

Social media and the lawyer

By Stephen Estcourt

'Social media is a shift in how people discover, read and share news, information and content. It's a fusion of sociology and technology, transforming people into dialogues (many to many) and it is the democratisation of information, transforming people from content readers into publishers. Social media has become extremely popular because it allows people to connect in the online world to form relationships for personal, political and business use. Businesses also refer to social media as user generated content (UGC) or consumer generated media (CGM)' – Wikipedia



There are three types of lawyer – those who can add up and those who can't. But I suspect there are only two types of lawyers reading this article – those who know nothing about social media; those who know a lot and don't want to know any more; and those who know a lot but want to know more about how to leverage using social media as a marketing tool.

Two or three years ago I was advising solicitors and clients, appearing in court and following my hobby of cooking, entirely with the assistance of books – lots of them. I had done this quite happily for the previous third of a century. The iPad had not been invented, Web 2.0 was not a term of which I had heard, Facebook was something that kids did and Twitter was for twits.

FACEBOOK AND TWITTER

Now, with my iPad loaded with some dedicated software, I take my brief to court on it and I tweet with colleagues all over Australia and the world. I am often encouraged and advised by colleagues among my 4,500 odd Twitter and Facebook pals. I tweet with legal commentators like @Foolkitlegal in Australia, @LawyerWorld in the USA and @LegalGeekery (a New York law school student). I chat on Facebook about cases of interest with friends and fellow barristers.

In the kitchen, I subscribe to cooking magazines on my iPad and store all my recipes on it. If I need assistance, I count some of Australia's leading chefs among my Twitter pals and Facebook friends.

Am I any better off? I think so. I believe that Facebook and Twitter have added a dimension to my life and my professional outlook, without which I'd be poorer.

It is very easy to pour scorn on Web 2.0 social media – 'how could you possibly have 1,000 Facebook friends – you are lucky if you have five good friends in a lifetime' – or – 'Dear Twitter, this morning I got up and went to the toilet and then went to work and now I am off to bed.'

But no-one can deny the power of Twitter when it trends topics worldwide where no other media access can be had, as was the case during the riots in the aftermath of the last Iranian elections in 2010 and the Egyptian overthrow of Hosni Mubarak in 2011.

Journalists across all media have totally embraced Twitter and the news actually appears first now in tweets from members of the press and then only later on radio and television. Last of all, in the print media.

As for Facebook, it is true that I haven't met in person all or even most of my friends, but as I wrote recently:

'On Easter Monday my wife Mary and I had lunch at home with three very good friends we had never met before and two extremely close friends we only met for the first time that day. The old notion that you must meet people first and then become friends has been turned on its head by Facebook and Twitter.

On these social media platforms you can get to know some people very well and then have the pleasure of meeting them. It has happened to us many times in the last year and it is a wonderful window to new friendships.'

'Tweetups' are increasingly common now as friends from

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Twitter (and Facebook) who have strong common interests, or who develop online personal or professional relationships, arrange to meet for lunch or drinks.

In this way, 'real' as opposed to 'virtual' friendships develop. This has been my own experience in both the professional and culinary dimensions of my use of the interweb.

The other somewhat surprising aspect of social media is the civility and *bonhomie* that exists in the ether. There is a pervading willingness to help with suggestions and advice on a multitude of issues that arise online every day. In fact there is a Twitter 'hashtag' designated #asktwitter, which when added to the end of a question posed on Twitter opens up your query to response by any of its half a billion users.

Is all of this Web 2.0 stuff a splash in the pan, like Betamax video, the Sony Discman and facsimile machines? I don't think so. The omnipresence of Twitter cannot be ignored. It is here to stay as another means of communicating, monitoring and learning.

Facebook, with its 1.06 billion users, is also unlikely to disappear. No doubt, rules and protocols and laws governing the use and abuse of social media and Web 2.0 will be called for and these will develop in the same way as governance has developed in IT generally. But the phenomenon is here to stay.

If China's 1.3bn citizens were permitted access to Twitter and Facebook, the user figures would no doubt skyrocket. Given the success of these platforms in bringing power to the people, however, I suspect there will be no change in China for some years to come. Although it should be observed that China now has Weibo, which is its own equivalent of Twitter.

BLOGGING AND OTHER ONLINE SOCIAL NETWORKS

To Twitter and Facebook and the other lesser social networks must be added blogging and private and business websites.

There are many online social networks now in existence apart from Facebook and Twitter - MySpace, Bebo, Tumblr and Foursquare to name a few. Some, like LinkedIn, however, are more business profile networks and of course Twitter sits across all platforms as a forum for socialising and business as well as news, politics and sport.

In fact, the term 'social media' is something of a misnomer I think. It would be a mistake to discount the marketing potential of 'social media' on the assumption that it has

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nothing to do with business. All online interactions raise your profile and have the potential to generate business.

As an example of this, I used my Chambers Twitter account to post very prompt analysis of the High Court's decision in the Malaysian Solution case – *Plaintiff M70* – causing our Twitter feed to trend as number 1 Australia wide: that is, my tweets on the subject became the number 1 retweeted topic in Australia. As a result, solicitors checked my interest and experience in public interest and human rights cases online and I was subsequently briefed to provide two separate opinions, which ended up being cited by the Prime Minister in the Federal Parliament on the subject of future changes to the *Migration Act 1958*.

Blogs are becoming increasingly common. As well as having personal and professional Twitter and Facebook accounts, I have a private website, a Chambers website and a personal blog. Law firms and barristers' blogs are now ubiquitous.

Each of these forms of social media separately present their own challenges, but the great challenge is integrating and using them in synergy as an effective online marketing strategy.

Australia has been slow to catch on. In his keynote address at a Law Institute of Victoria conference three years ago, US social media for lawyers guru, Adrian Dayton told *Lawyers Weekly* that New Zealand was way ahead of Australia in terms of professional interest in social media. Nonetheless, Dayton hosted his second 'social media boot camp' in Australia in March 2011.

An online presence by means of a website is really a necessary starting point. As an indicator of the importance of a professional website, in a recent survey of US General Counsel, 100 per cent of respondents indicated that they always review a firm's website when evaluating and purchasing legal services, while 90 per cent of respondents reported that lawyer biographies are the most important section of a law firm's website.

This is not enough, however. The US Top Ten Law Firms Best Website Practices Tips include, as a key goal, that your website should be used to promote sharing and broad distribution of your firm's content across multiple channels. That is to say, support-sharing your website content on social media sites. Your website can no longer be just an online

brochure, it must be an intelligent hub for all of your online activities.

Deploying a 'social sharing' button on each page of your website encourages visitors to share interesting content with their networks on social media sites such as Twitter, LinkedIn, and Facebook and provides a reason to revisit your site. Including your website, Facebook, Twitter, LinkedIn and blog presence online on your letterhead and in email footers is also recommended.

Many lawyers publish blogs, participate in webcasts, or 'tweet' on Twitter, but fail to integrate content from these channels into their websites. No longer just a glossy flyer or an online Yellow Pages entry, websites are now publishing platforms.

Integrating outside content sources with your website provides visitors with further evidence of expertise and thought leadership. It also promotes traffic to those other content resources since websites are frequently the starting point in the process of evaluating a firm and its lawyers.

Finally, these links to and from your website are an important component of search engine visibility, and provide those sources with 'link juice' that helps boost visibility of your website in Google's index. That is to say, it will help you or your firm or chambers pop up as No. 1 in a relevant Google search.

HOW TO START

First, set up your Twitter and Facebook accounts and a separate Twitter account and a separate Facebook page for your firm or chambers, which in the case of Facebook may be linked to your personal page. It is possible to synch your Facebook and Twitter accounts so that tweets are posted as Facebook updates.

Now for some tips.

1. Blatant sales pitches and advertising do not fit the social media culture – it's a bad look and will inevitably damage relationships you may have built.
2. Only share quality content and content that is relevant and interesting. No one reads rubbish and demonstrating good taste establishes you as reliable. Don't spam – do not go online and in 30 minutes over respond and post excessively. For every post about yourself post a couple about others, retweeting what they have said and commenting. Listen to what others are saying.
3. Return on investment is all about taking time – be patient. Quality content takes time, listening takes time, responding to others takes time and building relationships takes time.
4. Personally establish a following. It takes a bit of hard work but you can look at the Twitter accounts of people who have large followings, see who they follow, and follow the people who interest you. Most will, in a little while, follow you back and the relationship begins.
5. Post and tweet regularly, at least once or twice a day and post interesting and where possible, original, and up-to-date material. Write it yourself or get others to, search the web and find it, retweet others' material and re-post the URL links relevant to you. Upload whenever

and whatever you can: photographs, videos, podcasts, webcasts and webercises are all great material.

6. Observe social media protocols. Thank others for re-tweeting or sharing your posts – and for recommending that others follow you. Acknowledge use of others' links, follow back (judiciously) and engage with others. One-way traffic, where you post something about yourself but never respond to others, comes across as arrogant.
7. Be wary of copyright issues and the use of others' content. Give credit to others if you repost their links. You cannot just hijack other people's ideas and discoveries. If in doubt, and the material is not in the public domain, ask the person online if you can repost.
8. Your social media communication brands you. How do you want to be perceived? Cheap and cheerful? Elegant and sophisticated? Brooding and mysterious? Friendly and helpful? Reliable and solid? You choose and post accordingly, but never appear aloof and arrogant; sometimes funny, yes, but never boring.
9. Be passionate about what you do professionally, but not a salesperson. Remember you are posting and tweeting as a human being and not a company. For example, Nikon doesn't sell cameras, it shares expertise and knowledge on photography and makes you a better photographer. Getting involved in the provision of professional

development material can also be a good idea. That way your local law society or bar association may cite your website as a useful legal resource.

10. Evaluate what you do. There are tools you can use yourself to monitor, quantify and analyse your own online progress. They include Google Analytics, Hootsuite, SocialMention, Technorati and HubSpot. And a word of caution. Defamation is something to be very conscious of with an online presence.

DEFAMATION

Remember Matthew Evans – the SBS Gourmet Farmer. In his *Sydney Morning Herald Good Living* review of the *Coco Roco* Restaurant in 2003, he did not refer to the 'curdled seafood foam that tasted like reflux' nor to 'the disgusting Limoncello oysters that were slimy and bitter and excessively alcoholic' – nor even to 'the almond paste that was reasonably grey and looked like oily concrete'. Mr Evans in fact made those comments in his evidence given in court when he and the newspaper were sued for defamation.

What he said in the review was that 'the polished stainless steel around the open kitchen and the black reflector tiles in the bathroom make me feel I should be wearing a pink shirt and a thin leather tie'. Evans also noted that the claim that the style of the restaurant was glamorous was not so, unless 'glamour peaked in 1985'. He also used words like 'dismal', 'tasteless' >>

Evidence-Based Medicine and Evidence-Based File Reviews Legal Facilities

The file review process is new to Australia and will revolutionise the court procedures, and also revolutionise the veracity of any medicolegal report provided.

File Review

Dr Boyce recommends that both defence and plaintiff counsel have appropriate evidence-based information to set up their case and ask appropriate questions.

Dr Boyce provides this service as a further facility through several international societies, including the Cochrane Review and levels of medical evidence similar to the American Daubert Case.

All file reviews would need to have the file sent, usually no x-rays sent, and a synopsis of the case would be provided and detailed evidence of evidence-based material relating to the case would also be provided. This service would be provided nationally, as mentioned, both to defence cases and plaintiff cases, and the relevant questions framed to request an IME including evidence-based medicine to be provided to the

referring lawyer or insurance company. Based on the ODG (Occupational Disability Guidelines) and the Presley Reed Cases.

Quite naturally, the cost of such file reviews would depend on the thickness of the file; Dr Boyce has received files which are well over 6" thick, and the cost of such file reviews would be determined on the thickness of the appropriate file, and a quote on that file would be provided to the relevant provisor prior to the file being read or report provided.

Dr Geoffrey M Boyce (1970 Queensland medical graduate) continues to provide medicolegal neurological reports in northern New South Wales. He has a broad knowledge of all aspects of neurology and has been a member of APLA / ALA for over 20 years.

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and 'rubbery' to describe the steak he ate and described the sauce that accompanied the steak as a 'wretched garnish'.

Evans' counsel submitted that the publication was plainly a food review and the ordinary reasonable reader was familiar with the concept of such reviews and would understand that Mr Evans was only giving his estimation or opinion of the food on the details set out in the review and not stating facts.

The principal thrust of the plaintiffs' attack, though, was that if what Mr Evans wrote did otherwise qualify as comment, he did not, as the law requires, honestly hold the opinions he expressed. They attacked him as an untruthful and biased witness precisely, they said, because of the abusive language he used.

This is where it can get tricky online. It is true that Sir Frederick Jordan, in *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171 said, at 174:

'A critic is entitled to dip his pen in gall for the purpose of legitimate criticism; and no one need be mealy-mouthed in denouncing what he regards as twaddle, daub or discord.'

However, the dilemma Evans found himself in, and one to avoid, was that the 'pen dipped in gall' formed the very foundation for the plaintiffs' argument that he did not honestly hold the opinions he expressed.

So it may be true that in social media you are entitled to 'dip your pens in gall' for the purpose of legitimate criticism, and it is true that you need not be 'mealy mouthed' in denouncing what you regard as 'twaddle, daub or discord'. The dilemma is that if you do, the very words you use may be argued against you as demonstrating that you did not honestly hold the opinions you expressed.

Ultimately, Evans won that particular round, but only because he was accepted by the trial judge as an honest witness who did genuinely hold the opinions he expressed. If whether you win or lose can come down to the impression you make as a witness upon the judge hearing the case, you would be better advised to avoid the journey and the risk.

Use sarcasm, much less vitriol, sparingly, if at all, and avoid snide comments and pejorative terms or terms that are unnecessarily strident or unflattering. It is not a risk worth taking, for your objective could almost certainly be achieved by more moderate and, dare I say it, more skilful, writing.

As well as minding what you say, you should also be wary of what other people say, by way of comment posted on your page or website or in reply to tweets on your Twitter feed. Failing to remove or take down defamatory comment left by others could involve you in liability. Retweeting can also be problematic.

In Canada, the Court of Appeal for British Columbia has

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held that posting a hyperlink to a source that contains defamatory material is not, in the absence of further comment, a re-publication of the defamatory material.¹ I would not be confident, however, of a similar outcome in Australia, either for retweets, or for the posting of links to a defamatory publication.

The High Court recently, unanimously, held in *Google Inc v Australian Competition and Consumer Commission*,² that in providing its AdWords system for advertisers, Google did not engage in misleading and deceptive conduct where the system produced sponsored links

that were themselves misleading. The plurality of French CJ, Crennan and Kiefel JJ so held, on the basis that Google did not create the sponsored links and had no control over the advertisers' key words or the users' search terms, and that ordinary and reasonable users of Google would have understood that the representations were those of the advertisers. It was only Heydon J, however, who noted in his separate judgment, that if Google's provision of the technology caused it to be the maker of the advertisers' advertisements, then that would be an exceptionally wide form of absolute liability for those who publish in the media.

Indeed, Google had earlier been successfully sued for defamatory posts by others. In *Trkulja v Google Inc LLC*,³ Beach J held, dismissing Google's application for judgment notwithstanding the jury's verdict against it for defamation, that the question of whether Google was the publisher of a number of defamatory images and a defamatory article was a mixed question of law and fact. It had therefore been open to the jury to conclude that Google intended to publish the material its automated systems produced, because that was what they were designed to do in response to a search request.

Moreover, his Honour held that the jury was entitled to conclude that Google was a publisher even before it had notice from anybody acting on behalf of Mr Trkulja complaining of the existence of the posted material.

Beach J reviewed the English decisions of *Bunt v Tilley*,⁴ *Metropolitan Schools Ltd v Designtecnica Corporation*⁵ and *Tamaiz v Google Inc*,⁶ relied upon by Google for the contention that it was not a publisher as a matter of law. His Honour held that, to the extent that there was anything written in those judgments that might be thought to compel the conclusion that the jury in the case before him was not entitled to find that Google was the publisher of the relevant material, those cases did not represent the common law of Australia.

How these issues are ultimately resolved when and if they reach the High Court remains to be seen. In the meantime, it would be safe to assume that vigilance is required in monitoring comments posted on your website and in

your own use of social media when retweeting or hyper linking. You will see on some Twitter profiles 'RT is not a recommendation', this is done in an endeavour to minimise the risk of being sued and is a step worth taking, albeit perhaps of dubious utility.

ETHICS

Ethical considerations also provide a pause for thought for lawyers in online comment, although advertising limitations these days are the same for everyone at the highest level of abstraction; that is, what is posted cannot be false or misleading or amount to passing off. For lawyers, however, discussing client cases and making disparaging remarks about judges and suchlike are just as unethical on social media as they are in cocktail party conversations or in a letter to the editor of your local newspaper. If you couldn't ethically say it in a room full of your colleagues, then you can't say it online.

So are you convinced of the utility of social media? There are I must confess, two schools of thought about whether to and how to engage. The first comprises people such as Adrian Dayton, the US evangelist of social media for lawyers. He has run 'social media boot camps' for lawyers in Australia and he preaches the online gospel worldwide. His books include *Social Media for Lawyers Twitter Edition 2009* and *Social Media for Lawyers LinkedIn, Blogs and Website 2.0*, published in 2011.

In the other corner, however, are people like US legal blogger, Justinian C Lane.

He has written:

'Most people who know me think I'm a quiet, unassuming, laid-back guy. And I am. Until I reach my level of tolerance. Tonight, I reached my level of tolerance for snake oil salesmen who bill themselves as social media experts for lawyers. Perhaps snake oil salesmen is too

kind. People who want to charge lawyers money for teaching them about social media are bullshit peddlers who hope to exploit the (presumed) ignorance of the (presumed) rich... Every time I get a Facebook, a Twitter, or a LinkedIn spam from some lawyer offering to teach me everything I need to know about rainmaking via social media, I know I'm dealing with a first-class failure as an attorney.'

Lane nonetheless concluded:

'If you really want to know about social networking, here's what to do: Just do it. Get on Facebook and find your old high school/college friends. Get on LinkedIn and find the people you worked with fresh out of college. Start a blog. Play around. Explore. Have fun. And for God's sake, don't worry about the "right way" to do this. There is no right way, but there is a wrong way: The wrong way is to be a self-promoting arsehole who spams everyone on his friends' lists about rainmaking.'

The decision as to whether you go online at all and how you go about it if you do is, of course, yours to make. My thoughts as expressed in this article may perhaps assist you in making those choices. ■

This article was initially published on the Derwent and Tamar Chambers website on 27 November 2012 and was kindly made available to Precedent by Justice Estcourt prior to his appointment to the Supreme Court of Tasmania in April this year.

Notes: 1 *Crookes v Newton* 2009 BCCA 392. 2 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1. 3 *Trkulja v Google Inc LLC* [2012] VSC 533. 4 *Bunt v Tilley* [2007] 1 WLR 1243. 5 *Metropolitan Schools Ltd v Designtecnica Corporation* [2011] 1 WLR 1743. 6 *Tamaiz v Google Inc* [2012] EWHC 449.

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