Interactive Session

LAWYER MEETS WORLD (WIDE WEB)

SOCIAL MEDIA AND ETHICS

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• Rule 1.1: Competence
  o Client-Lawyer Relationship
    ▪ A lawyer shall provide competent representation to a client. Competent representation required the legal knowledge, skill, thoroughness and preparation reasonable necessary for the representation.
  o Comment 8 - Maintaining Competence
    ▪ To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

• Rule 7.2: Communications Concerning a Lawyer’s Services: Specific Rules
  o (a) A lawyer may communicate information regarding the lawyer’s services through any media.
  o (b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services except that a lawyer may:
    ▪ (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
    ▪ (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;
    ▪ (3) pay for a law practice in accordance with Rule 1.17;
    ▪ (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
      ▪ (i) the reciprocal referral agreement is not exclusive; and
      ▪ (ii) the client is informed of the existence and nature of the agreement; and
    ▪ (5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.
  o (c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
    ▪ (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
    ▪ (2) the name of the certifying organization is clearly identified in the communication.
  o (d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

• Rule 3.6: Trial Publicity
  o (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
  o (b) Notwithstanding paragraph (a), a lawyer may state:
    ▪ (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
• (2) information contained in a public record;
• (3) that an investigation of a matter is in progress;
• (4) the scheduling or result of any step in litigation;
• (5) a request for assistance in obtaining evidence and information necessary thereto;
• (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
• (7) in a criminal case, in addition to subparagraphs (1) through (6):
  • (i) the identity, residence, occupation and family status of the accused;
  • (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
  • (iii) the fact, time and place of arrest; and
  • (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

o (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

o (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

• Rule 1.18: Duties to Prospective Client
  o (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
  o (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
  o (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
  o (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
    • (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
    • (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
    • (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
    • (ii) written notice is promptly given to the prospective client.
Lawyer Meets World (Wide Web): Social Media and Ethics

Presenters
Sam R. Fulkerson (Oklahoma City)
Frank L. Tobin (San Diego)

Client Representation

- Competence – Rule 1.0, 1.1, Comment 8
  - Diligence
  - Failure to use social media
  - Confidentiality Issues
Must Lawyers Use Technology?

- See *Munster v. Groce*, 829 N.E.2d 52 (Ind. App. 2005) (lawyer admonished for not using Google to find a non-resident defendant after filing a Long Arm affidavit asserting the defendant’s address could not be found).

*Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010, *en banc*)

- The court allowed a new trial based on a juror’s nondisclosure of his litigation history. It noted, however, that Plaintiff’s counsel discovered the information using Missouri’s automated case record service after the trial. Acknowledging a lack of a Supreme Court rule governing this area, the court imposed an affirmative duty on attorneys to make online investigation of potential juror’s prior litigation history a key part of their jury selection process “in light of advances in technology allowing greater access to information.”
A Duty of [Technological] Competence

- See ABA Model Rule 1.1, Comment [8]

Client Representation

- **Who is on Social Media?**
  - 90% of adults age 18-29 use social media; 78% of adults aged 30-49, 64% of adults aged 50-64, and 37% of adults aged 65+ also use it.
  - 68% of women are active on social media, compared to 62% of men.
  - The average internet user has 7 social media accounts.
    - 16-24 year-olds have an average of 8 accounts each.
    - These are up from 5.5 and 6.5 accounts, respectively, in 2014.
  - The total number of active social media users globally is 2.31 billion, or 31% of the total population.
    - This is a 10% increase in the last year.
    - 1.97 billion users access social sites through mobile devices.

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Social Networking Websites

- Every minute:
  - 347,222 tweets sent on Twitter
  - 4.2 million Facebook users “like” something
  - 284,722 “snaps” are sent via Snapchat
  - 300 hours of new video is uploaded to YouTube
  - 3,600 new photos are posted on Instagram

(2016: Josh James, How Much Data is Created Every Minute)

Privacy and Security

- How secure is social media information?
  - 26% of Americans say they are sharing more information on social networks than one year ago
  - 66% of active Facebook users do not know about privacy settings
  - 47% of teens have a public Facebook profile viewable by anyone
  - 24% of Americans say they are not at all confident in their ability to use privacy settings

What Does Social Media Evidence Look Like?

- Photos
- Text messages
- Printouts/screen captures
- Video
- Audio recordings/voicemail

Client Representation

- Investigation
  - Duty to supervise subordinates
    - “Friend” requests
    - Communications with represented parties
  - Public pages v. privacy settings
  - Abuse of social media
  - Use of third party vendors
  - Admissibility of social media
How Can Social Media Evidence Be Used?

- For the employer
  - Can provide exculpatory evidence for employer
  - Can provide evidence about mitigation, or lack thereof
  - Can provide exhibits with powerful jury impact, especially on the issue of the plaintiff’s veracity and damages issues

- Against the employer
  - Admissions against interest
  - Inconsistent statements about challenged employment decisions
  - Inconsistent statements about policies
  - Inconsistent statements about RIFs

ABA Model Rules

- ABA Model Rules of Professional Conduct implicated in using social media to source information:
  - 1.6 Confidentiality of Information
  - 4.1 Truthfulness in Statement to Others
  - 4.2 Communication with Person Represented by Counsel
  - 4.3 Dealing with Unrepresented Persons
  - 5.3 Responsibility Regarding Non-lawyer Assistant
  - 8.4 Misconduct
Public Profiles

- Can you investigate public profiles?
- Can you use a current or former co-worker’s, or a witness’s account to look at plaintiff’s private pages?

Public Profiles: Ethical Issues

- Public vs. private social media information
  - *US v. Lifshitz*, 369 F.3d 173, 190 (2nd Cir. 2004): Users would logically lack a legitimate expectation of privacy in the materials intended for publication or public posting.
Public Profiles: Sourcing Information

- Accessing public social media profiles and using information found therein:
  - NY State Bar Committee on Professional Ethics: “Because harvesting public social media does not require a lawyer to ‘friend’ the other party, accessing the social network pages of the party will not violate Rule 8.4, which prohibits deceptive or misleading conduct.”
  - ABA Formal Opinion: “Unless limited by law or court order, a lawyer may review a juror’s or potential juror’s internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.”

“Friending”

- Can you friend other professionals in the legal field?
- Can you friend an unrepresented party?
- Can you friend a witness?
- If you do friend a party/witness, what do you have to disclose in the process?
- Can you create a “dummy” or “professional” account?
“Friending”: Ethical Issues

- “Friending” witnesses
  - If a client friends a witness on his or her own, this is likely not an ethical issue for the lawyer
    - However, if a “defense agent,” “including the client,” “friends” a witness, see ABA Model Rule 5.3
  - You can set up a “professional” account in order to friend someone as long as it is honest and it identifies you
    - It can be problematic if you somehow mislead about who you are
    - Some states require more, such as the true nature of contact

“Fraudulent Friending”: Sourcing Information

- When an attorney asks a third party to “friend” a witness/party to the case to gain access to information posted on social media
  - 2009 Philadelphia Bar, Opinion 2009-02: Third party friended a witness, only stated truthful things about himself (name, city, etc.) but left out the fact that he was associated with the attorney. Found this to be deceptive because it omitted a material fact.
  - Disciplinary Counsel v. Brockler (2016): Prosecutor handling a murder case listened to recorded conversations between the accused and his girlfriend, heard them fighting. He created a Facebook profile and pretended to be mistress of the accused. He attempted to pit them against each other. He was fired, suspended from practice for 1 year.
Direct “Friending”: Sourcing Information

When an attorney uses a personal social media profile to friend a party/witness

- **Bar Association of the City of New York Committee on Professional Ethics:** an attorney or the attorney’s agent may use his or her real name to “friend” an unrepresented individual in furtherance of obtaining information from that person’s social media page without disclosing the true motive. As long as the attorney used truthful information, the conduct was ethical.

- **Oregon State Bar:** A request for access to nonpublic information from an unrepresented individual does not establish any transparent ethical transgressions. This places the burden on the account holder to appropriately filter “friend” requests.


Direct “Friending”: Sourcing Information

- **In the Matter of Eric Gamble, No. 112, 037 (Dec. 5, 2014) (Supreme Court of Kansas):** Suspended from practice for 6 months for “engaging in conduct prejudicial to the administration of justice,” “engaging in conduct that adversely reflects on the lawyer’s fitness to practice law” (by bullying the opposing party), and knowingly making “a false statement of material fact or law to a third person.”
“Friending”: ABA Model Rules

- An attorney must disclose his or her true identity; must not make misrepresentations or direct others to do so and when representing a client, must not communicate about the subject of that representation with another person the lawyer knows has representation. A request is presumptively proper if the true identity of the lawyer and the reason for the request are disclosed.

ABA Formal Op. 466-4/24/14

- Unless limited by law or court order, a lawyer may review a juror’s or potential juror’s Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

- A lawyer may not, either personally or through another, send an access request to a juror’s electronic social media. An access request is a communication to a juror or asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

- The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

- In the course of reviewing the juror’s or potential juror’s Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.
ABA Formal Op. 466-4/24/14

- The auto-generated third-party notice to a subscriber that their profile had been viewed likely would not violate Rule 3.5 because “the lawyer is not communicating with the juror, the social media provider is. I think a lawyer’s duty of diligence and competence permits if not requires the lawyer to gather whatever public information is available about a juror.”

Spoliation of Evidence

- Can you advise your clients to change their privacy settings?
- Can you advise your clients to “clean up” their accounts generally?
- Can you advise your clients to delete posts specifically?
- Can you advise your clients to delete or deactivate their accounts?
Spoliation of Evidence: Ethical Issues

- ABA Model Rules of Professional Conduct implicated in social media as it relates to spoliation of evidence:
  - Rule 3.4 Fairness to Opposing Party and Counsel
    - A lawyer shall not:
      - (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Spoliation of Evidence: Case Law

- **Allied Concrete Co. v. 736 S.E. 2d 699 (Va. 2013):** Attorney agreed to a 5-year suspension for misconduct; the attorney was fined $542,000 and the client was fined $180,000.
- **Gatto v. United Airlines, Inc., 2013 U.S. Dist. LEXIS 41909 (D.N.J. Mar. 25, 2013):** The court held that the plaintiff engaged in spoliation by deleting his Facebook profile, thereby entitling defendants to an adverse inference instruction at trial.
Spoliation of Evidence: State Ethics Board Decisions

- Philadelphia Bar Professional Guideline Committee, Opinion 2014-5: An attorney must take reasonable steps to preserve and produce what is on a client’s social media page. An attorney must play as active and ongoing role in a preservation plan, including sending preservation mandates in writing to the client and to other nonparties if necessary.

- Professional Ethics of the Florida Bar, Opinion 14-1 (June 25, 2015): “A personal injury lawyer may advise a client pre-litigation to change privacy settings on the client’s social media pages so that they are not publically accessible. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the lawyer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as the social media information or data is preserved.

- New York County Lawyers Association, Opinion 745: An attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages, consistent with the principles stated above. Provided that there is no violation of the rules of substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advise as to what may be kept on ‘private’ social media pages, and what may be ‘taken down’ or removed.

- North Carolina State Bar 2014 Formal Ethics Opinion 5 (2015): If removing postings does not constitute spoliation and is not otherwise illegal, or the removal is done in compliance with the rules and law on preservation and spoliation of evidence, the lawyer may instruct the client to remove existing postings on social media.
Spoliation of Evidence: ABA Guidance

- Don’t tell them to delete, but suggest changing privacy settings:
  - “But if outright spoliation is one extreme, there are options that are feasible to implement within the parameters of ethical conduct. For example, attorneys may instruct clients to control their privacy settings to limit what is deemed open for public consumption. That said, nothing can prevent an adversary from seeking a court order unlocking the subject account if the discovery request is narrowly tailored.”


Spoliation of Evidence: Discovery

- **Thompkins v. Detroit Metro. Airport, 278 F.R.D. 387, 388 (E.D. Mich. 2012):** There must be a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence as it relates to the plaintiff’s Facebook page.

Admissibility of Social Media Evidence

- Guidance from the ABA indicates admissibility turns on authentication:
  - Party must show that evidence is relevant, authenticate it, address issues of unfair prejudice and probative value, and address hearsay, and demonstrate that it conforms to the best evidence rule.
  - Must also be deemed relevant under FRE 401 (any tendency to make a fact more or less probable).
- People v. Valdez, 201 Cal. App. 4th 1429 (Cal. App. 4th Dist. 2011): The court held that a reasonable trier of fact could conclude that the social media profile belonged to the defendant because of the proven ability to upload or manipulate page content.

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Business Development

- Advertising/Career Development – Rule 7.2
  - Improper Solicitation
  - Endorsements/Recommendations
  - Twitter/Blogging
  - Comments on Pending Matters – Rule 3.6(a)
- Misrepresentation
- Providing Legal Advice: General v. Specific Information
- Creating Attorney-Client Relationship – Rule 1.18
  - Disclaimers
Direct Solicitations

- Rule 7.3 governs Direct Contact with Potential Clients
- Solicitation is targeted communication started by the lawyer directed to specific potential client that offers to provide legal services.
- The same rules apply to electronic solicitation.

Advertising Case Results

- Rule 7.1(b) applies to this:
- Disclaimer must
  - Put the case results in a context that is not misleading (or potentially so),
  - State that case results depend upon a variety of factors unique to each case, and
  - State that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer.
Endorsements

- People can “like” lawyers on Facebook and “endorse” lawyers on LinkedIn.
- These may be recommendations under Rules 7.1 & 7.3.
- Remember, you adopt the statements of others who post on your social media site.

Blogging

- A blog is a website where a writer posts writings that are organized chronologically. Blogs are popular outside the legal context and have gained popularity in the legal field over the last 10 to 15 years. Legal blogs exist on almost every subject.
- LexBlog’s 2012 annual State of AmLaw 200 Blogosphere reported that 78% of the 200 largest law firms in the United States were blogging.
Ethics and Social Media

- Online connections carry the same ethical pitfalls as in-person interaction with potential clients and others. Remember, the same rules apply to your online presence as they do to any type of communications.

Can This Get Me in Trouble?

- Public defender revealed client confidences relating to pending matters in her blog.
- Public defender lost her job of 19 years.
- Public defender was disciplined by the Illinois State Bar.
- *In the Matter of Peshek* (Illinois Complaint)

**Remember** Rule 1.6: A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or in the disclosure of which would be embarrassing or would likely be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
Can This Get Me in Trouble?

- Lawyer suspended for 18 months for improper response to criticism posted on the website.
- Disclosed information in response to clients’ Internet complaints about his fees or services in two instances.

People v. Underhill (Colo. August 12, 2015). The couple posted complaints about Underhill on two websites. He responded with internet postings that publically shamed the couple by disclosing highly sensitive and confidential information gleaned from attorney-client discussions, in contravention of Colo. RPC 1.6(a) (a lawyer shall not reveal information relating to the representation of a client) and Colo. RPC 1.9 (c)(2) (a lawyer shall not reveal information relating to representation of a former client).

Hunter v. Virginia State Bar

- Criminal defense lawyer blogged about past victorious cases on his firm’s website.
- Posts included names, evidence, and charges against them.
- Supreme Court of Virginia held that former Rule 7.2(a)(3) was constitutional as applied to the blog and was properly regulated speech. Thus, lawyer must post the required disclosures.
Providing Legal Advice

- Inadvertently creating attorney-client relationship via online communications

QUESTIONS?
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