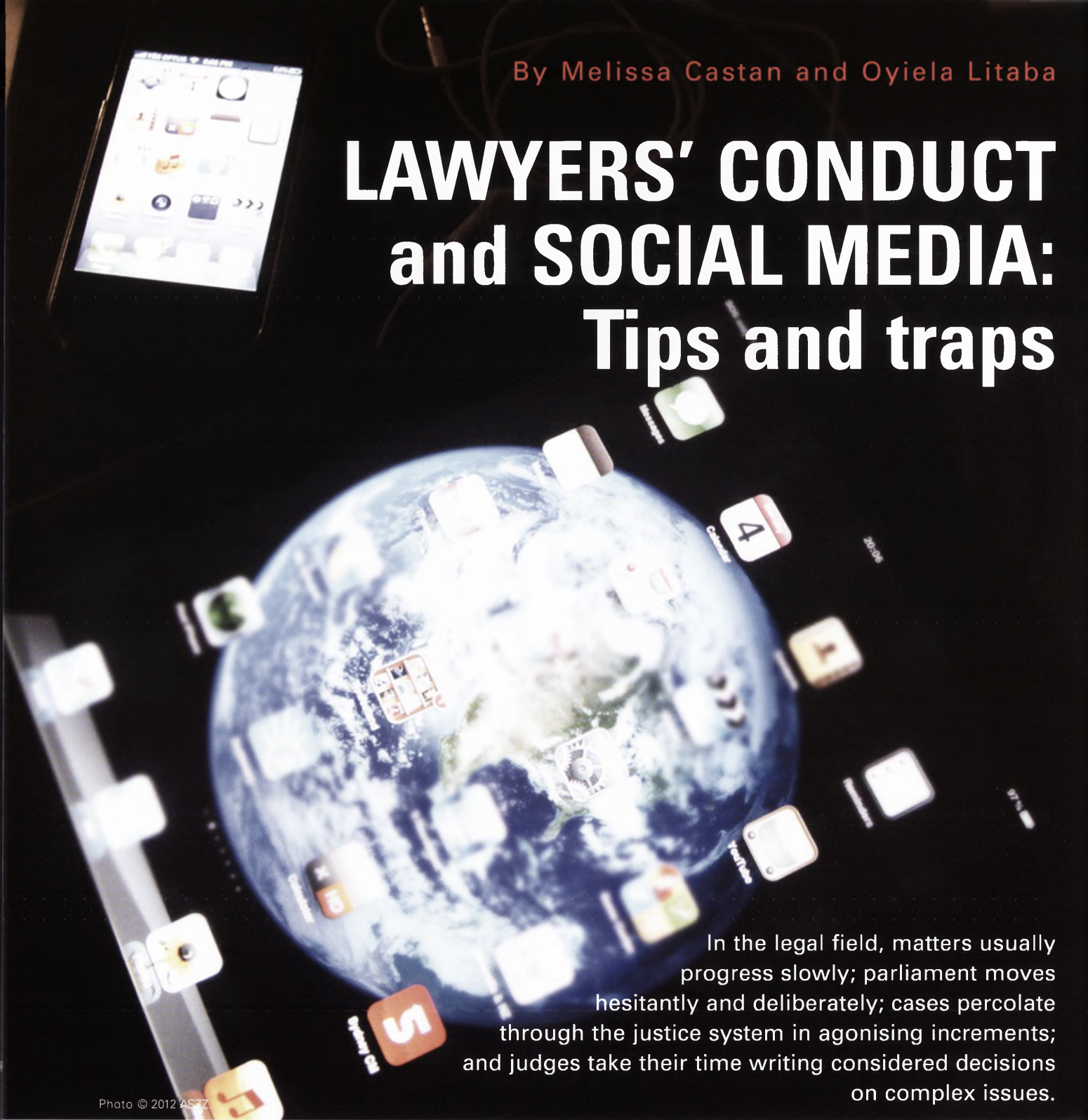


By Melissa Castan and Oyiela Litaba

# LAWYERS' CONDUCT and SOCIAL MEDIA: Tips and traps



In the legal field, matters usually progress slowly; parliament moves hesitantly and deliberately; cases percolate through the justice system in agonising increments; and judges take their time writing considered decisions on complex issues.

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**T**he exception might be the demands of the client and the opposing side, who can demand instant and constant gratification. Many lawyers are faced with pressures that can lead to distress,<sup>1</sup> but one of the best parts of working in the law is the tremendous intellectual and social connections we make. New forms of social media such as Facebook, Twitter, YouTube, and blogs provide additional platforms and opportunities to engage with others both within your professional area and beyond it.

This article considers the ways in which participating in social media platforms can enhance lawyers' professional development and networks, and provide an additional source of information and community. It shows how these platforms can boost engagement with legal and interdisciplinary communities, locally and beyond. It also highlights aspects of the relevant rules of professional conduct that take on particular significance in the 'virtual' world of social media.

## ENGAGEMENT

New social media platforms have made an enormous amount of information available to us. There are also many more sources of independent (or non-'mainstream' media) information. When combined with a 'smart' phone or tablet, and an increasingly busy online work and home life, lawyers can feel they are facing an onslaught, an information overload. In this context, the invitation to join Twitter or write a blog might seem unenticing, but lawyers can gain much from engaging with new communities, as long as we apply the same ethical and professional boundaries we maintain in real life.

For lawyers and people working in legal fields, social network sites can provide access to new audiences, and new professional communities, and we are no longer constrained by the timelines imposed by the traditional print media. Communicating on web-based platforms can be a form of professional development, just the same as reading newsletters, face-to-face meetings and attending conferences. For instance, the *Law Institute Journal* highlights interesting legal blogs and websites in its 'Insites' review feature;<sup>2</sup> and the National Association of Community Legal Centres does the same on its CLEWS resources page.<sup>3</sup> For barristers' blogs, see the list Stephen Warne is collating at the Australian Professional Liability Blog.<sup>4</sup> Many bloggers, such as Skeptic Lawyer and Peter Black, keep extensive 'blogrolls' or lists of favorite blogs.<sup>5</sup> These are just a few of the examples where a particular interest group or professional community has identified the value of sharing resources through social media platforms, rather than relying upon traditional print media.

Social media is inherently interactive, and can provide a forum, unprecedented in its efficiency and immediacy, for the sharing of ideas, calls for action, campaigns, judgments, as well as international, national and regional developments and events. And there is the potential for mobilising movements to keep governments accountable as well.

## HOW TO GET STARTED

It well may be that many people use social network sites for sharing trivial and frivolous information. However, these platforms are not limited to communicating on the ephemeral. Platforms such as Twitter, Facebook, blogs and LinkedIn (and whatever comes next) provide opportunities for creating new networks of interested and interesting people to whom you would otherwise never have access.<sup>6</sup>

There is no shortage of 'how-to' guides on the Web,<sup>7</sup> but for the uninitiated, a brief primer on some virtually free community builders follows.

### Facebook

Facebook is used for keeping in touch, and is not limited to finding old school friends and posting holiday photos. It can be used for much more, such as creating new spaces for your legal community to meet, whether for students in the same class, practitioners in a specific subject area, or legal centres and those who use them. You can control the scope

of the audience when you set up a Facebook 'group': you might choose to make a group 'private' by invitation only, or completely public, available to anyone else on Facebook. Consider the reasons you are setting up a presence on Facebook and then decide the appropriate privacy settings.<sup>8</sup>

### Twitter

Twitter is a 'micro-blogging' network, collating a vast source of information; it works like a curated noticeboard to the world, where you choose whose notices (tweets) you read, dipping in and out as it suits you. You select who you follow, and if you tweet regularly on your areas of interest, you will gain a cohort of followers. The two groups, your followers and those whom you follow, will often overlap over time. Twitter 'works' best when you start engaging with others, although you do not have to use it that way. You can do nothing more than read the 'newsfeed' or you can 'live tweet' events or promote your interests and those of others as you wish (as long as it is in posts of 140 characters or fewer). If you use Twitter for professional engagement, you can find people practising in your area and easily exchange news and information. The individual or small firm lawyer can develop their own personalised subscription list and thereby gain the advantages that might normally be reserved for those in a larger firm with in-house librarians or 'know-how' groups.

For example, following the 'hashtag' (or search term) #auslaw will give you a collection of law reform developments across Australia. Equally, you can follow terms specific to your area, such as #crime #legaled (legal education) or #ip (intellectual property), etc. You have limited control of the audience on Twitter: anyone can 'follow' your tweets (unless you adopt a 'private' account, or 'block' someone), and the tweets are searchable by search engines such as Google. The advantage of this openness is that you can find a very diverse range of people to follow, and they can find you. The caveat is that you need to be just as careful in what you say and how you say it in your tweets as you are with your emails or other communications.

### Blogging

Blogging is a self-publishing medium on the internet. A blog allows you to present your unfiltered, timely responses to legal events without the prior approval of a publisher or editor. It can take on a very personal voice, or present your own collection or collation of work on an area of law reform, legal developments or an area of legal doctrine.<sup>9</sup> It will allow you to respond quickly to changing events such as a landmark judgment or rushed amendment to the law. There is no filter between you and the audience so, as in all your professional communications, you need take precautions regarding the tone and content of your posts. You may not be an expert in a topic, but you may have a well-founded legal opinion on a wide range of matters. Just take care to be accurate and stick to what you know in terms of legal knowledge (as opposed to inside knowledge of the facts). As noted below, be vigilant about your duties of confidentiality and to the court.<sup>10</sup>

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## LinkedIn

For pure 'networking' in the professional sphere, many recommend LinkedIn, which brands itself as enabling one to: '[m]anage your professional identity. Build and engage with your professional network. Access knowledge, insights and opportunities.' Once you upload your professional profile, you can link your other platforms in, and update your CV as you wish. Some use LinkedIn as a 'professional facebook', communicating business and work opportunities; others use the groups function to participate in professional discussions and interest groups.

It is possible to use each of these platforms to support each other, so as to develop a reliable and engaged audience, no matter what their social media platform preferences may be.

## PROFESSIONAL CONDUCT

As Professor Mark Pearson recently warned; "[w]e are all international publishers now – every time we blog, tweet or comment on a website – and are subject to the laws of several hundred legal jurisdictions worldwide".<sup>11</sup>

Are the risks of 'social' networking for lawyers, law students, and those who work within the legal system any greater than the risks in 'old' media, such as print, email, radio or television? As lawyers, we are already conscious of the need to be careful with our statements, public and private. But the social network platforms seem, well, 'social'; thus, the temptation may be to engage in informal or personal discussion. That is usually unproblematic, as long as we recall our duties to the court, the client and the profession and avoid inappropriate discussion of client matters.

## Defamation

It is well recognised that you can be liable for defamatory or certain offensive statements made on social network sites; 'free' speech is not an absolute right. Such statements can be read all over the world, so it can be hard to know where an act of defamation or breach of law took place. The defamation rules of any other jurisdiction could be brought to bear regarding your glib 'off-the-cuff' statement made in St Kilda, Balmain or North Adelaide.<sup>12</sup> In Australia, it is a breach of law to engage in conduct which gives rise to offence, or which insults people, based on their race, particularly where such comment is 'based on falsehoods accompanied by nasty hyperbole'.<sup>13</sup> Chatting online may feel intimate, but it is best understood as being entirely public.

## Confidentiality and contempt

The scope for wide dissemination of online comments makes it particularly important to be alert to issues of confidentiality. It may seem trite to say so – but the relevant 'real life' rules of professional conduct apply to the 'virtual' world of social media.<sup>14</sup> The Legal Services Commissioner (NSW),<sup>15</sup> the Victorian Bar's Ethics Committee<sup>16</sup> and the President of the Law Institute of Victoria<sup>17</sup> have all recently drawn this to the attention of lawyers. The occasions when breaching client confidentiality is permissible are

very limited and unless authorised by the client, they primarily involve situations where disclosure, to appropriate authorities, may be compelled by law.

The Victorian Bar Ethics Committee reminded its barristers that they risk breaching the rules in relation to the disclosure of confidential information but, also, should take care not to express opinions that diminish public confidence in the legal profession or in the administration of justice.<sup>18</sup> The example provided was in the context of posting 'a flippant or sarcastic comment on Facebook or Twitter about a fellow member of the Bar, the judiciary, one's client or a matter in which counsel is briefed'.<sup>19</sup>

Being topical is important, but beware the danger of veering into contempt of court, particularly where expressing an opinion on the merits of a potential or current court proceeding.<sup>20</sup> Tweeting from court, or about court, could cause problems. In England, the Lord Judge has issued formal guidance on tweeting from court, allowing journalists to tweet without express permission of the court,<sup>21</sup> although no such guidelines have emerged yet in Australia.<sup>22</sup> Lawyers need to be careful of leaving themselves open to allegations of bias; some years ago, a NSW prosecutor was removed from a case on account of statements made at a lecture to students that were reported in the press.<sup>23</sup> Today, those same statements could be 'live tweeted' and widely distributed. More recently, a US prosecutor was stood down for making insulting comments on a news site, under a pseudonym, on ongoing matters, people and even federal judges.<sup>24</sup> This is a timely reminder that attempting to shield one's opinions behind a pseudonym, or false or even ironic account, is likely to be futile.<sup>25</sup>

Don't let the temptation to appear knowledgeable lead you to inappropriate discussions about topical matters. Two recent cases, involving breaches of confidentiality in traditional media in situations where the lawyers disregarded the duty of confidentiality owed to a client, illustrate the dangers of losing sight of professional behaviour while courting the media.<sup>26</sup>

Legal ethicist, Neil Watt, made the poignant comment that "[a]s a regular on Twitter and various blogs, I'm always conscious of how my comments can be taken, misread, interpreted in ways I didn't intend (or ways I did intend with consequences I hadn't considered!) or otherwise impact on those I work with".<sup>27</sup>

## Advice and marketing

Legal bloggers, in particular, need to be careful about providing information that could be construed as legal advice. Many people search the internet for 'answers' to their legal problems, and may land on your blog. Make it clear to the reader that your ramblings on the rules of affray are not advice, and cannot be relied upon for that purpose.

In the US, the Institute of Legal Reform recently noted: '...[f]or the litigation industry, the Internet, complemented by social media, represents a potent marketing tool – serving up opportunities to monitor and recruit plaintiffs on the very social media platforms where people share the most personal and intimate details of their lives'.<sup>28</sup>

They also, however, warned that 'failure to clearly disclose management of sponsored social media profiles and websites deserves a closer look'.<sup>29</sup>

Beware of using social media to orchestrate a campaign that appears to be grass roots, but is actually a co-ordinated PR or branding campaign. This could be considered 'astroturfing' and might risk not only liability for misleading consumers,<sup>30</sup> but could also be counterproductive if the public discovers that it has been manipulated.

Similarly, using a blog to 'flog' your corporate wares may be considered distasteful, and be seen a 'cheap and nasty' form of legal marketing. Canadian lawyer and blogger, Antonin Pribetic, has written on the perils of 'flawing' your blog; that is, setting up a legal themed blog 'without any substantive legal content, that is created, monetised and promoted exclusively for profit'.<sup>31</sup> If you use social media as a form of marketing, you could be held liable for contempt as well as for any misleading statements posted by third parties.<sup>32</sup>

If you are looking at social network platforms simply as a way to 'reach more clients' or advertise your wares, you may be on the track to 'blatantly discreditable marketing tactics and unethical practices'.<sup>33</sup> Clients may come as a by-product of an expanding professional network, but this article is more focused on the professional development aspects of these platforms.

### MANAGING THE RISKS

One of the easiest ways to manage these risks is not to get involved at all, but this strategy presents its own risk, given that so much of our professional and private life has moved online. When clients, experts, news and legal developments are all operating in a virtual environment, can we afford to pretend it is not important or relevant?

As one lawyer recently said:

'...if your business uses social media platforms that allow you to monitor and delete content posted to those platforms by your customers (or by members of the public), those platforms need to be carefully monitored by people with the necessary skills to understand the kinds of statements that are likely to get you into trouble with regulators, competitors or customers'.<sup>34</sup>

If you or your firm sets up a blog, you (or someone else) must have the capacity to monitor the online postings of others, and it is incumbent upon you (or them) to deal proactively with the material that is posted there. There is no obligation to allow unregulated comments on a blog, and the commonly used platforms such as WordPress or Blogger allow you to mediate the commentary. But in order to manage that commentary, there must be some guidelines or boundaries as to what is reasonable, and what is not permitted. Thus, it is necessary to consider a 'social media policy' at the same time as you consider your presence on a blog, or any of the social media platforms.

We recommend that you investigate your workplace social media policy, and if there is none, it is time to get one! While we might flippantly say there is only one rule on social media, 'act professionally', there is some

scope for defining in more detail what is reasonable and appropriate for your workplace.<sup>35</sup> Some examples are those policies of the Victorian Department of Justice,<sup>36</sup> or Monash University.<sup>37</sup>

### CONCLUSION

Communicating information is an important part of legal practice; but having a presence on social media platforms is not a replacement for the legal and advocacy work lawyers usually do. These platforms can be used to supplement conventional practice to generate collaborative communications without the limitations of physical meetings or traditional print media, allowing the first-year student to engage with the appellate judge, and the law lecturer to reach the law firm. They can provide additional forums for professional development and greatly expand your legal networks and resources.

To get you started, see the collections of Australian legal tweeters and bloggers maintained at <http://AmicaeCuriae.com>. ■

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