Social Media

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Social Networking – What is It?

- A new set of internet tools that enable shared community experiences, both online and in person.

- A community, in this context, is a group of people with common interests who connect with one another to learn, play, work, organize and socialize.

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Examples of Social Networking Sites

- Facebook
- Twitter
- Linked In
- Pinterest
- Flickr
- YouTube
- Blogosphere

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PART ONE:
Use of Social Media by Governments



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Legal Issues – More Questions than Answers?

1. Open Meetings Act and Freedom of Information Act (FOIA) Compliance
2. First Amendment and Privacy Issues
3. Discrimination
4. Supplement not Substitute
5. Copyright Issues
6. Employee Usage

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Open Meetings Act

- Will social media interactions and communications by your government officials be considered “meetings” subject to OMA?

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Freedom of Information Act

- Is information on your site subject to release under FOIA?

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Records Retention

- Are communications and other information posted on your sites subject to local record retention laws?





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First Amendment

- Are comments posted on your social media sites protected by the First Amendment?

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Discrimination

- Does your site provide equal access to individuals with disabilities?
- Must you provide alternative methods of disseminating information and soliciting input to reach underrepresented groups (economic, age, education)?

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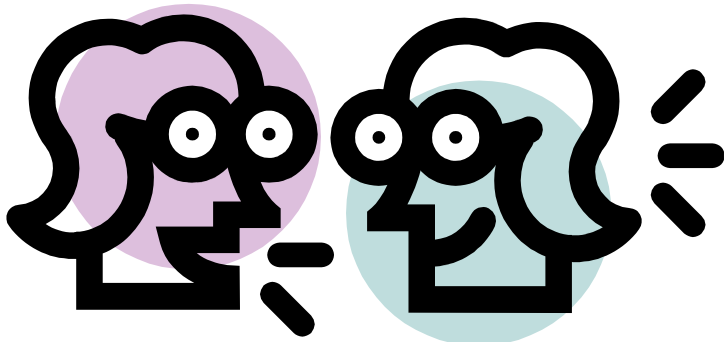
Supplement not Substitute

Can cyberspace adequately replace real-time and face-to-face questions and answers that your regular meetings provide?



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Copyright Issues

- Do you have permission to use content posted on your social media sites (i.e., photos and videos)?



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Employment Issues

- The law is not settled
- Employers walk a tightrope in using and enforcing electronic information



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Candidates for Employment

- Notify candidates (include on application)
- Treat all candidates the same
- Consider the reliability of the information
- Do not “friend” candidates to view information
- Discuss negative information with candidates
- Employers can use information about a candidate that is not an illegal basis for making a hiring decision (i.e., discriminatory)
- Document reasons for rejecting employment

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Social Media Passwords

- Legislation has been introduced in Congress, but no federal law currently exists
- Some states have enacted legislation to protect employee privacy
- Examples: Maryland & Illinois

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Illinois P.A. 97-0875

- Amends the Right to Privacy in the Workplace Act:

- (b)(1) It shall be unlawful for any employer to request or require any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee's account or profile on a social networking website or to demand access in any manner to an employee's or prospective employee's account or profile on a social networking website.

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P.A. 97-0875, cont.

- (2) Nothing in this subsection shall limit an employer's right to:
- (A) promulgate and maintain lawful workplace policies governing the use of the employer's electronic equipment, including policies regarding Internet use, social networking site use, and electronic mail use; and
- (B) monitor usage of the employer's electronic equipment and the employer's electronic mail without requesting or requiring any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee's account or profile on a social networking website.

- (3) Nothing in this subsection shall prohibit an employer from obtaining about a prospective employee or any employee information that is in the public domain or that is otherwise obtained in compliance with this amendatory Act of the 97th General Assembly.

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Employee Usage

- Employers can discipline for:
  - excessive use of social media at work
  - disclosure of confidential information
  - making false statements about employer

- Employers can monitor employee usage:
  - Must balance employer interest and privacy rights of employee
  - Should provide notice to employees (personnel policy)

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Importance of a Social Media Policy

A good social media policy will:

1. Define the purpose and scope for use
2. Identify a moderator in charge of the site
3. Develop standards for appropriate public interaction and posting of comments
4. Establish guidelines for record retention and compliance with FOIA and OMA
5. Implement an employee access and use policy and incorporate it into employee handbook or personnel policy

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PART TWO:
Use of Social Media by Lawyers

- More than half of lawyers are members of at least one social networking site

- More and more firms are establishing a social media presence on sites such as Facebook or Twitter



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Attorney-Client Relationship

- Attorneys may inadvertently create an attorney-client relationship when using social media through chats, e-mailing, and posting on blogs, Facebook, Twitter and similar forums.
  - Limit reader feed-back
  - Keep information general
  - Use a disclaimer

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Solicitation and Advertising

- ABA Model Rule 7.1 and 7.2 state that networking websites are considered communications and advertising

- ABA Model Rule 7.3 prohibits in-person, telephonic or real time electronic client solicitation for pecuniary gain.
  - E-mail, Facebook or LinkedIn message solicitation is not banned
  - However, be cautious with chat room communications

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Contact with Represented Persons

- ABA Model Rule 4.2 prohibits contact with a person known to be represented by counsel

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Conflicts of Interest

- ABA Model Rule 1.7 prohibits communication with adverse parties

- Lawyers should be aware that users of social media may not be using their real name, creating situations where a lawyer may be communicating with an adverse party

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Client Confidentiality

- ABA Model Rule 1.6 prohibits breach of client confidentiality
- An attorney who reported her cases on a blog was disciplined because she was breaching the confidential nature of her client's case and communications

Practice and Specialization

- ABA Model Rule 7.4 prohibits attorneys from stating they are specialized in a legal area unless certified by an authority.

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Unauthorized Practice of Law

- ABA Model Rule 5.5 prohibits the practice of law in a jurisdiction in violation of the jurisdictional rules

- Lawyers must be careful not to provide legal advice in a state where the lawyer is not licensed

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False or Misleading Statements

- ABA Model Rule 7.1 prohibits making false or misleading statements
- This prohibition has extended to statements written/posted on blogs and social networking sites such as Twitter and Facebook.

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Deceit and Nondisclosure of Material Facts

- ABA Model Rule 8.4(c) prohibits an attorney from deceitful conduct, including nondisclosure of material facts
- Philadelphia Bar Association extended this to a lawyer's use of a third party to "friend" a witness to gain access to her Facebook page

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Extrajudicial Statements

- Rule 3.6 prohibits a lawyer involved in a matter from making "an extrajudicial statement that the lawyer knows or reasonably should know
  - will be disseminated by means of public communication and
  - will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter"

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Ex Parte Communications

- Lawyers must be careful not to engage in *ex parte* communications with judges regarding pending matters
- Bar opinions have been inconsistent whether lawyers and judges can be social media "friends"



Questions

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