

# TWO OPINIONS:

## SOCIAL MEDIA'S IMPACT ON LAW FIRMS

Two seasoned lawyers provide their opinions on the impact of social media on law firms.



John Browning is a Partner at Lewis Brisbois Bisgaard & Smith in Dallas, Texas and a trial lawyer with more than of 23 years of experience. He is the author of numerous articles and the leading book on social media's impact on the law. Mr. Browning received his Doctor of Jurisprudence from the University of Texas School of Law and his Bachelor's degree from Rutgers University (Rutgers College), in History, and in Comparative Literature 1986 graduating with general honors and departmental honors in both majors.

### Q: What is the most significant change from social media that you've seen impact the practice of law?

A: There are so many changes that have resulted from social media's impact, from countries adopting social networking platforms as a means of alternative service to jurisdictional considerations often involving a party's social media presence or activities. However, I would have to say that the most significant change comes from the vast digital treasure trove of information that lawyers are now finding and using thanks to social media. Whether in formal discovery or informal case investigation, lawyers are turning to resources like Facebook and Twitter more routinely.

### Q: What do you see as the most difficult terrain for lawyers to navigate within the world of social media?

A: I believe the most difficult terrain for lawyers to navigate in the social media realm has been in the area of legal ethics. Lawyers are continually engaging in missteps with the use of social media – failing to maintain confidentiality, improperly “friending” parties or witnesses, and even failing to properly advise clients on pertinent evidence. Lawyers need to remember that the existing rules of ethics apply to social media just as they do to more traditional forms of communication.

### Q: What do you see as the biggest opportunity for lawyers to use social media to serve their clients better?

A: I think lawyers are missing a huge opportunity to exploit social media resources as a standard part of their work up of a case, and to communicate with their clients from the very beginning an agreement about social media use. Recent ethics opinions have discussed counseling clients about their social media activities at an

early juncture in the attorney-client relationship when the attorney might be able to provide guidance as what to post or not to post, use of privacy settings, etc. Lawyers need to be more open and proactive with their clients and avoid unpleasant surprises down the road.

### Q: Is there any “black ice,” so to speak, on the road of social media – any surprising sources of risk?

A: I would have to say that the area of social media in the workplace presents considerable risk for the unwary attorney. With the proliferation of employee-owned devices in the workplace, there are a whole host of risks that can arise from an employment situation, including data security issues, employee privacy and online harassment. With the National Labor Relations Board's increasingly activist stance on social media policies and state legislatures dictating what an employer can and can't ask for in terms of an applicant's social media profile, this area presents a lot of risk.

### Q: What resources would you recommend to lawyers to help them stay up to date on the evolution of social media and how it's impacting legal ethics?

A: I'd recommend both of my books as excellent resources and “must-haves” for any lawyer – The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law (West 2010), and my latest book, the Social Media and Litigation Practice Guide (West 2014). Both deal extensively with legal ethics, and both provide handy forms for practitioners.

### Q: Tell us about one example that demonstrates how you've seen social media impact a law practice.

A: Perhaps the clearest example comes from the 2013 Virginia Supreme Court case of *Allied Concrete v. Lester*. In this wrongful

death case, Plaintiff's counsel directed the surviving husband to delete some damaging Facebook photos that wouldn't have been consistent with his portrayal as a grieving widower. He also had the client sign sworn answers to interrogatories indicating that he did not even have a Facebook account. After a plaintiff's verdict, the defense sought a new trial on grounds of spoliation, and the plaintiff



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### Q: What is the most significant change from social media that you've seen impact the practice of law?

A: Without a doubt, the practice of law has changed in a lot of ways in recent years. The biggest changes have happened because of advances in technology which increase the pace of the practice of law and the speed at which clients expect an answer. Social media is just one subset of that. Additionally, social media has impacted dramatically the way law firms market their services, particularly the absolute need to have a social media strategy. How to develop a social media strategy is not something we learned in law school but is an integral part today of building a successful law practice.

### Q: What do you see as the most difficult terrain for lawyers to navigate within the world of social media?

A: After ethics, the most difficult terrain for most lawyers to navigate within social media is the development of social media policies for employees. Obviously, it is advisable for firms to have policies and procedures for social media activity on the part of employees. But it is a tough balancing act to balance ethical requirements like confidentiality with other concerns, such as NLRB findings. For example, a provision in policies will be found to be unlawful when they interfere with the rights of employees under the National Labor Relations Act, such as the right to discuss wages and working conditions with co-workers. Firms may need outside expert legal guidance to develop the social policies they need.

### Q: What do you see as the biggest opportunity for lawyers to use social media to serve their clients better?

A: The biggest missed opportunity for lawyer to use social media to serve their clients better is in the use of blogs. According to the 2013 ABA Technology Survey about 27% of law firms maintain blogs. I was surprised it was not a higher number. To either serve existing clients or to develop new business, a lawyer has to distinguish oneself

attorney and his client were sanctioned a staggering \$722,000. It also resulted in disciplinary action against the plaintiff's attorney by the Virginia Bar, and he lost his law license. A true cautionary tale for the digital age.

from the competition. A great way to do that is by emphasizing your expertise and client service. Clients also have come to expect that they will get some information for free. Blogs can help you meet that expectation as well as identify areas of developing law where clients might need additional help.

### Q: Is there any “black ice,” so to speak, on the road of social media – any surprising sources of risk?

A: The “black ice” on the road of social media is the challenge for lawyers to keep up with the ways you can use social media to investigate and advance their client's legal matters. The ways social media are being used by creative, tech-savvy attorneys changes constantly. Social media provides so many tools, and the standard of care is evolving such that in order to be competent, lawyers will be required to keep up. It's challenging.

### Q: What resources would you recommend to lawyers to help them stay up to date on the evolution of social media and how it's impacting legal ethics?

A: I also would recommend John's books as well as each state bar's ethics opinions.

### Q: Tell us about one example that demonstrates how you've seen social media impact a law practice.

A: Again like the discussion about “black ice” cases like *Canedy v. State*, where a California appellate court held that a lawyer's failure to locate a sexual abuse victim's recantation on her social media profile could constitute ineffective assistance of counsel and *Johnson v. McCullough*, where the Missouri Supreme Court imposed an affirmative duty on attorneys to make online investigation a key part of their jury selection process, drive home the fact that advances in technology and social media are changing not just how lawyers can practice but how they arguably must practice.