

SOCIAL MEDIA AND LEGAL ETHICS



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Sources of Lawyers' Duties

- Legal Professional Act and Regulations
- Rules of Professional Conduct and Practice, NT Law Society
- Barristers' Conduct Rules, NT Bar Association
- Common law (eg. contempt)
- Contract law (eg implied term of a retainer)
- Equity



Duties to the Court

- Duty to conduct proceedings with candour & honesty: *Incorporated Law Institute of NSW v Meaher* (1901) 9 CLR 655 per Isaacs J at 681
- Duty to assist the court as to the law
- Duty not to knowingly mislead the court
- **Duty to the court is paramount** and prevails over duty to the client

Duties to the Client

- **Duty of Confidentiality**
 - Encourages full and frank disclosure between client and lawyer
 - Client can seek legal advice without fear of prejudice from subsequent disclosure
 - Does not end when the end of a retainer
- **Duty to Act with Competence and Diligence**
- **Fiduciary Duties**
 - Lawyer-client relationship is a **fiduciary relationship** which imposes obligations of trust, integrity and confidence
 - Loyalty lawyers owe to their client places the duty at a high threshold
 - Lawyer's duty does not end with termination of the retainer or death of the client

Duties to the Public

- Duty to **uphold the law**
- Duty to refrain from assisting client break law
- Duty to **maintain the integrity and reputation of the legal profession** (courteous communications)
- Duty not to make misleading **representations**
- Duty to undertake continuing legal development

Duties of Counsel in Litigation

- Duty to conduct cases efficiently and expeditiously
 - Not to make forensic decisions to gain a collateral advantage
 - Not being a mere mouthpiece for the client
- Duty not to abuse court processes / corrupt administration of justice
- Duty not to Mislead: Pleadings, Submissions, Openings, Closings
 - Not to allege any matter of fact without material to support
- Duties to cross-examine fairly
 - Not to allege any matter of fact amounting to criminality, fraud or other serious misconduct unless reasonable basis to support allegation
 - Not to make suggestion on credit unless reasonable belief that if accepted, the suggestion would diminish the witness' credibility
- Duties in *ex parte* interlocutory applications
- Special duties of prosecutors – fairness, disclosure, etc

Social Media & Traditional Media

- Traditional media
 - involves one-way communication
 - eg. newspaper, TV, radio
- Social media
 - allows interactive use between consumers and broader group or public at large
 - Consumers create and distribute the content
 - Facilitates dialogue, “sharing”



Types of Social Media

- Facebook: 14,000,000 Australian users
- Instagram: 5,000,000 monthly active users
- LinkedIn: 3,500,000 Australian users
- Twitter: 2,800,000 active Australian users
- Lawyer Specific:
 - lawyrs.net and Lawlink.com
- Others:
 - YouTube
 - MySpace
 - WAYN
 - Blogging forums
 - Dating websites



Beneficial Uses of Social Media

- Social media can be an influential marketing tool at little or no cost
- Can be used to:
 - advertise to potential clients
 - recruit new staff and
 - network with the profession and public
- Spread a message to a large audience in *real time*
 - Instantaneous interaction
 - Dialogue



Characteristics of Social Media

- Public comment and interaction
 - Once info placed online, publically accessible, may fall outside protection of confidentiality
 - Users cannot control action of other social media users' photo tagging, comments and blogging
- Permanent
 - Hard to correct a mistake posted online as it may have been viewed by many people or is available permanently (even when deleted)
- Often sent from personal / private device
 - Therefore having the feel of being a private conversation
- Instantaneous, real-time communications
 - Informal nature of social media communication leads to reduced level of formality
 - Increases likelihood of errors
 - Risk of posting something inappropriate or being associated with inappropriate comments posted by others

Dangers of Social Media

- **Blogging about cases and clients can breach confidentiality**
 - Disclosure of case strategy or case outcomes in LinkedIn summaries
 - Social media, used inappropriately during a trial, can have serious consequences – including mistrial/retrial
- **Social media networking sites can provide access information about witnesses or other parties**
 - “Discovery” gold mine: user’s location, daily activities, personal relationships, opinions, political inclinations, representations
 - Evidence found online can form credibility material for cross-examination
- **Bullying, Harassment or Offensive Behaviour online**
 - Minister Nathan Barrett posts explicit pictures to member of electorate
- **Facebook posts can become evidence!**
 - Workers compensation claims where “injured” person posts pictures on skiing holiday
 - Teenage offenders showing off proceeds of crime on Facebook
 - Person says they were somewhere other than what their Facebooks shows

Risk Mitigation



- Personally: Set your strict privacy setting
- In the office: have a social media policy
- Refrain from posting or blogging on social media any:
 - Confidential information
 - Expressions of opinion on the merits of a potential or current case
 - Opinions about judges or legal practitioners
- Advise clients to deactivate their social media sites and avoid posting on the internet anything to do with the litigation
 - However, note your obligation not to be a party to any illegal destruction of evidence!

Social Media in Litigation

- **Defamation**
 - Tension between freedom of expression and preservation of reputation
 - New class of “publishers” (users) who may not appreciate the legal consequences of their online posts
- **Personal Injuries**
 - Incapacity, injury, psychological impact
- **Family law** proceedings
 - Infidelities and extra-marital relationships
- **Criminal**
 - Defence of reasonable belief person was over 16 (child sex cases)
 - “It wasn’t me” defence: note possibility of shared computers, malware, pop-ups
 - Identification evidence from online postings
- **Discrimination**
 - Racial discrimination online
 - Cyber-bullying and harassment - Note that if done at work (using work computer), employer may be vicariously liable if they do not take reasonable steps to prevent the conduct
- **DVOs**
 - Harassing texts, frequency and timing of calls, language and content



Discoverability of Social Media Evidence

- Relevance to a fact in issue
 - Q whether document could “rationally affect the assessment of the probability of the existence of a fact”
- Scope of discovery
 - Q whether discovery is “necessary for the resolution of the real issues in dispute in the proceedings”
 - Not a fishing expedition – requires case management

EVIDENTIARY ISSUES

- Definition of “document” – very broad under UEA
 - “any record of information” includes
 - anything on which there are marks, figures, symbols able to be interpreted
 - anything from which sounds, images or writings can be reproduced
- Authenticity – admissibility is based on *relevance*; not authenticity, but authenticity may have a bearing on admissibility
- Reliability (forensic evidence)
 - Mobile phones and laptops presumed to be reliable: *Bevan v WA* [2010]; WASCA 101 [2012] WASCA 153
- Privacy
 - *Surveillance Devices Act* (NT)
 - *Telecommunications (Interception and Access) Act* (Cth)
- Identification evidence (criminal cases):
 - *Strauss v Police* [2013] SASC 3 (18 January 2013) – dangers of “displacement effect” of facebook / photo identification

EVIDENTIARY ISSUES

- Computer Representations (Hearsay)
 - **s146 UEA:** Evidence produced by processes, machines and other devices
 - presumption if a record is produced by a device is tendered by a party who asserts that the device produced a particular outcome, that in producing the document or thing in question, the device or process produced that outcome
 - **s161 UEA:** Reliability - presumption that a record of an electronic communication was: sent or made the way it appears from the document; by a person it appears to have been sent by; on the day and time at which it appears to have been sent.
- Discretionary Exclusion
 - **s137 UEA:** Exclusion of prejudicial evidence in criminal proceedings – court *must* refuse to admit evidence adduced by the prosecutor if probative value is outweighed by the danger of unfair prejudice to the defendant

DUTY TO THE COURT



- Lawyers duty to the court is paramount, and prevails if inconsistent with other duties (eg duty to client)
- Duty includes to act with candour, honesty and fairness
- Must act with integrity and must not act in a way, in personal or professional life, that reduces public confidence in the administration of justice or bring the profession into disrepute
- **DOs AND DON'Ts**
 - Do NOT write negative comments about judicial officers or other lawyers
 - Refrain from commenting about merits of cases that are before the court
 - Do not comment about court proceedings on online blogs
 - Be careful about photos posted or tagged on social media
 - **Suggested Test:** Don't post anything on social media you would not be comfortable saying before a crowd [or higher test: before a court]

UNINTENDED RETAINERS

- “Unintended” or faulty Retainers
 - Can arise from providing legal advice on online forums
 - Person may assume a retainer exists because a lawyer can responded to their question
- How to Avoid
 - Don’t provide legal advice on social media
 - Ensure you do not advise where you do not have full instructions/information
 - If providing general advice, state clearly that you do not intend to create a retainer and otherwise qualify the advice
 - Suggest that the person email the lawyer’s firm and set up an appointment to discuss
 - Do a “Fact Sheet” about the law and its application generally for your website rather than individualise advice.

JUDGES' USING SOCIAL MEDIA



- **Judges must**
 - Refrain from acting in a way that will erode public confidence in the judiciary
 - Act impartially and appear to be impartial
- **Should judges be prevented from using social media?**
 - Should judges be able to “like” people, businesses and charities on Facebook? Or post profiles on LinkedIn?
 - No firm rules around this, but note *Australian Guide to Judicial Conduct (AGJC)*:
 - Judges should not comment publicly on politics
 - Judges should not become involved in controversial political debates
 - Judges should not fundraise
- **Should judges be “friends” with practitioners on social media?**
 - Friendships or past professional association with counsel or solicitor is not generally to be regarded as a sufficient reason for disqualification (AGJC)
 - Note that “friend” no longer has the same meaning it did pre-internet
 - “Friendships” on social media are arguably less threatening to judicial impartiality than friendships in real life

GUIDELINES FOR ETHICAL USE OF SOCIAL MEDIA

- Guidelines offered in various jurisdictions:
 - **VIC**: “Guidelines on the Ethical Use of Social Media”, Law Institute of Victoria
 - **NSW**: “A Guide to Practice Issues: Social Media” (2013), NSW Office of Legal Services Commissioner
 - **QLD**: “Seven Ethical Sins in Social Media” (2013), QLD Law Society Ethics Centre
 - **WA**: “Social Media Policy”, WA Law Society

ARE CURRENT RULES OF CONDUCT SUFFICIENT?

- Do Lawyers' Conduct Rules need to be amended to address social media?
 - Ethical Guidelines to be stand-alone documents for easier amendment?
 - Setting clear guidelines to help prevent breaches of lawyers' duties?
 - Uniform national guidelines for lawyers?

SOURCES

- G E Dal Pont, “Lawyers’ Professional Responsibility” (2013) Lawbook Co, 5th ed.
- Beware the Tweet, Peter Bartlett, Law Institute Journal, November 2015
- The limited impact of Facebook and the displacement effect on the admissibility of identification evidence, Paul McGorrery, (2015) 39 Crim LJ 208
- Marilyn Krawitz, “May it tweet the court: Ethical considerations involving Australian lawyers’ social media use” (2013) 2 JCivLP 85 – 102.
- Marilyn Krawitz, “Can Australian judges keep their “friends” close and their ethical obligations closer? An analysis of the issues regarding Australian judges’ use of social media (2013) 23 JJA 14 – 34.
- Eugene Clark, “Some ethical challenges posed by the use of new technologies for lawyers” – CDU ‘Law School Notes’, December 2004.
- The Hon T F Bathurst, “Tweeters, Posters and Grammers Beware: Discovery and Social Media”, 21 June 2016.

Thank you

