philosopher kings" or the "intellectual elite". The key is to focus on professional integrity, independence and competence. As Rule 6.04(1) of the Rules of Professional Conduct and commentary state:

> Maintaining Professional Integrity and Judgment
>
> 6.04 (1) A lawyer who engages in another profession, business, or occupation concurrently with the practice of law shall not allow such outside interest to jeopardize the lawyer's professional integrity, independence, or competence.
>
> 6.04 (2) A lawyer shall not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

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[12] Rule 6.06 of the *Rules of Professional Conduct* (available online at: http://www.lsuc.on.ca/media/rpc_6.pdf, retrieved May 14, 2012)

> Commentary
>
> The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation, or writing on legal subjects, as well as activities not so connected such as, for example, a career in business, politics, broadcasting or the performing arts. *In each case the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society.*
>
> Where the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise *unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence as, for example, where the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.* [emphasis added]

What remains troublesome is when some lawyers continue to self-promote their "legal expertise" in a variety of areas of practice, while objectively they have little or none. Frankly, stating that one is a "legal expert" on Twitter, Facebook, blog or website is perilously close to false advertising. The reality is that no professional bar association qualifies any lawyer as an "expert". While there are specialist accreditations and certifications available in many jurisdictions[13], this does not equate with expert status.

In a Report to Convocation dated April 30 2009,[14] the Law Society of Upper Canada Professional Regulation Committee considered the use of the word "expert" in relation to Rule 3.03(1) of the Rules of Professional Conduct. At the October 2008 Convocation, bencher Bob Aaron had raised an issue about the word "expert" and how it would be misleading for a lawyer to use that term to advertise services in an area of law unless the lawyer was a certified specialist in that area.

The current rule and commentary read as follows:

> 3.03 ADVERTISING NATURE OF PRACTICE
> Certified Specialist
>
> 3.03 (1) A lawyer may advertise that the lawyer is a specialist in a specified field only if the lawyer has been so certified by the Society.
>
> Commentary
> Lawyer's advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.
> In accordance with s. 27(1) of the Society's By-law 15 on Certified Specialists, the lawyer who is not a certified specialist is not permitted to use any designation from

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[13] See the Law Society of Upper Canada's Directory of Certified Specialists (available at: http://www1.lsuc.on.ca/specialist/jsp/directory1.jsp, retrieved May 14, 2012)

[14] Report to Convocation dated April 30 2009 (available at: http://www.lsuc.on.ca/media/convapr09_prc.pdf, retrieved May 14, 2012)

> which a person might reasonably conclude that the lawyer is a certified specialist. In a case where a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm which makes reference to the status of a firm member as a specialist, in media circulated concurrently in the other jurisdiction(s) and the certifying jurisdiction, shall not be considered as offending this rule if the certifying authority or organization is identified.
> A lawyer may advertise areas of practice, including preferred areas of practice or that his or her practice is restricted to a certain area of law. An advertisement may also include a description of the lawyer's or law firm's proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.

The Report to Convocation includes an amusing footnote of the Chair of the Committee's views on the use of the word "expert":

> The Chair of the Committee advised Convocation of the Committee's views on the issue, having discussed the issue at a previous Committee meeting. The Chair said: "We weren't persuaded that we should include a per se prohibition on the use of the word expert…The lawyer who really is every day working as a mail carrier and maintains…that he or she is an expert in securities legislation or securities litigation…would…very much be offside…these proposed rules…which would be marketing that is not demonstrably true, accurate or verifiable."

The Committee provides some furtive examples of law firms using the word "expert" in their social media marketing strategy, including:

> a. The website of a large Toronto law firm states that one of its senior partners, who is not a certified specialist, practicing corporate and securities law is "an internationally recognized expert in corporate governance";
>
> b. A large Toronto firm offers an online newsletter on employment law issues and states "Read our labour and employment law experts' case commentary", which is written by two lawyers who are not certified specialists;
>
> c. Information on the website of a large Toronto firm about a senior business law lawyer (not a certified specialist) includes "Named by Law Business Research's International Who's Who of Banking Lawyers and Who's Who Legal Series as a leading expert in Canadian banking law, corporate governance and mergers and acquisitions".

Subrule 3.02(2) of the Rules of Professional Conduct currently reads:

> (2) A lawyer may market legal services if the marketing
> (a) is demonstrably true, accurate and verifiable,
> (b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive, and
> (c) is in the best interests of the public and is consistent with a high standard of professionalism.

The Committee recommended against making further amendments to the marketing rules, concluding that "the current rules and commentary, which prohibit false or misleading advertising, are sufficient to address any issues that might arise from use of the word "expert" in lawyer advertising."

Compare the Court of Appeal for Ontario's decision in *R. v. Abbey,* [15]where Justice Doherty outlined various factors for verifying an expert to give evidence in court (in that case, expertise in gang membership based upon teardrop tattoos):

- To what extent is the field in which the opinion is offered a recognized discipline, profession or area of specialized training?
- To what extent is the work within that field subject to quality assurance measures and appropriate independent review by others in the field?
- What are the particular expert's qualifications within that discipline, profession or area of specialized training?
- To the extent that the opinion rests on data accumulated through various means such as interviews, is the data accurately recorded, stored and available?
- To what extent are the reasoning processes underlying the opinion and the methods used to gather the relevant information clearly explained by the witness and susceptible to critical examination by a jury?
- To what extent has the expert arrived at his or her opinion using methodologies accepted by those working in the particular field in which the opinion is advanced?
- To what extent do the accepted methodologies promote and enhance the reliability of the information gathered and relied on by the expert?
- To what extent has the witness, in advancing the opinion, honoured the boundaries and limits of the discipline from which his or her expertise arises?
- To what extent is the proffered opinion based on data and other information gathered independently of the specific case or, more broadly, the litigation process?

Clearly, stating "Lawyer X is a widely recognized expert in the area of Y" is not subject to any level of scientific rigour. Perhaps the only area where a lawyer has expertise is as a court-qualified witness in a professional negligence lawsuit. Most lawyers are competent, others not. For the incompetent, a professional negligence lawsuit and/or suspension or disbarment is a possibility, but by no means a certainty.

In the end, ask yourself this question: why am I writing this blawg post about my client's case? If the answer is ego-fulfillment, self-promotion or catharsis; stop typing and delete the post. Even if your reasons are altruistic, get your client's express consent first and then save your draft and post after the final judgment is rendered and all appeals are exhausted.

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[15] 2009 ONCA 624 (CanLII) (Ont. C.A.)

## Who Should Be Responsible for Your Social Media Presence?

This is a rhetorical question. Of course, you, and you alone, are responsible for what you do as a lawyer, both in the real world and the virtual world. As New York personal injury lawyer and blawger, Eric Turkewitz has admonished:

*Outsource Marketing = Outsource Ethics* [16]

To which Texas criminal defense lawyer and blawger, Mark W. Bennett has added this corollary:

*Outsource Marketing = Outsource Reputation* [17]

### *Ghostblogging*

The issues of legal ghostwriting (law school term papers, court documents for pro se litigants, CLE papers for senior attorneys, etc.) and ghostblawging have evoked strong reactions and comments among the blawgosphere. Ghostblawging is essentially letting someone else ghost write your blog. If you are presenting yourself as a lawyer to the public, consider whether this constitutes false or misleading advertising.[18]

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[16] Eric Turkewitz, "Outsourcing Marketing = Outsourcing Ethics (5 Problems With Outsourcing Attorney Marketing)": http://www.newyorkpersonalinjuryattorneyblog.com/2009/11/outsourcing-marketing-outsourcing-ethics-5-problems-with-outsourcing-attorney-marketing.html (*New York Personal Injury Blog* dated November 16, 2009-retrieved May 14, 2012)

[17] Mark W. Bennett, "Call This 'Notice'": http://blog.bennettandbennett.com/2010/01/call-this-notice.html (*Defending People* dated January 26, 2010-retrieved May 14, 2012)

[18] Mark W. Bennett, "Ghostblawging OK?": http://blog.bennettandbennett.com/2007/09/ghostblawging-ok.html (*Defending People* dated September 15, 2007-retrieved May 14, 2012);

Scott H. Greenfield, "The Bully Line": http://blog.simplejustice.us/2010/02/02/the-bully-line.aspx (*Simple Justice* dated February 2, 2010-retrieved May 14, 2012);

Brian Cuban, "Blawg This! -Because I Can't Write": http://www.briancuban.com/blawg-this-because-i-cant-write/ (*The Cuban Revolution*-undated- retrieved May 14, 2012);

John Gregory, "May Law Blogs Be Ghostwritten?": http://www.slaw.ca/2010/02/24/may-law-blogs-be-ghostwritten/ (Slaw.ca dated February 24, 2010-retrieved May 14, 2012);

Debra Cassens Weiss at ABA Journal: Are Ghostwritten Lawyer Blogs Unethical?: http://www.abajournal.com/news/article/are_ghostwritten_lawyer_blogs_unethical (*ABA Journal* dated February 4, 2010-retrieved May 14, 2012);

Robert C. Richards, Jr., "Recent Ethics Opinions on Lawyers' Ghostwriting of Legal Papers": http://legalinformatics.wordpress.com/2010/05/04/recent-ethics-opinions-on-lawyers-ghostwriting-of-legal-papers/ (*Legal Informatics Blog* dated May 4, 2010-retrieved May 14, 2012);

Dr. Mohan Dewan and V. C. Mathews, Advocates with R. K. Dewan & Co. Intellectual Property Rights Protection Lawyers, "Does Plagiarism Or Ghostwriting Amount To Copyright Infringement?":

### *Blog Scraping/RSS Scraping*

Blog scraping is described as the:

> "process of scanning through a large number of blogs, usually daily, searching for and copying content. This process is conducted through automated software. The software and the individuals who run the software are sometimes referred to as blog scrapers.
> Scraping is copying a blog that is not owned by the individual initiating the scraping process. If the material is copyrighted it is considered copyright infringement, unless there is a license relaxing the copyright. The scraped content is often used on spam blogs or splogs."[19]

Jonathan Bailey at *Plagiarism Today* defines RSS scraping as follows:

> RSS scraping is when a third party, usually a spammer, grabs the content in an RSS and republishes it wholesale on another site.
>
> In this regard, RSS scrapers work a great deal like Google Reader, grabbing your site's content and displaying it on a site but, where Google Reader places the content behind a password protected wall that can only be accessed by the subscriber (or those who are shared the individual story), scrapers instead place the content on a public site for anyone to view, including search engines.[20]

There are different methods to combat blog scraping and RSS scraping, including the use of *Creative Commons* [21] licenses which provide a standard method for authors to declare their works "some rights reserved" (instead of "all rights reserved"). While Licenses do not pre-empt fair dealing (or in U.S. "fair use"), an attribution license[22] allows one to copy, distribute, and display a work, on condition that the original author is named. The *Share-alike* [23] attribution allows use of derivative works

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http://lawyers-law.com/does-plagiarism-or-ghostwriting-amount-to-copyright-infringement/ which ironically itself appears to have been plagiarized here: http://www.articlesnatch.com/Article/Does-Plagiarism-Or-Ghostwriting-Amount-To-Copyright-Infringement-/488499;

For a contrary view that ghostblawging is an acceptable practice see, Kevin O'Keefe's Real Lawyers Have Blogs: Ghostwriting for law blogs?: http://kevin.lexblog.com/2005/02/articles/blog-basics/ghostwriting-for-law-blogs/ (*Real Lawyers Have Blogs* dated February 20, 2005-retrieved May 14, 2012) and Allison C. Shields, "Should you use a ghostwriter for your blog?": http://legalease.blogs.com/legal_ease_blog/2010/10/should-you-use-a-ghostwriter-for-your-blog.html (Legal Ease Blog dated October 21, 2010-retrieved May 14, 2012).

[19] Wikipedia, "Blog Scraping": http://en.wikipedia.org/wiki/Blog_scraping (retrieved May 14, 2012)
[20] Jonathan Bailey, "FAQs: The Basics of RSS Scraping": http://www.plagiarismtoday.com/2011/05/09/faqs-the-basics-of-rss-scraping/ (*Plagiarism Today* dated May 9, 2011-retrieved May 14, 2012)
[21] http://creativecommons.org/
[22] http://creativecommons.org/licenses/by/2.0/
[23] http://creativecommons.org/licenses/by-sa/2.0/

on a reciprocal or same license basis. A work in the public domain is no longer protected under copyright and may be used without restriction. I personally use the *Creative Commons Attribution-Non-Commercial-No Derivs 3.0 Unported License*, [24] but your mileage may vary.

**What Should You Say On Social Media and Where Should You Say It?**

Generally, you are subject to the same liability issues as anyone making a publication available to the public, and receive some, but not all, of the freedom of speech and freedom of the press protections under section 2(b) of the Canadian Charter of Rights and Freedoms. Some of the legal issues included:

- Defamation
- Intellectual Property (Copyright/Trademark)
- Trade Secret
- Privacy Legislation[25] [26]
- Competition Act advertising regulations [27]
- Intrusion upon Seclusion [28]

My own social media activity is focused primarily on Blawging, LinkedIn and Twitter. I have tried to use Google+ but, it rarely results in any traffic. My blawg: *The Trial Warrior Blog* is a personal, not a professional or practice blog. However, many lawyers complement their law firm websites with blawgs to promote their practices or for client development. If your intent is to commercialize your social media activity, there are a number of issues that you need to appreciate that may attract legal liability and/or professional discipline.

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[24] http://creativecommons.org/licenses/by-nc-nd/3.0/

[25] Personal Information Protection and Electronic Documents Act (S.C. 2000, c. 5) and the four provincial privacy statutes declared by the federal Governor in Council to be substantially similar to PIPEDA: An Act Respecting the Protection of Personal Information in the Private Sector (Quebec);; The Personal Information Protection Act (British Columbia); The Personal Information Protection Act (Alberta); and The Personal Health Information Protection Act (Ontario).

[26] For a discussion of current privacy and other issues involving Facebook, see Dave Gulbransen , "Blawg Review #321: http://www.gulbransen.net/2012/05/blawg-review-321/ (*Preaching to the Perverted* dated May 14, 2012-retrieved May 14, 2012)and Mark Gollom, CBC News Canada, "5 Facebook rulings that affect what Canadians can do online": http://www.cbc.ca/news/canada/story/2012/05/10/facebook-cases.html (May 11, 2012).

[27] See, section 52 of the Competition Act, R.S.C., 1985, c. C-34, which contains the general prohibition against misleading advertising and states that misleading advertising will occur when a materially misleading representation is made to the public in the promotion of a product or service. For an interesting American lawyer's view on "social media credential fraud", see Bradley Shear "Do Marketing Ethics and the FTC Advertising Regulations Matter in the Social Media Age?: http://www.shearsocialmedia.com/2011/04/do-marketing-ethics-and-ftc-advertising.html (*Shear on Social Media Law* dated April 18, 2011-retrieved May 14, 2012).

[28] See the recent Court of Appeal for Ontario decision in *Jones v Tsige* 2012 ONCA 32 (Ont. C.A.) which recognized the tort of appropriation of personality and the existence of a cause of action for intrusion upon seclusion.

Based upon personal experience, it is annoying to get sued for defamation for writing a blog post. [29] It is equally annoying to respond to an anonymous Law Society complaint.[30] Dan Pinnington and Bruce Carton have each discussed the issue of whether a "ReTweet" ("RT") constitutes an endorsement or approval of the content of an original "tweet". [31]

With respect to copyright and trademark law, use your best judgment. Plagiarism and copyright or trademark infringement applies equally to blawging. Fair dealing and source attribution are best practices.

In *Crookes v. Newton,* [32] the Supreme Court of Canada held which held that website owners, bloggers and forum moderators will not be subject to intermediary liability for hyperlinking to defamatory content which does not constitute re-publication unless the alleged libel is endorsed or repeated.

**When is the Best Time to Use Social Media?**

Opinions vary, but blawging and tweeting should not monopolize your daily routine. I generally write about 2-3 blawg posts per week and tweet on average 8-10 tweets per day. A substantive blawg post takes between 45 minutes to an hour to write and edit before publication. A tweet takes about 20 seconds or less, depending on whether it is a reply or RT. I use Tweetdeck® as a desktop platform and UberSocial® for Blackberry ™ as a mobile platform. It is all a matter of personal preference and time management.

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[29] See, Eric Turkewitz's *New York Personal Injury Law Blog* which provides updates on what Scott H. Greenfield has stylized as the "Rakofsky v. The Internet" defamation lawsuit: http://www.newyorkpersonalinjuryattorneyblog.com/category/joseph-rakofsky.

[30] See, Antonin I. Pribetic, "The Price of Lawyer Free Speech": http://thetrialwarrior.com/2011/12/19/the-price-of-lawyer-free-speech/ *(The Trial Warrior Blog* dated December 19, 2011-retrieved May 14, 2012)

[31] See, Dan Pinnington, "Saying More With Fewer Characters: A Modest Proposal for a Twitter RT Taxonomy": http://www.slaw.ca/2011/11/10/saying-more-with-fewer-characters-a-modest-proposal-for-a-twitter-rt-taxonomy/ (*Slaw.ca* dated November 10, 2011-retrieved May 14, 2012). See also, Bruce Carton, "The 'RT Taxonomy': Creating Different Flavors of Retweets": http://legalblogwatch.typepad.com/legal_blog_watch/2011/11/there-is-an-old-legend-that-due-to-the-fact-that-they-spend-most-of-their-lives-looking-at-it-eskimos-have-dozens-of-words.html (*Legal Blog Watch* dated November 11, 2011-retrieved May 14, 2012)

[32] 2011 SCC 47 (S.C.C.) at paras. 27-30, 42 (per Abella J. (Binnie, LeBel, Charron, Rothstein and Cromwell JJ. concurring). McLachlin C.J.and Fish J. at para. 52, concurring in the result, were of the view that a hyperlink should constitute publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to. A mere general reference to a website is not enough to find publication. Deschamps J. also concurring in the result, disagreed with the majority's holding to grant a blanket immunity for hyperlinking to defamatory content (at para. 96and 103).

## Conclusion

The Law Society of Upper Canada has published a guide which is primarily a template for law firms with associates and staff that needs guidance on accepted or best practices for online activity. [33] Ontario lawyers, law clerks, and legal staff should read this document carefully and decide how and when they wish to participate online on social media platforms such as Facebook, Twitter, LinkedIn, Google+, *etc.*

The LSUC Social Media Policy provides examples as to when these guidelines may or may not apply:

> The following are some examples when these guidelines might apply.
>
> Beth, a partner at a firm, participates in an e-mail discussion list hosted by a business professional roundtable, where she can send and receive messages on a wide variety of business topics and interact with current and potential clients.
>
> Arthur, an associate at a firm, maintains a personal blog that he started as a law student. He has written about law school, classes, his articling experience, and now occasionally comments on his work.
>
> Greg, a paralegal, regularly reads the Empowered Paralegal blog and occasionally posts comments on the site.
>
> Susan, a litigation support specialist, has a Twitter account that she uses to update her friends and colleagues on her whereabouts, particularly if she's working long hours on a case.
>
> The following are some examples where these guidelines do not apply.
>
> Mark, Nadine, and Lisa have "friended" each other on Facebook and discuss movies and occasionally collaborate in a game of Firmtown. Their profiles identify [Firm name] as their employer but there is no other mention of work.
>
> Erik has a Twitter account where he provides to his followers updates on the status of his cactus throughout the day.

The last example is by far my favourite:

> "Erik has a Twitter account where he provides to his followers updates on the status of his cactus throughout the day".

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[33] Law Society of Upper Canada, "Online Activity/Social Media Policy" dated September 2010, available at: http://rc.lsuc.on.ca/pdf/kt/67_6370_OnlineActivitySocialMediaPolicy2010.pdf -retrieved May 14, 2012).

Hopefully, the Law Society of Upper Canada will continue to update and improve its online activity/social media policy regularly. While I like cacti (or cactuses), the issues of equal access to justice, lawyer ethics and freedom of expression are also worthy topics of online discussion.

In the end, the legal profession is often criticized as slow to accept technological change. Yet, clients and the general public expect lawyers to be technologically proficient and professionally competent. While social media will not make you a competent lawyer, if you otherwise lack substantive knowledge, it is a resource tool like any other. The art of written advocacy and legal writing are fundamental to legal competency and proficiency. Blawging is a great way to keep your writing skills sharp. Twitter, with its 140 character limit, improves clarity and brevity of thought. By all means, use social media to promote your practice. Just remember that practical and ethical are not mutually exclusive.


**USING SOCIAL MEDIA TOOLS IN A PRACTICAL AND ETHICAL WAY**
**Thursday, May 31, 2012**

Antonin I. Pribetic
Litigation Counsel
Steinberg Morton Hope & Israel LLP
Incoming Chair, OBA International Law Section

"The Medium Is The Message."
Marshall McLuhan, *Understanding Media: The Extensions of Man* (1st Ed. McGraw Hill, NY, 1964; reissued MIT Press, 1994

- What is Social Media?
- Types of Social media technologies:
  - Internet forums/fora,
  - Weblogs (blogs), including law blogs ("blawgs")
  - social blogs,
  - Microblogging (Twitter, Tumblr)
  - Other leading social networking websites such as Facebook, MySpace, LinkedIn, Google+ and XING, also have their own microblogging feature, better known as "status updates".
  - wikis,
  - podcasts,
  - photographs or pictures (Instagram, Flickr, Lockerz)
  - video,
  - rating and social bookmarking.

# "W5"

1. **Why?**
2. **Who?**
3. **What?**
4. **Where?**
5. **When?**

## My Ten Rules of Blawging (and Social Media Generally)

1. **Trust no one, not even yourself**.

## W5

2. **Do not worship false gurus.**

## W5

3. **Before you jump on the Twitter bandwagon, make sure the wheels haven't fallen off.**

## W5

4. **Aristotle once wrote, "A friend to all is a friend to none".**

# W5

5. **Write what you know**

# W5

6. **Free speech is not free; it comes with a price.**

# W5

7. **An opinion is not a statement of fact.**

# W5

8. **An expert is a person who has devoted a significantly greater amount of time and effort reflecting on a complex subject beyond that of an average person.**

# W5

**9. A blawg post is neither a legal memorandum, a law review article, nor a case comment.**

# W5

10. **Take a position.**

# Don't Be a Flawger

- **Flawg": noun.** A legal blog without any substantive legal content that is created, monetized and promoted exclusively for profit. A Flawg will often contain posts about the latest legal tech gadgets, or the how to gain new clients through the awesome power of the internet, in the absence of anything remotely legal to discuss;
- **"Flawger": noun:** someone who flawgs. Usually, a non-lawyer/social media law marketer, (but also a disbarred/suspended/unemployed/underemployed/retired/or failed lawyer who quit) who writes blawg posts about how to write blawg posts, SEO, ROI, iPads, cloud computing, top ten lists, and enjoys attending law marketing conferences and twittering about using #hashtags.

## Should I Blawg About My Clients or My Clients' Cases?

- Simple answer: **NO.**
- I never write posts about my clients or my client's cases. However, media statements are sometimes necessary to highlight the important legal issues involved in a pending case.*
- If you still feel think you want to blog about your client's case, you should ask yourself the following three (3) questions:
  1) Will it benefit or harm my client's pending case?
  2) Have I obtained my client's informed, written consent?
  3)Have I complied with the Rules of Professional Conduct?
  *Always ask a trusted colleague his or her opinion before writing a post discussing your client's case

# Are You a Legal Expert? Really?

3.03 ADVERTISING NATURE OF PRACTICE

- Certified Specialist
- 
- 3.03 (1) A lawyer may advertise that the lawyer is a specialist in a specified field only if the lawyer has been so certified by the Society.
- 
- Commentary
- Lawyer's advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.
- In accordance with s. 27(1) of the Society's By-law 15 on Certified Specialists, the lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist. In a case where a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm which makes reference to the status of a firm member as a specialist, in media circulated concurrently in the other jurisdiction(s) and the certifying jurisdiction, shall not be considered as offending this rule if the certifying authority or organization is identified.
- A lawyer may advertise areas of practice, including preferred areas of practice or that his or her practice is restricted to a certain area of law. An advertisement may also include a description of the lawyer's or law firm's proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.

# Are You a Legal Expert? Really?

- Subrule 3.02(2) of the Rules of Professional Conduct currently reads:
- (2) A lawyer may market legal services if the marketing
- (a) is demonstrably true, accurate and verifiable,
- (b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive, and
- (c) is in the best interests of the public and is consistent with a high standard of professionalism.

**Who Should Be Responsible for Your Social Media Presence?**

*"Outsource Marketing = Outsource Ethics"*

~ Eric Turkewitz, New York Personal Injury Attorney Blog

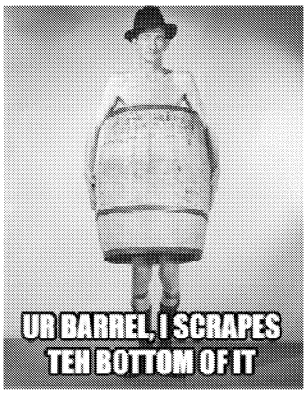
## Are You a Legal Expert? Really?

*"Outsource Marketing = Outsource Reputation"*

*~ Mark W. Bennett, Defending People*

## *Ghostblogging*

## *Blog Scraping/RSS Scraping*



## What Should You Say On Social Media and Where Should You Say It?

- Defamation
- Intellectual Property (Copyright/Trademark)
- Trade Secret
- Privacy Legislation
- Competition Act advertising regulations

## What Should You Say On Social Media and Where Should You Say It?

- Rakofsky v. The Internet

-Google it

## What Should You Say On Social Media and Where Should You Say It?

- Hyperlinking is not republication of defamatory content.
- In *Crookes v. Newton,* the Supreme Court of Canada held which held that website owners, bloggers and forum moderators will not be subject to intermediary liability for hyperlinking to defamatory content which does not constitute re-publication unless the alleged libel is endorsed or repeated.
- 2011 SCC 47 (S.C.C.) at paras. 27-30, 42 (per Abella J. (Binnie, LeBel, Charron, Rothstein and Cromwell JJ. concurring). McLachlin C.J.and Fish J. at para. 52, concurring in the result, were of the view that a hyperlink should constitute publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to. A mere general reference to a website is not enough to find publication. Deschamps J. also concurring in the result, disagreed with the majority's holding to grant a blanket immunity for hyperlinking to defamatory content (at para. 96and 103).

## What Should You Say On Social Media and Where Should You Say It?

- A Retweet ("RT") is not a *per se* endorsement.
- Given Twitter's ephemeral nature, most tweets have only a short half-life (a few hours).
- However, semantical and syntactical ambiguities often arise in condensing and sharing short (140 character) messages on Twitter.
- The great Canadian science fiction writer, William Gibson (@greatdismal) has coined the phrase "Attribution Decay" to denote when the originator of a tweet is often omitted after his or her tweet is retweeted multiple times.

# RT Taxonomy

- Dan Pinnington has expanded upon my original RT Taxonomy:
  RT+ (agree)
  RT- (disagree)
  RT=(indifferent)
  RT? (confusing)
  RT± (undecided)
  RT* (interesting)
  RT! (a must read)
  RT~ (original tweet was edited)
  RT:) (a happy tweet)
  RT:( (a sad tweet)

Bruce Carton has added a few more:

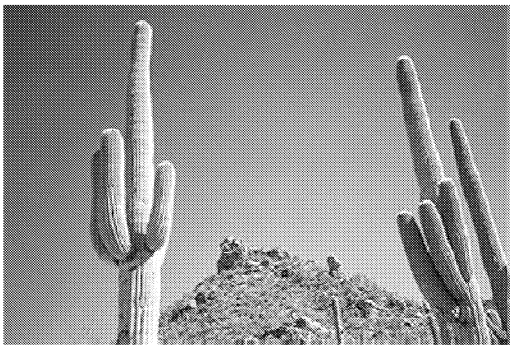
RT;) (sarcasm)
RT:o (unbelievable)
RTv (vanity/self-promotion)

# Social Media Policies

- Some law firms, but not many, have established Social Media Policies.
- Law Society of Upper Canada, "Online Activity/Social Media Policy":
  "The following are some examples when these guidelines might apply.
- Beth, a partner at a firm, participates in an e-mail discussion list hosted by a business professional roundtable, where she can send and receive messages on a wide variety of business topics and interact with current and potential clients.
- Arthur, an associate at a firm, maintains a personal blog that he started as a law student. He has written about law school, classes, his articling experience, and now occasionally comments on his work.
- Greg, a paralegal, regularly reads the Empowered Paralegal blog and occasionally posts comments on the site.
- Susan, a litigation support specialist, has a Twitter account that she uses to update her friends and colleagues on her whereabouts, particularly if she's working long hours on a case.
- The following are some examples where these guidelines do not apply.
- Mark, Nadine, and Lisa have "friended" each other on Facebook and discuss movies and occasionally collaborate in a game of Firmtown. Their profiles identify [Firm name] as their employer but there is no other mention of work…."

# Social Media Policies

- "Erik has a Twitter account where he provides to his followers updates on the status of his cactus throughout the day".



# Social Media Policies

- As every rose has its thorn, so too, every cactus has its...um, spines.
- While tweeting about one's cactus all day may be sufficient to avoid breach of the LSUC Social Media Guidelines, it does seem rather mundane and will not increase your Klout score or Peer Index dramatically. I fear that it will likely end up getting you unfollowed or blocked *en masse*. It also will not guarantee you safety or security, either online or offline. For example, one could suffer cactus spine injuries or develop cactus dermatitis. Then there's the risk of criminal prosecution in Arizona if you vandalize (cactus plugging), remove or traffic in Arizona's state flower, the Saguaro or giant cactus over four feet tall.

- The worst, however, is death by cactus:

  "David Grundman and his roommate James Joseph Suchcochi packed their guns and took off for the desert near Lake Pleasant back in 1982. Snopes.com tells us Grundman had great success shooting up a small saguaro, which quickly thumped down dead. So he went for a bigger one. A 26-foot saguaro that was estimated at 100 years old.
  The cactus was apparently not amused by being shot up – and one of its 4-foot arms tumbled down, crushing and killing Grundman. What a way to make history.
  While Snopes also mentions tales of animal revenge, the site says Grundman's is the only documented case of a plant getting back at a human."

# Social Media Policies

•By all means, tweet only about cactuses (or cacti), but remember the words of the conservative political pundit Charles Krauthammer:

"In the middle ages, people took potions for their ailments. In the 19th century they took snake oil. Citizens of today's shiny, technological age are too modern for that. They take antioxidants and extract of cactus instead."