

In-House Counsel: How to Avoid Missteps in the Social Media Minefield

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While social media has become ubiquitous, attorneys are subject to particular restrictions online. During Ward and Smith's 2017 In-House Counsel Seminar two attorneys reviewed some of the potential pitfalls in-house counsel must consider when using social media themselves or reviewing how their organizations use it.

Matt Cordell holds the position of Senior Information Technology Legal Counsel at VF Corp., a Greensboro-based Fortune 500 company that manages some of the world's

best-known apparel and lifestyle brands. Devon Williams is a labor and employment attorney at Ward and Smith.

"Three-quarters of lawyers individually say that they use social media in a professional capacity," Cordell says, citing industry surveys. "The under-40 demographic was far more likely to be using social media."

The pair first went over some ground rules for attorneys using social media. They noted that lawyers in North Carolina and elsewhere have been disciplined for inappropriate social media use, so the consequences of ignoring professional guidelines can be significant.

ABA and North Carolina Rules of Professional Conduct encompass a series of simple, but important, principles that govern online conduct.

1. **Tell the truth.** This seems simple, but attorneys should keep in mind that fudging credentials or experience, or even using terms such as "specialty" or "expert" in a LinkedIn profile can raise issues.
2. **Don't disclose confidential information.** This goes beyond simply not sharing confidential client information on social media. Metadata in documents, for example, or something as simple as a check-in at a client's office may inadvertently disclose confidential information. In some cases, sensitive data should be encrypted to safeguard it.
3. **Communicate with judges — but carefully.** It's not uncommon for attorneys to have professional relationships with judges. But lawyers need to be sensitive to whether they have any matters in front of a particular judge. Rules on this vary from state to state. "Our advice to you is proceed with caution in all of this," Williams says. "Even if you are not actively before a judge."
4. **Communicate with represented parties only when appropriate.** This principle is about more than simply whether you can reach out to someone represented by opposing counsel. In-house counsel may sometimes deal directly with executives from another company in negotiating a contract, rather than working solely through the other firm's counsel. But that's only appropriate when a lawyer can reasonably infer consent from the other company to communicate with a represented party.
5. **Avoid false pretenses.** This goes beyond simply telling the truth. Attorneys should also avoid potentially deceptive tactics, such as pretending to be someone else online to gain access to

information that would otherwise be private.

6. **Be clear about who your client is.** In-house counsel need to be clear about which party they represent, and in what context they give advice to other parties.

Not only must attorneys police their own behavior, but they should also keep an eye on the social media strategies and tactics of their organizations, which may have legal implications.

In-house counsel should watch out these issues on their company's social media:

- **Employee rights.** The National Labor Relations Act limits how employers can regulate the speech of employees—even for non-union workforces. Those limitations apply to employee social media use, and the National Labor Relations Board has given employees wide latitude in this arena.
- **IP issues.** Companies need to be wary of improper or infringing uses of others' names, brands and logos. Other third-party intellectual property may also be subject to copyright, the right of publicity and other legal claims.
- **Advertising guidelines.** Just as with other forms of advertising and promotions, unsubstantiated claims or comparative advertising may raise red flags.
- **Indemnity challenges.** Cordell notes that digital agencies typically tend to place editorial review obligations on their clients and won't indemnify for the content they publish on behalf of a client.
- **Evidence preservation.** Are your corporate social media accounts being managed in a way that allows for evidence to be preserved if required?
- **Industry-specific regulations.** Some industries, such as financial services, have industry-specific guidelines and regulations that must be followed online. Failing to follow those may expose a company to additional liability.

Cordell says that when social media marketers are considering something that may be risky or harmful to the company's reputation, in-house counsel should consider framing their concerns in the language of business: "Will it hurt our brand image? How will this help our sales or profit?"

None of this means that attorneys and companies can't or shouldn't be on social media, though. You can find Matt Cordell on Twitter, and Ward and Smith is there, too!

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