

# LAW STUDENT ESSAY COMPETITION PROFESSIONALISM SUMMIT 2009

The first annual Nevada Professionalism Summit Committee Essay Competition was open to all law students enrolled in and attending the William Boyd School of Law at the University of Nevada, Las Vegas. The topic was “Professionalism in the Practice of Law.” The authors of the top three entries received cash prizes and all three of the winning essays can be read on our website at [www.nvbar.org](http://www.nvbar.org). *Nevada Lawyer* is pleased to present the winning essay, by Kimberly E. Loges.

**Congratulations to all of the winners!**

## DANGER AHEAD: U S

BY KIMBERLY E. LOGES, FIRST-PLACE ESSAY CONTEST WINNER

Social media is taking up a lot of attorneys’ time these days. Whether it’s updating statuses on Facebook, MySpace or Twitter, reading received Tweets, or blogging about the day’s events, chances are attorneys have not spent much time thinking about how dangerous these activities may be for their legal career. For those unfamiliar, social media sites encourage one to reconnect with lost friends, classmates or colleagues, and make it easy to search for them either through e-mail addresses or geographic networks. According to a recent LexisNexis survey: 86 percent of lawyers ages 25 to 35 are members of social networks like Facebook, LinkedIn and MySpace, as opposed to 66 percent of those over 46.<sup>1</sup> In addition to this survey, Stephen Gillers, an expert on legal ethics at New York University Law School, believes that “twenty-somethings have a much reduced sense of personal privacy.”<sup>2</sup> This reduced sense of personal privacy has led to an increase of attorneys acting carelessly, and sometimes



## USE CAUTION WHEN TRAVERSING SOCIAL MEDIA SITES

recklessly, on Facebook, MySpace, Twitter and public blogs. While this behavior reflects poorly on the legal field it may ultimately bring about needed discussions on how attorneys can use social media and still retain their professional integrity. For the time being, the Model Codes of Professional Conduct do not include rules for professionally interacting with social media sites. However, this may change in the future as more and more lawyers find themselves in courtrooms and before disciplinary boards for conduct related to social media sites. This paper presents several examples of how members of the legal field have failed to behave professionally when it comes to social media sites, and offers suggestions on how best to avoid these pitfalls.

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For starters, attorneys should think twice about what kinds of personal information they put on the Internet. Each time an attorney creates a profile on a social media site, he is essentially advertising himself. However, unlike advertisements that have fine print, a profile does not include a disclaimer cautioning its readers about potential sarcasm, inappropriate comments or even adult content. Although it is true that social media sites can provide an attorney subtle and informal data about clients, witnesses, adversaries and jurors which might not be found elsewhere, people can also seek out similar information on members of the legal community. Moreover, law firms, and even one state bar association, have turned toward reviewing social media sites as a means of looking at an attorney's character.<sup>3</sup> Despite the fact that most social media sites allow users to keep their profiles private, that privacy is deceiving as passwords can easily be shared or hacked. Furthermore, regardless of whether an attorney's profile is private or public, potential clients are still able to

make decisions about who to hire based on an attorney's contact list, friends or followers and those persons' political affiliations, religious convictions and/or personal interests. With many clients already suspicious of the legal system before they hire an attorney it is important to consider what effect social media sites may have when attempting to earn a client's trust. Therefore, it would be wise for an attorney to not only limit his personal information, but also look into the privacy measures the site offers. A measure as simple as blocking comments from others, or screening who can see photo albums or status updates could save a lot of embarrassment for an attorney later on.

Additionally, attorneys must also be careful with whom they become "friends" with, as it is not always clear how well people know each other on these sites. Thus, becoming "friends" with a judge's sister, who is a member of one's church, may still lead the judge to err on the side of caution when it comes to questions of disqualification and/or recusal.

In addition, as there are no distinctions between types of friends on these sites it may be difficult to explain to a court that Bob is not really a close friend in the traditional manner, but instead someone you haven't seen since elementary school. Moreover, an attorney should be careful to not communicate with an adverse party's client without the consent of the opposing counsel. The question becomes does a "friend request" or "friendship" via Facebook or MySpace constitute "communication" under the Model Rules of Professional Conduct? While one court held that a "friend request" constituted a violation of "contact" for a temporary restraining order, another court assigned no significance to the Facebook "friends" reference.<sup>4</sup> In *People v. Fernino*, the defendant used MySpace to send a "friend request" which the state argued was a violation of a temporary restraining order.<sup>5</sup> The *Fernino* court stated that:

While it is true that the person who received the "friend request" could simply deny the request to become "friends," that request was still a contact, and "no contact" was allowed by the order of protection. It is no different than if the defendant arranged for any agent to make known to a claimant, "Your former friend wants to communicate with you. Are you interested?"<sup>6</sup>

Although one may argue that there is a difference between contact for a temporary restraining order and

communicating with an adverse party's client, it is unclear how a court may ultimately rule. On the other hand, in *Quigley Corp. v. Karkus*, Quigley presented evidence that defendants Ligums and DeShavo were Facebook friends as proof that the shareholders had extensive personal and professional connections, and thus were in agreement to act in concert to solicit proxies and vote shares for control of the company.<sup>7</sup> While the *Quigley* court stated that friendships on Facebook hold little weight and may be as fleeting as the click of a delete button, other courts may view these relationships differently in the future.<sup>8</sup>

Deciding whether to become friends on Facebook or MySpace with clients should be another concern for attorneys. Becoming friends on a social media site with a client potentially means that the client can read other friends' comments, see online photo albums, read status updates about things occurring in his attorney's personal life, and see who else his attorney knows. Conversely, a client may prefer that you keep his identity confidential and not have any contact through social media sites. The thing to keep in mind is that while having a casual conversation with clients in person one can at least control how much and what kinds of personal information are discussed and keep any other boundaries in place. With Facebook or MySpace it may only take one inappropriate remark to destroy a client relationship.

Those in the legal field should also think twice when it comes to being friends on Facebook or MySpace with opposing counsel or other legal professionals. For example, one lawyer requested and received a continuance due to a death in her family.<sup>9</sup> The judge, Susan Criss, later checked the lawyer's Facebook page and found stories of drinking and partying, not activities one normally does while grieving.<sup>10</sup> Criss stated, "All week long, as the week is going by, I can see that this lawyer is posting about partying. One night drinking wine, another night drinking mojitos, another day motorbiking."<sup>11</sup> When the

lawyer requested a second continuance Judge Criss declined and disclosed her online findings to a senior partner of the lawyer's firm. The lawyer has since removed Judge Criss from her friend list and most likely learned a thing or two about what not to put online.<sup>12</sup> Thus, attorneys should note that other legal professionals may use a profile's information against an attorney later on.

Social media sites can also interfere with the professional responsibilities of the judiciary. A notable example involving judicial ethics involved North Carolina District Court Judge Terry becoming Facebook friends with defense counsel.<sup>13</sup> After the two exchanged several messages on Facebook that involved references to the specifics of a case both were involved in, Judge Terry was publicly reprimanded for having unauthorized, ex parte communications with the lawyer.<sup>14</sup> Another example involves a law student who asked a federal judge to recommend his work on the networking site LinkedIn.<sup>15</sup> The judge responded that he would gladly be

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a reference; however judicial ethics constrain him against providing a recommendation, either in letter or electronic form.<sup>16</sup> In short, judges should be even more cautious than attorneys when using social media sites.

Bad-mouthing others in the legal field through the use of social media sites is another issue that is becoming more prevalent. Former attorney Jay Kuo experienced this firsthand after calling his opposing counsel “chicken” on his private blog.<sup>17</sup> California Superior Court Judge Curtis Karnow heard about Kuo’s blog post, and read it, along with several other postings.<sup>18</sup> While Karnow failed to find the postings prejudicial enough to throw out the case at hand, the judge still came down hard on Kuo, calling his behavior “juvenile, obnoxious and unprofessional.”<sup>19</sup> Moreover, Judge Karnow concluded that Kuo was not trying to interfere with the defendant’s relationship with his attorney; only that Kuo “sought to celebrate himself, tout his prowess and to preen his own feathers, as it were, unconscious of other effect.”<sup>20</sup> Karnow also felt that Kuo’s actions were probably reckless because he should have known that his private blog could be uncontrollably distributed.<sup>21</sup> Other examples of bad-mouthing judges include those of Sean Conway and

Kristine Ann Peshek. Conway called a judge an “evil, unfair witch” in a blog post, for which he received a reprimand, and Peshek referred to one jurist as “clueless” and another as an “---hole.”<sup>22</sup>

Along with refraining from bad-mouthing legal professionals, attorneys should use caution with regard to the overall content of their blog posts. In addition to bad-mouthing judges, Peshek is currently facing a disciplinary hearing for identifying clients on her public blog by either their first names, a derivative of their first names, or by their jail identification numbers.<sup>23</sup> Moreover, Peshek also included confidential details of cases, including statements such as, “This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because ‘he’s no snitch.’ I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.”<sup>24</sup> As a consequence of her unprofessional behavior, Peshek lost her job as an assistant public defender after 19 years.<sup>25</sup>

Attorneys who blog may even find themselves before the court for defamation. Attorney Eric Albritton sued blogger/attorney Richard Frenkel for defamation based on anonymous blog postings Frenkel posted to his blog “Patent Troll Tracker.”<sup>26</sup> The complaint claimed that Frenkel defamed Albritton by accusing him of conspiring with a federal judicial clerk to alter documents to obtain subject matter jurisdiction in a patent suit.<sup>27</sup> The defamation suit settled after the federal judge ruled that Albritton could not win punitive damages unless he proved actual malice.<sup>28</sup> Thus, even somewhat anonymous blog postings can cause problems for an attorney’s career.

In conclusion, if legal professionals do find themselves using social media sites, they should think twice about what information they provide and with whom they connect. Whether it is using the privacy controls or creating two profiles, one personal and another for professional purposes, or completely staying clear of the sites, legal professionals need to exercise caution so as to avoid conflict later on. For those in the legal field who will continue to use social media sites remember what your mother told you, “if you don’t have anything nice to say, don’t say anything at all.” **NL**

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1 John Schwartz, A Legal Battle: Online Attitude vs. Rules of the Bar, N.Y. Times, Sept. 13, 2009, at A1.  
 2 Id.  
 3 See Jan Pudlow, Examiners’ Facebook Policy Sets Cyberworld All Atwitter, The Florida Bar News, Sept. 15, 2009, [www.floridabar.org/85256AA9005B9F25.nsf/0/83F1CF3224405117852576250069E228?OpenDocument](http://www.floridabar.org/85256AA9005B9F25.nsf/0/83F1CF3224405117852576250069E228?OpenDocument).  
 4 *People v. Fernino*, 851 N.Y.S.D.2d 339 (N.Y. Crim. Ct. 2008); *Quigley Corp. v. Karkus*, No. 09-1725, 2009 WL 1383280 at \*5 (E.D. Pa. May 15, 2009).  
 5 *People v. Fernino*, 851 N.Y.S.D.2d 339, 341 (N.Y. Crim. Ct. 2008).  
 6 Id.  
 7 *Quigley Corp. v. Karkus*, No. 09-1725, 2009 WL 1383280 at \*5 (E.D. Pa. May 15, 2009).  
 8 Id.  
 9 Schwartz, supra note 1, at A1.  
 10 Id.  
 11 Id.  
 12 Id.  
 13 *In re B. Carlton Terry, Jr.*, No. 08-234, (N.C. Judicial Standards Comm’n April 1, 2009).  
 14 Id.

15 E.g. How Lawyers Avoid The Social Media Fail Whale, [socialmedialawstudent.com/social-media/how-lawyers-avoid-the-social-media-fail-whale/](http://socialmedialawstudent.com/social-media/how-lawyers-avoid-the-social-media-fail-whale/).  
 16 Id.  
 17 E.g. Pam Smith, Judge Reprimands Temp Prosecutor for Personal Blog, Law.com, April 28, 2006, [www.law.com/jsp/article.jsp?id=1146139204085](http://www.law.com/jsp/article.jsp?id=1146139204085).  
 18 Id.  
 19 Id.  
 20 Id.  
 21 Id.  
 22 E.g. Debra Cassens Weiss, Too Much Information: Blogging Lawyers Face Ethical and Legal Problems, ABAJournal.com, Sept. 14, 2009, [www.abajournal.com/news/too\\_much\\_information\\_blogging\\_lawyers\\_face\\_ethical\\_and\\_legal\\_problems/](http://www.abajournal.com/news/too_much_information_blogging_lawyers_face_ethical_and_legal_problems/).  
 23 *In re Kristine Ann Peshek*, No. 6201779, (Hearing Bd. of the Ill. Att’y Registration and Disciplinary Comm’n filed Aug. 25, 2009).  
 24 Id.  
 25 Schwartz, supra note 1, at A1.  
 26 Weiss, supra note 22, at 1.  
 27 Id.  
 28 Id.