

Law Firm Online Activity Policy

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Unofficial Online Presence of Law Firms

Today almost every law firm has an online internet presence. Often the presence is official and comprised of websites and online directory listings prepared and vetted by the lawyers or nonlawyers responsible for the firm's marketing and risk management.

Although they may not realize it, almost all law firms also have an unofficial internet presence. Lawyers and staff create social network profiles and other web pages that reference the law firm, contain firm-related pictures or content, and perhaps even discuss the firm's activities and clients. Or they post comments that link to the firm or a firm email address on third-party sites, or feed third-party sites (such as AboveTheLaw.com) with firm information and images.

The creators of a firm's unofficial online presence are often junior lawyers and nonlawyer staff such as secretaries, receptionists, or accounting personnel. They may receive little attention from the firm's marketing and risk management staff. Nevertheless, their online activities can become major sources of promotion or problems for the firm.

Whether on law-related sites such as Legal OnRamp or Martindale-Hubbell Connected, or (as is more common) on general social networking and miniblogging sites such as Facebook, LinkedIn, MySpace, or Twitter, or as posts on news or other sites, unofficial web posts and pages help create and may dominate the online profile for a firm. They may also create risks for the firm, its reputation, and its clients.

If you have not evaluated your firm's web presence recently, try running the firm name through a powerful search engine like Google as well as through the most common social network sites, such as Facebook, LinkedIn, MySpace, and Twitter. You may be surprised how many law firm lawyers and staff are already on these sites. You may also be surprised—or disappointed—to learn that a person visiting these very popular sites (Facebook has more than 150 million users) will receive a very different impression of your firm than you might intend. This includes:

- Top-ranked search results are for former employees, including those who left in uncomfortable circumstances and likely have an ax to grind;
- Photos of lawyers or staff in embarrassing situations, or pictures of animals, cartoon characters, crying children, or favorite celebrities in lieu of lawyer or staff portraits;
- Information about sometimes embarrassing hobbies or interests, including odd collections or political or musical interests; and
- Discussions of daily activities, including overt or thinly veiled references to clients and client matters.

In addition, lawyers and staff may have posted pictures of firm events or contact lists that include client contacts. They may also be answering law-related questions, making representations about their expertise, or exchanging testimonials, without regard for the ethical rules that govern such activities.

For those charged with law firm risk management, such independent, unregulated activities create obvious potential headaches, particularly on a permanent, public forum like the internet.

Recognizing the risks of such online activities, some firms naturally attempt to ban all unauthorized internet postings about the firm. These efforts generally fail. Firms that have tried to ban their lawyers and staff from participating in social networks or posting on blogs or other websites, or limit participation to only certain (usually law-related) networks, normally find that lawyers and staff ignore such restrictions. For example, a firm that orders lawyers to use only Legal OnRamp will often experience noncompliance when a lawyer's college or law school friends, hobby community, or family all congregate on another, non-law-related site such as Facebook or MySpace.

A firm would likely be better served by educating its lawyers and staff about its limitations on and the risks of online activity, and trying to ensure that the firm's interests are protected when the online activities refer to or involve the firm or its clients. The first step for protecting the firm's interests is generally to adopt and seek compliance with a firm social networking policy. This policy then serves as the cornerstone for an online-activity education and compliance program.

The remainder of this article suggests elements for a possible law firm online activity policy, and discusses various approaches for such provisions. Potential language is in blue italics, with comments in regular text after each section.

Sample Online Activity Policy.

Introduction. Firm encourages development of business and personal relationships, including through social networks and other online activities.

While this commitment to online activities is important, we also have substantial legal and ethical responsibilities that must be observed when posting online. These responsibilities include obligations to protect the privacy, confidentiality, and legal interests of Firm and its clients. Online activities also create risks for Firm, including inadvertent client relationships or the practice of law where Firm's lawyers are not licensed.

Therefore, Firm has adopted this Online Activity Policy. This Policy applies to any Firm-related online activity.

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Even when engaging in activities not related to the Firm or clients, you are encouraged to recognize that these guidelines may suggest best practices and, when possible, to observe these guidelines even in purely personal activities.

These opening paragraphs attempt to balance a law firm's desire to encourage lawyers and staff to engage in online activity, and recognition that they will engage in such activity, with the need to caution them about the risks of irresponsible online activities. The major concerns of online activity—potential risks to confidentiality and the firm's and clients' legal interests, as well as risk associated with inadvertent client relationships and corresponding risk of inadvertent practice—are directly referenced so a reader will immediately know the firm's major concerns.

These opening paragraphs and the rest of the Policy are written to include all lawyers and staff at the firm without distinction as to role or job status. If a firm wants to rework the policy, it should think carefully before deciding to have a policy that does not regulate the activities of all lawyers and staff. The internet permits any person at the firm to publish to a global audience. Frequently issues for firms arise from unexpected sources. Those who feel disenfranchised—even the most junior lawyers or seemingly least empowered staff—are potential sources for the most damaging communications about a firm.

Risk of Online Activity.

Both you and Firm itself owe very significant legal and ethical obligations to Firm's clients. These obligations include duties to keep clients' confidences and to pursue the client's interests first and foremost, even before our own interests. Also, you have obligations not to endanger unnecessarily Firm's as well as its clients' interests.

In light of these obligations, Firm asks you to be mindful that any online post should be presumed public and permanent. Presume that your client, any relevant court, opposing counsel, disciplinary counsel, and anyone hoping to sue Firm may have access to and use of your online statements. If you place it on the internet, it can be copied, forwarded, or subpoenaed. You will likely have no control over a post's ultimate use or dissemination.

This section reminds everyone at the law firm of their basic fiduciary obligations to clients and to the firm. It also seeks to remind everyone of the risks of online activity. The greatest risks from online postings do not come from a violation of some ethical rule; instead, they tend to arise from an ill-considered post that offends a client, opponent, or judge, or that is circulated to a global audience to the firm's embarrassment and injury.

Scope.

This policy governs all Firm-related online and internet activities. Online activity is Firm-related if a post (1)

contains the Firm's name, address, contact information, or Firm's email suffix or link to Firm's website, or images of persons working at Firm or at Firm functions or (2) is created or maintained at Firm or using Firm computers or other equipment.

Many who use the internet for communications focus on the freedom these communications provide, and the freedom they intend for their own online communications. Therefore, many people at a law firm who want to be active online will chafe against any policy that regulates online activity. Law firms, in contrast, will often recognize that vigorous regulation of online activities by the persons at the firm will often provide the best protection for the firm and its clients.

Recognizing this cultural conflict, this sample policy attempts to balance the desired laissez faire of the online community and the restrictiveness that law firms tend to favor. It does so by regulating only firm-related posts, but defining such posts broadly. By design, this policy should not reach purely personal posts by persons who work for the firm.

Of course, even purely personal activities may reflect negatively on or jeopardize the firm and its reputation. Mitigating such risks will likely be best accomplished, however, through education and encouraging (not forcing) those persons who are active online to act responsibly. Such an approach will likely be more effective than prohibiting posts created on personal computers that do not reference the firm. Trying to regulate these more personal activities would likely cause persons at the firm to ignore those restrictions, and possible other, more important aspects of the online activity policy.

Questions about Policy.

If you have any questions about this Policy or its application, or believe application of the policy to certain circumstances is not appropriate, please contact [designated person] to discuss such issues.

This paragraph suggests potential flexibility in application of the Policy, and also designates the person whom lawyers and staff should contact to discuss the Policy. This offer should alleviate some of the frustration online users will experience in being subjected to the Policy. For this provision to work best, the person designated should generally be seen as reasonable, be available and approachable, and have some comfort with online activities, including social networks.

Responsibility for Online Activities.

The Firm considers you personally responsible for any online activity that is linked to or may be traced back to Firm. This includes any use of Firm's name, internet domain, or property including computers. When you use (a) Firm's name, domain name, email address, or other

contact information, or (b) images of Firm property or personnel, or (c) Firm's computers and other resources, this may imply that you are acting on Firm's behalf.

This paragraph is intended to warn those active online that, if their activities can be traced back to the firm, the firm expects to hold them responsible for such activities. This paragraph should authorize the firm to discipline firm lawyers and staff for conduct that the lawyer or staff may consider not work related, for example using the firm computers outside the office for improper online activities.

Note, however, that this paragraph likely does not reach to improper downloads of illegal materials and the like. Most law firms already regulate such activity in their computer usage policies. This sample policy is designed so as not to duplicate such efforts, but a firm could, if it chose, include such restrictions here.

Respect Clients and Colleagues.

You should respect the privacy, opinions, and interests of clients, colleagues and others online. Also, you should respect everyone else online. While a rude response may appear witty at the moment, it may be damaging to Firm and to you in the long run. Thus, we advise to avoid such circumstances. If you realize that you have made a mistake in an online post, apologize and/or correct the mistake.

Do not post anything embarrassing to Firm, colleagues, or clients, or others associated with Firm. Obtain permission before posting information from or about others at or associated with Firm.

Rude behavior is quite common online, perhaps because, feeling protected by the anonymity of the internet, people will post what they would never say. The notion that “flaming” or attacking someone online is also witty and entertaining, and thus encouraged or admired rather than discouraged, may also be a factor. This paragraph addresses such issues by requesting respect for all firm-related persons.

Often the damage online activities cause to a firm arises from legal and ethical but disrespectful activities: the sharing of embarrassing pictures, stories, or communications. Also, often those active online draw considerable negative attention (and possibly online reprisals). Thus, this section requests that those active online show respect to all others. Coupled with the *Right to Discipline* section below, this also provides clear authority to discipline lawyers or staff for disrespectful online behavior.

The request for permission contained in this section should also help to reduce the use of disrespectful communications: people will not want to ask permission, so they may temper their communications. It will also involve multiple persons, including the affected persons, into the decision of whether a communication will be posted. This

should limit the problems likely to arise from such posts.

Some firms will find the permission requirement alone will likely not suffice. For example, a particular group of lawyers or staff may agree on the posting of embarrassing pictures from a firm outing that the firm and its management agree should not be shared. To mitigate such concerns, the firm may want to designate a particular individual—often a marketing or risk management or similar lawyer or staff—who should be consulted before firm-related materials are posted.

Protect Client and Firm Confidences.

Lawyers have a broad obligation to protect client and Firm confidences. This includes a duty to protect client information even when that information is otherwise publicly available. Under no circumstances should you use or disclose, directly or indirectly, client-related information—including that Firm represents a client, as well as filed pleadings—or Firm confidences online without the express permission of affected clients and Firm.

Often people who post online about client matters justify their actions by explaining that all information posted is publicly available. This defense often does little to temper a client’s anger over an unauthorized and undesired disclosure. Moreover, it ignores that the ethical rules (in particular ABA Model Rule 1.6(a) as adopted in most jurisdictions) and fiduciary obligations may prevent a lawyer from using or disclosing information about the representation of a client, even when that information is already available.

This section also attempts to restrict disclosure of firm information. Lawyers and staff often forward such information to news and other sites. Certainly neither this provision nor this Policy will prevent all such disclosures. This Policy should, however, remind people that they should not share such information, and provide a clear method for discipline should someone violate the firm’s expectations for confidentiality.

Protect Contact Information.

Contact information of Firm's clients and business associates is important, often confidential, information. Under no circumstances should you post or share such information online. This includes that you should not upload your Firm contact list to a social network site, because this may expose your contacts to outside review.

One area of firm information particularly vulnerable to mishandling is client information. Often lawyers and staff will not fully appreciate how social network sites operate. They may perceive the ability to upload their contact lists as a convenience, without understanding that such uploading may expose the information to all their other networked friends or connections. This section attempts to discourage such behavior. If the lawyers and staff at a firm are internet savvy, this section may be omitted.

Think Before Connecting.

Often you will receive requests to befriend, connect, or link to other social network users. When considering including clients, referral sources, and others you deal with professionally in your network, please be aware that you may be opening that information up to others accepted in your network.

Like the prior section, this section warns of the dangers that may arise when lawyers or staff agree to link to or befriend other social network users. When a social network user connects to other online persons, often the connection gains access to more of the user's profile, page, contacts, and the like. Often people do not consider the risks of such a connection when agreeing to connect.

Again, if the lawyers and staff at a firm are internet savvy, this section may be omitted.

Beware Giving General Legal Advice.

Firm discourages providing legal advice to someone not otherwise a client based solely upon an online post. In particular, Firm is concerned about the risks of giving legal advice without knowing all the relevant facts and engaging in unauthorized practice if the person giving advice is not licensed where the person receiving the advice or the matter is located.

If you believe it is appropriate to provide general guidance, you should state you are not intending to provide legal advice, and that the person should seek counsel from his or her own lawyer. A suggested disclaimer may read: "I don't know all the relevant facts, so I cannot give you legal advice. You should consult your own lawyer. However, from what you have written, it sounds like" Also, if you are not licensed in the applicable jurisdiction, you should warn of this fact in your communication. Finally, if you want them to consider retaining you, you may make this clear in the post: "If you think you need a lawyer on such matters, please feel free to contact me offline at [contact information]."

Then, if the person does follow up with you to receive specific legal advice, open a file through Firm's ordinary client intake process. This will ensure that Firm does not have a conflict, and that other proper procedures for opening and handling the file are observed. Also, make sure that a lawyer licensed and knowledgeable of the law in the correct jurisdiction is involved in the representation.

This section attempts to warn about the dangers of providing general legal advice based upon online posts. Two dangers are addressed: risks of unauthorized practice and of providing legal advice based upon an online post that may omit material information. Note that the section is written to warn against improper action by nonlawyers as well as lawyers. Often unauthorized practice and incompetent practice

concerns become most serious when experienced law firm staff—often a secretary or paralegal—decides to directly address an issue, relying on years of work at a law firm that may or may not be relevant.

Often lawyers answer such questions because they hope to originate a new matter. This section attempts to address such concerns by emphasizing a disclaimer that can be used to mitigate such risks at the outset, and then encourages the lawyer to invite an offline communication later to formalize the client-lawyer relationship.

Run a Conflict Check Before Discussing Real Matters.

Before discussing any specific legal matter online, you should determine whether Firm has any involvement in that matter. Therefore, before (a) answering a law-related question or (b) writing about a law-related news story, decided case, or other matter, please request a conflict check from New Files. This includes running a conflict check before posting comments on stories or posts others have authored. If Firm does have some involvement, please consult the lawyer responsible for the matter or [designated person] before proceeding with your post or online activity.

Lawyers in particular have begun blogging or posting online regarding real, pending cases. These posts tend to allow the lawyers to establish themselves as subject-matter experts on the related matters, a nice way to develop business. Unfortunately, sometimes the lawyers create such publications without realizing their firm is involved in the underlying matter, or represents an involved party on other matters. The post may interfere with such representations or client relationships.

The easiest way to avoid such problems is to request that those persons considering posting online also conduct a conflict check on the matter before posting. This policy is used where I blog, www.TheEthicalQuandary.com. It imposes only a minor burden, and has allowed us to avoid some embarrassing situations where we criticized the work of our firm or the success of our clients.

Honest Communications.

You should avoid dishonest behavior and misrepresentations online. This includes engaging in online activity, such as communicating electronically or creating web-sites, while employing a misleading alias or suggesting that you are someone else.

In addition to rude behavior, the anonymity of the internet appears to encourage people to engage in dishonest online behavior. Often this includes creating false profiles to tease the profiled person, or using other ruses (such as posing as a friend or acquaintance) to gain access to online information.

Such conduct may violate applicable law. Even when it does not, it creates potential ethical and other problems. This provision therefore seeks to prohibit all such behavior.

This model policy is not intended to take a position regarding the use of avatars (a graphical representation of a user, often one that does not resemble the real user) or the like on sites such as Second Life. Some internet sites require the use of an avatar, and do not allow the user to choose an avatar that looks like the user. Certainly in these sites the use of an avatar alone should not constitute dishonest conduct. A firm may want to specify or at least educate its lawyers and staff that, while avatar use alone is likely permitted, the firm would deem using an avatar to mislead people as a potential act of misrepresentation. For example, if a nonlawyer created a lawyer avatar, or a person created an avatar of a different gender, and then tried to use those differences to deceive another, this may constitute action that the firm would deem a violation of this policy.

Advertising Rules Apply Online.

The Rules of Professional Conduct that govern lawyer advertising and solicitation generally apply to online activity. Therefore, you should avoid any false or misleading statements while posting online. In addition, you should ensure that any online website or post you create bears all required notices and disclaimers. In particular, our jurisdiction prohibits a lawyer from [add appropriate language, such as “using client recommendations and testimonials”]. Also, our jurisdiction requires special disclaimers when [add appropriate language, such as “claiming a specialty or discussing past results”].

Often lawyers and staff do not consider that lawyer advertising rules generally apply online. This section is designed to caution lawyers and staff they need to comply with such rules when engaging in online activities. When active in a jurisdiction that imposes additional requirements, a firm may want to add express reference to these requirements in this section of its online policy.

Preserve Online Communications.

The Rules of Professional Conduct, as well as malpractice and other concerns, generally [require/support] that a lawyer should maintain a copy of all communications about the lawyer or the lawyer’s services for a period of [two] years [confirm with your state’s version of ABA Model Rules 7.2 and 7.3 as appropriate]. Please make sure that you arrange to access any Firm-related communication you post online for a period of at least [two] years.

Many jurisdictions’ ethical rules impose a requirement for how long any lawyer advertisement or solicitation must be kept. This section is drafted to incorporate such requirements, or so that the firm may advise its lawyers and staff of the period they should keep such communications. A firm could also require that lawyers and staff submit or file all online communications in a particular folder (perhaps on a computer server drive) or with particular persons. These

safeguards should provide an additional limit on firm-related posts, and also ensure that the firm has the ability to monitor online communications and copies of any communication it may need to address a subsequent concern.

Link to Firm Profile.

To help monitor its online profile, Firm operates a “Law Firm” profile on the following social networks: LinkedIn, Legal OnRamp, Martindale-Hubbell Connected, and Twitter [add additional sites as appropriate]. If you are creating a profile on these networks, please connect to or befriend the user “Law Firm,” and ensure that you allow “Law Firm” to observe information on your site that is viewable by other network participants.

Social networks generally alert connections or friends of changes or posts to profiles. This provision seeks to take advantage of this function by having all lawyers and staff who are active on a social network site link to a firm profile. The firm’s risk management and marketing staff should then be more capable of monitoring online activities by simply tracking changes through this profile.

Of course, the firm should take care not to link this profile to persons outside the firm, and to sever relationships with anyone who departs the firm.

Obedience to Applicable Rules.

You should obey the law and the rules of the website or social network site in which you participate. Further, even if not explicitly directed by this Policy, you should obey other applicable legal and ethical rules. This includes that you should not send mass emails to persons whom you do not know to advertise legal services or solicit potential clients.

This section intends to remind that a person acting online must still follow all applicable rules, including those imposed by a website or by other state or federal law, including applicable ethics opinions. In addition, because of federal and ethical restrictions in some jurisdictions on unsolicited emails, this policy generally directs that lawyers and staff should not send unsolicited emails to advertise legal services or solicit clients.

Right to Discipline.

Firm reserves the right to take disciplinary action against, including to terminate employment or association of, any person who engages in any online activity that violates the law—including the Rules of Professional Conduct—otherwise reflects poorly upon or otherwise damages Firm or its clients.

This section provides a clear warning that the firm may discipline or even terminate a person who engages in illegal

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or other improper online behavior. This section is designed to be very broad and inclusive. A firm may prefer to narrow this provision, but should recognize that doing so may prevent it from having express authority to take action when someone engages in legal but ill-advised behavior.

Prohibited Sites.

Because of issues with security policies or similar concerns, Firm prohibits the use of the following social network sites for Firm-related activities without authorization from Firm IT: [identify sites].

This provision allows for a firm to prohibit lawyers and staff from engaging in firm-related activities on particular sites that the firm deems as posing too great a risk to the firm or its clients. Often these sites can be selected by the firm's information technology group, and may include sites that lack adequate privacy and other safeguards or serve as frequent sources for those seeking to distribute viruses or other harmful computer information (including malware).

Alternatively, a firm could choose to designate the social networking or other sites where it will allow its lawyers and staff to create profiles that refer to or link back to the firm's online presence. As previously noted, these policies may be difficult to enforce, but may allow enough freedom to obtain compliance from all but the most determined rule-breakers.

Conclusion

As noted at the outset, law firm lawyers and staff are using online posts and in particular social networks to promote their services, network, and share their lives, activities, and friendships with others. Law firms can and should take steps to mitigate their risks from such online activity. This article and its sample policy provide a starting point that, with education and reinforcement, should help a firm design and implement its own online activity or social networking policy.

Of course, an online activity policy and related education will not address all issues raised in the opening paragraphs of this article. A firm that wants to further protect itself online may, for example, want to couple an online activity policy and related education with other protections. These protections may include restrictions in employment agreements that limit distribution of client and firm information and post-employment use of the law firm's name. The protections may also include a proactive, designed approach to social networks, such as encouraging present firm lawyers to populate and use social network sites, so that they become the first-listed profiles of a firm, instead of having disgruntled former lawyers or employees' profiles appear.

Of course, the lawyers who populate and use the social network may need guidance regarding how they should participate, a function that the proposed policy is designed to facilitate. 