Professionalism in the Age of Social Media

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Friday, December 12, 2014
9 a.m.–Noon

Oregon State Bar Center
Tigard, Oregon

3 Ethics credits
PROFESSIONALISM IN THE AGE OF SOCIAL MEDIA

SEMINAR PLANNERS

The Honorable John Acosta, United States District Court, Portland
The Honorable Kathleen Dailey, Multnomah County Circuit Court, Portland
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SCHEDULE

8:00  Registration

9:00  The Principles of Professionalism in the World of Social Media
      Margaret DiBianca, Young Conaway Stargatt & Taylor LLP, Wilmington, DE

10:15 Break

10:30 Practicing Law in an Online World
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      Simon Whang, Portland Office of City Attorney, Portland
      Social Networking: Litigation Tips and Strategies
      Dominic Campanella, Brophy Schmor LLP, Medford

12:00 Adjourn
FACULTY

Dominic Campanella, Brophy Schmor LLP, Medford. Mr. Campanella has a civil litigation practice and tries cases in Oregon state and federal courts. He also represents clients in administrative hearings at the state and local level. He is a member of the Jackson County Bar Association.

Margaret DiBianca, Young Conaway Stargatt & Taylor LLP, Wilmington, DE. Ms. DiBianca maintains a legal practice consisting of equal parts litigation and client counseling. She represents employers in a variety of industries in employment rights claims, discrimination matters, and equal employment disputes at the state and federal court level. She defends employers against claims brought by former and current employees and assists employers to enforce restrictive covenants. Ms. DiBianca regularly provides in-house training to managers and supervisors. She also teaches best practices to human resource professionals, executives, and in-house counsel and presents at CLE events on the subject of social media and legal ethics. She maintains ongoing employment-law commentary at the Delaware Employment Law Blog. In 2014, Ms. DiBianca was inducted in the ABA Journal’s Blawg Hall of Fame.

Katherine Heekin, Heekin Medeiros PC, Portland. Ms. Heekin is an attorney and certified fraud examiner focused on commercial litigation. She is licensed to practice law in Oregon and Washington.

Simon Whang, Portland Office of City Attorney, Portland. Mr. Whang is a Deputy City Attorney for the City of Portland. He has served as a prosecutor for the Manhattan DA’s Office, Multnomah County, and the Oregon Division of Finance and Corporate Securities and as an Assistant Attorney General for the Oregon Department of Justice. He is also an adjunct professor of mock trial/moot court at Lewis and Clark Law School. Mr. Whang speaks regularly on ethics and professionalism.
Chapter 1

Ethical Risks Arising from Lawyers’ Use of (and Refusal to Use) Social Media

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Chapter 1—Ethical Risks Arising from Lawyers’ Use of (and Refusal to Use) Social Media

ETHICAL RISKS ARISING FROM LAWYERS’ USE OF (AND REFUSAL TO USE) SOCIAL MEDIA

Margaret M. DiBianca

I. SOCIAL MEDIA IN THE LEGAL PROFESSION

The number of lawyers and law firms participating in social media is, and has been, on the rise. According to the American Bar Association (“ABA”), in 2010, 56 percent of lawyers surveyed reported that they maintain a presence in an online community or social network, such as Facebook, LinkedIn, LawLink, or Legal OnRamp. This is a 30 percent increase from the number of legal professionals who participated in social networking in 2009 and a 250 percent increase from 2008. As the number of legal professionals using social media continues to increase, so, too, does the number of stories of lawyers’ misuse of social media.

In August 2010, the Conference of Court Public Information Officers published the results of its year-long study on the impact of new technology, including social media, on the courts and legal system (the “CCPIO Report”). The CCPIO Report defines social media as “highly interactive, multimedia, websites and programs that allow individuals to form into communities and share information, knowledge and experiences more quickly and effectively than ever before.” The universe of social-media tools can be classified into several types, three of

1 This article, which originally was published in 2011, was updated in February 2012. The original version is available at http://media.dsba.org/Publications/DLR/PDFs/DLR.12-2.pdf.

2 Margaret (Molly) DiBianca is an attorney with the law firm Young Conaway Stargatt & Taylor, LLP. She is the editor and primary author of the Delaware Employment Law Blog (www.DelawareEmploymentLawBlog.com) and of the Going Paperless Blog (www.GoingPaperlessBlog.com).


5 Id.


7 Id.
which (social-networking sites, blogs, and microblogs) are relevant to the topics discussed in this article.

The first type of social media relevant to this discussion, online social networking, is also the most popular.\(^8\) As described by one court, social-networking sites “serve as an online newsletter or as a personal journal – where an individual can post concerns, ideas, opinions, etc. – and it can contain links to web sites or can use images or video.”\(^9\) Content uploaded by a user is stored in the user’s “profile.”\(^10\) The user designates other users as “friends,” who are able to then view the user’s profile and leave comments.\(^11\) Various levels of privacy settings can be applied to a user’s profile.\(^12\) One state law defines a social-networking site as having three unique characteristics:

Social networking web site means a web page . . . (a) that enables users or subscribers to create, display, and maintain a profile or Internet domain containing biographical data, personal information, photos, or other types of media, (b) that can be searched, viewed, or accessed by other users . . . with or without the creator’s permission, consent, invitation, or authorization, and (c) that may permit some form of communication, such as direct comment on the profile page, instant messaging, or email, between the creator of the profile, and users who have viewed or accessed the creator’s profile.\(^13\)

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Currently, the most popular social-networking site for personal use is Facebook. LinkedIn is the most popular online social network for professional use, linking more than seventy million professionals to develop business opportunities, collaborate, and share job opportunities. Compared to Facebook, a user’s LinkedIn profile is more like an online resume and less like a high-school yearbook.

Blogs are the second type of social media discussed in this article. Blogs have become so pervasive in the legal profession that they have been awarded their own name: blawgs. There are blawgs on practically every legal topic imaginable. Even AmLaw-ranked law firms have joined the online discussion. Blogs are updated frequently with narrative posts and commentary displayed in reverse-chronological order.

Microblogs are the final type of social media discussed in this article. Microblogging is “a form of multimedia blogging that allows users to send and follow brief text updates.” Twitter is the leading microblogging platform. Users send messages (“tweets”) consisting of


15. See Posting of Leena Rao, LinkedIn Tops 70 Million Users; Includes Over One Million Company Profiles, TECHCRUNCH.COM, (June 20, 2010), at http://techcrunch.com/2010/06/20/linkedin-tops-70-million-users-includes-over-one-million-company-profiles/.


19. See, e.g., O’Keefe, supra, note 3.


21. CCPIO Report, supra, note 6, at 38.

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up to 140 characters. Almost all messages on Twitter are public but users limit whose posts they see by “following” only the users who they find interesting. Thus, when a user logs in to his Twitter account, he sees only the tweets of those users that he has chosen to follow.

All types of social media share a common, defining characteristic—user-generated content. Blogs, Facebook profiles, and tweets are all created by individual users and published to a potentially unlimited number of other users. With a simple click of the computer mouse, users can share information that, perhaps, ought not to be shared. As one court explained, “the act of posting information on a social networking site, without the poster limiting access to that information, makes whatever is posted available to the world at large.” The “user-to-user” nature of social media has transformed the way the internet is used, resulting in “a migration from the static, unidirectional, mass communication tools of the 1990s to a concept of the Web as highly interactive, dynamic and community-oriented—a migration from Web 1.0 to Web 2.0.”

This transformation has attracted the attention of a significant number of legal professionals, who have embraced social media for personal and professional purposes. It has also caused many legal professionals to become warier than ever of the potential dangers of the Internet, resulting, in part, from a fear of the unknown. As discussed in part II of this article, though, ignorance is not bliss when it comes to attorneys’ familiarity with—and even use of—social media. Instead, a lawyer’s ethical duties may actually require him to become familiar with, if not make use of, social media. Part III addresses some of the risks facing lawyers who do engage in social media. Thus, the purpose of this article is to encourage lawyers to take an


25. Id. See Posting by Chloe Albanesius, Mobile Apps Helps Boost Twitter Membership to 145M, PC MAG.COM, (Sept. 3, 2010), at http://www.pcmag.com/article2/0,2817,2368704,00.asp.


27. Ind. Newspapers, Inc. 966 A.2d at 438 n.3.


29. Id.

30. See CCPIO Report, supra, note 6, at 70 (reporting that privacy was reason most often cited (75 percent) by respondents who do not use social-networking sites; ethical concerns was the second most cited reason (47 percent)).
active interest in social media and to understand its potential effect on their practices, while not losing sight of the potential ethical risks.

II. THE ETHICAL RISKS OF SOCIAL-MEDIA IGNORANCE

Although social media is being used by more lawyers than ever before, many legal professionals refuse to engage in social media at all. Some believe that social media offers no benefit to their particular practice. Others are wary of the risks associated with any new technology. Naysayers and late adopters alike may be equally surprised to learn that ignoring social media altogether may constitute a violation of their ethical obligations.

A. The Duty of Competence

Rule 1.1 of the Delaware Rules of Professional Conduct (the “Rules”) requires lawyers to be competent in their representation of clients. Ethical competence requires a lawyer to possess the “legal knowledge, skill and preparedness reasonably necessary for the representation.” Comment 6 to Rule 1.1 instructs that lawyers “should keep abreast of changes in the law and its practice.” Thus, the duty of competence includes a duty to stay current in not only the substantive area of law in which one practices, but in the procedural and technical aspects as well.

On the most basic level, the duty of competence requires a lawyer to be knowledgeable about the substantive law in the area in which he practices. At least one court has found that

31. See, e.g., O’Keefe, supra, note 3.

32. See In re: B. Carlton Terry, Jr., No. 08-234, at ¶ 3 (N.C. Judicial Standards Comm’n, Apr. 1, 2009), available at http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf (during a conversation with the defendant’s attorney and the presiding judge about Facebook, the plaintiff’s lawyer stated that she did not know what “Facebook” was, and did not have time for it).

33. See CCPIO Report, supra, note 6, at 70 (“limited usefulness” was the most often cited reason for not using a new technology).


36. Id.

37. Id. at cmt. 6.


39. See, e.g., Burton v. Mottolese, 835 A.2d 998 (Conn. 2003) (affirming disbarment where attorney demonstrated lack of competence with respect to substantive and procedural issues).
the issuance of a friend request via a social-networking site constituted a “contact” in violation of a temporary restraining order. Thus, for family-law practitioners and criminal-defense attorneys who represent clients subject to no-contact orders, the duty of competency may require them to warn their clients of the potential dangers of social-networking sites.

There are other scenarios that would similarly require a basic understanding of social media. For example, the American Academy of Matrimonial Lawyers reports that 66 percent of divorce attorneys use Facebook as their primary source for online evidence. Based on this statistic, can a family-law practitioner be truly competent if he ignores social media and lacks even a basic understanding of what Facebook actually is?

Perhaps the competency standard is not yet this high. But, if the use of social media continues to increase as predicted, it may be possible that, soon, a basic awareness of social media will be necessary for the competent practice of law. And there is recent evidence that a movement in this direction may be closer than previously thought.

In September 2011, the ABA Commission on Ethics 20/20 (the “Commission”), issued its Initial Draft Proposals, outlining its recommended changes to the Model Rules relating to technology. The Commission proposed making the following addition to Comment 6 of Rule 1.1:

40. See People v. Fernino, 851 N.Y.S.2d 339 (N.Y. Crim. Ct. 2008). Similar contact has served as the basis for legal action, as well. For example, a woman in Tennessee was arrested for allegedly violating a legal order of protection that had been previously filed against her when she sent a Facebook “poke” to another woman. See Ki Mae Huessner, Tenn. Woman Arrested for Facebook ‘Poke’, ABC News (Oct. 12, 2009), at http://abcn.ws/yzcLrE. In July 2011, a convicted sex offender was arrested in North Carolina after allegedly sending a Facebook friend request to one of his victims. Sex Offender Arrested After Sending Facebook Friend Request to Victim, MyFox8.com (July 7, 2011), at http://bit.ly/A72QDM. And, in August 2010, a Florida man was arrested for allegedly violating a restraining order when he twice attempted to contact his ex-wife via Facebook. Amar Toor, Man Jailed After Sending Facebook Friend Request to Estranged Wife, Switched.com (Aug. 17, 2010), at http://aol.it/wBDTU2.

41. See In re Goldstein, 990 A.2d 404, 408 (Del. 2010) (finding that lawyer failed to “provide competent representation because he failed to discover or explain to his client” that the client’s conduct was unlawful).


43. The Commission was created by then ABA President Carolyn B. Lamm in 2009, with the stated purpose of conducting a “thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.” See http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html
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 technology, engage in continuing study and education . . . \(^{44}\)

The Commission explained that Comment 6 “already encompasses an obligation to remain aware of changes in technology that affect law practice,” but concluded that, by making express reference to technology, the Comment would offer “greater clarity regarding a lawyer’s obligations in this area and emphasize the importance of technology to modern law practice.”\(^{45}\) Thus, the Commission’s proposal is intended to emphasize the need to understand technology as a fundamental component of the duty of competency.

**B. The Duty of Diligence**

If the competency standard requires attorneys to be at least familiar with social media, the duty of diligence may require a more hands-on understanding of the specific social-media applications. Comment 1 to Rule 1.3 provides that a lawyer should act “with zeal in advocacy upon the client’s behalf.”\(^{46}\) If the diligent attorney must be zealous in pursuing a matter on his client’s behalf, it seems possible that more than familiarity may be required—actual use of social media may be necessary.

Take, for example, the divorce scenario discussed above. In this example, the duty of diligence as applied to social media may trigger several obligations. Initially, during the lawyer’s intake interview of the potential client, the duty of diligence may require him to ask her about her social-networking activities. Does she, for example, have a Facebook profile? If so, does it contain any disparaging comments about her spouse?

Best business practices, as well as the duty of diligence, may require the lawyer to at least view the potential client’s Facebook profile if she has one. Or, if the profile has been restricted with optional privacy settings, the duty of diligence may require the lawyer to send the client a friend request that, once accepted, will give the lawyer access to the client’s profile. The lawyer may be able to use Facebook to effectively screen clients—declining to represent any individual who is less than forthcoming with facts or who tells a story in person different than the one she tells online.\(^{47}\)


\(^{45}\) Id.

\(^{46}\) Del. Rules Prof’l Conduct R. 1.3, cmt. 1.

\(^{47}\) See Mann v. Dep’t of Family & Protective Servs., No. 01-08-01004, 2009 Tex. App. LEXIS 7326, at *4 (Tex. Ct. App. Sept. 17, 2009) (concluding that petitioner-mother had endangered her child based, in part, on photos from her MySpace profile, which showed her drinking; the mother was not of legal drinking age).
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The duty of diligence extends far beyond the initial intake interview. If more than half of divorce attorneys say that Facebook is their best source for online evidence, then failure to utilize the site as part of informal discovery may constitute a failure to perform due diligence. A divorce attorney who ignores Facebook and other social-networking sites as a source of possible evidence could be compared to a prosecutor who fails to conduct a criminal background check on a defendant’s key alibi witness.48 Both may be in violation of Rule 1.3.49

Once the lawyer confirms that the client’s profile does not contain any potentially harmful content and agrees to take on the representation, additional steps may be required to fulfill the duty of diligence. For example, does the duty of diligence require the lawyer to warn his client against posting potentially damaging content for the duration of the litigation? If it is assumed that the diligent opposing counsel is almost certain to search online for information about his adversary’s client, it seems to follow that the lawyer should advise his client not to post information or pictures that could negatively impact her case. And, taking the idea a step further, it could be argued that the duty of diligence also requires a lawyer to monitor the Internet for information that is potentially adverse to his client’s position throughout the course of the litigation.50

C. The Duty to Preserve Evidence

But the ethical quandaries do not stop there. Suppose the lawyer discovers that his client’s Facebook page does, in fact, contain several unsavory images or comments that would likely decrease the value of her claims. The lawyer’s reaction may be to instruct the client to

48. See generally Lawrence v. Armontrout, 900 F.2d 127, 129-30 (8th Cir. 1990) (“Trial counsel’s admitted failure to attempt to find and interview [potential alibi witnesses] falls short of the diligence that a reasonably competent attorney would exercise under similar circumstances.”).

49. See, e.g., Partee v. United Recovery Group, No. CV 09-9180, 2010 U.S. Dist. LEXIS 54025, at *6 (C.D. Cal. May 3, 2010) (granting motion to dismiss based, in part, on evidence submitted by the defendant from the plaintiff’s MySpace page, which stated that she worked in Utah, as evidence that she also lived in Utah); Zamecnik v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ., No. 07-C-1586, 2010 U.S. Dist. LEXIS 42748, at *17 (N.D. Ill. Apr. 29, 2010) (noting the number of persons joining a Facebook page as evidence); United States v. Gagnon, No. 10-52-B-W, 2010 U.S. Dist. LEXIS 40392, at *9 (D. Me. Apr. 23, 2010) (noting that the defendant’s son “as evidenced by the Facebook page submitted into evidence, apparently harbors considerable animus toward [a witness]”).

50. Such a scenario is not difficult to imagine. See, e.g., Vesna Jaksic, Litigation Clues Are Found on Facebook, NAT’l L.J., Oct. 15, 2007, at 1 (describing divorce case that was negatively impacted when it was revealed that petitioning husband had described himself as “single and looking” on his MySpace page). Similar outcomes have been reported in the custody context, as well. See, e.g., J.N. v. D.R., No. CN07-01654, 2008 Del. Fam. Ct. LEXIS 62, at *17 (Del. Fam. Jan. 29, 2008) (considering as evidence pictures introduced by father of mother with alcohol, which mother acknowledged, had been obtained from either her or her friend’s MySpace profile); In re T.T., 228 S.W.3d 312, 322-23 (Tex. App. 2007) (in case involving termination of parental rights, the court considered the father’s statement that he did not want children, posted on his MySpace profile).
remove the offensive or harmful content or, even, to delete her Facebook account. Rule 3.4(a), however, prohibits the lawyer from making this recommendation.

Rule 3.4(a) prohibits a lawyer from unlawfully altering or destroying evidence and from assisting others in doing so. Lawyers have an ethical duty to preserve electronically stored information, which includes social-networking profiles. In Delaware, an “affirmative duty to preserve evidence attaches upon the discovery of facts and circumstances that would lead to a conclusion that litigation is imminent or should otherwise be expected.” Thus, the duty to preserve evidence “may arise before any litigation has been commenced.”

Accordingly, a lawyer has an affirmative duty to ensure the preservation of a client’s social-network profile if the profile contains information or content relevant to the dispute. A lawyer who instructs a client to delete her social-networking account or to remove content from it is likely guilty of spoliation of evidence, which could result in significant sanctions. In Delaware, an adverse inference may be drawn if the court determines that a party acted “intentionally or recklessly in failing to preserve the evidence.”

This precise scenario came to life in a recent case in Virginia. In Lester v. Allied Concrete Company, the plaintiff, Isaiah Lester, filed a wrongful-death claim based on the death of his wife in a motor-vehicle accident. During discovery, the defendants sought the contents of Lester’s Facebook account and information related to a photograph, which Defendants’ counsel had obtained from Lester’s Facebook page. The photo showed Lester “clutching a beer can, wearing a T-shirt emblazoned with ‘I [heart] hot moms’ and in the company of other young

51. Del. Rules Prof’l Conduct R. 3.4(a) (“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.”).


56. Id.

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Plaintiff’s counsel, Matthew B. Murray, met with his paralegal, Marlina Smith, about the discovery request and asked how the defendants had obtained the picture. Smith said she thought the photo likely came from Facebook. When she later accessed Lester’s Facebook page, where, indeed, the photo could be viewed, Murray told Smith to tell Lester to “clean up” his Facebook profile because “we don’t want blowups of this stuff at trial.”

Smith emailed Lester, informing him that the photo was on his Facebook page and stating that there were “some other pics that should be deleted.” She emailed him again later that day, and exhorted Lester to “clean up” his Facebook page because “we do NOT want blow ups of other pics at trial.” Lester later deleted 16 photographs from his Facebook profile.

Defendants had requested production of “screen print copies on the day this request is signed of all pages from Isaiah Lester’s Facebook page.” Instead of providing the information requested, Murray had Lester deactivate his Facebook account the day before Murray signed and served responses to discovery, in which Murray responded to the Request for Production seeking Facebook screen-prints, “I do not have a Facebook page on the date this is signed.”

Following a trial, the jury found for the plaintiff and awarded $10,577,000 plus interest in damages. The defendants sought sanctions against Murray and Lester for the spoliation of Facebook evidence and the deceptive response to the discovery requests. The court agreed with the defendants’ arguments on these points and concluded that “[b]oth Lester and Murray must be held accountable for the spoliation.” The court ordered Murray and Lester to pay the defendants $542,000 and $180,000 respectively—a total of $722,000 in fees and expenses—as a result of their conduct relating to Lester’s Facebook profile.

As the Lester case makes clear, a lawyer may not advise (or assist) a client in deleting his Facebook or other social-networking account or any contents thereof for the purpose of avoiding their discovery. The better alternative is to have the client set her profile page as “private” using

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58. Id. at ¶ 30.
59. Id. at ¶ 33.
60. Id. at ¶ 34.
61. Id. at ¶ 48.
62. Id. at ¶ 36.
63. Id. at ¶ 38.
64. Id. at ¶ 13.
65. Id. at ¶ 100.
the various privacy settings provided by the application. The opposing party will not have direct access to the contents of her page but could request the evidence through formal discovery channels. That is, of course, if the opposing counsel is diligent.

D. The Duty to Supervise

The duties of competence and diligence extend beyond a lawyer’s own actions. Any lawyer with supervisory authority will be responsible for the unethical acts of the lawyers and nonlawyers he supervises. These duties are set forth in Rules 5.1 and 5.3.

1. Other Lawyers

Rule 5.1(a) requires a firm’s managing partners to make reasonable efforts to ensure that all lawyers comply with their ethical duties. Rule 5.1(b) requires a lawyer with supervisory duties to make reasonable efforts to ensure that any lawyer reporting to him similarly complies with all ethical duties. Thus, the duty to supervise, as set forth in Rule 5.1, requires more than a “do-no-harm” approach. A lawyer with supervisory responsibilities must take affirmative steps to ensure that the lawyers and nonlawyers below him in the reporting structure are aware of and in compliance with the rules of professional conduct to the same extent the lawyer himself must comply.

Rule 5.1(a) has one particularly notable result when applied in the context of social media. Specifically, Rule 5.1(a) seems to require that a law firm, through its managing partners, take affirmative steps to educate its lawyers about the ethical use of social media. Additionally, the rule may require that a law firm take the affirmative step of adopting and

67. See, e.g., Simply Storage Mgm’t, 2010 U.S. Dist. LEXIS 52766 (requiring claimants to produce their entire social-networking profiles in response to the defendant’s discovery request). See also Ledbetter v. Wal-Mart Stores, Inc., No. 06-1958, 2009 U.S. Dist. LEXIS 126859 (D. Colo. Apr. 21, 2009) (denying the plaintiff’s motion for a protective order with respect to discovery of information on her social-networking profiles marked as private); Mackelprang v. Fidelity Nat’l Title Agency of Nev., Inc., No. 06-00788-JCM-GWF, 2007 U.S. LEXIS 2379 (D. Nev. Jan. 9, 2007) (ordering the plaintiff to produce private Facebook messages if they related to her claims or damages); Beye v. Horizon Blue Cross Blue Shield, 568 F. Supp. 2d 556 (D.N.J. 2006) (ordering the plaintiffs to produce any writings that related to their eating disorders, including entries on Web sites, such as Facebook or MySpace).

68. Del. Rules Prof’l Conduct R. 5.1, 5.3.

69. Id. at 5.1(a).

70. Id. at 5.1(b).

71. Id. at 5.1(a).

72. Id.
implementing an effective policy or set of guidelines to address the use of social media by its lawyers.73

Comment 2 to the ABA Model Rule 5.1 supports this conclusion.74 The comment states that Rule 5.1(a) “requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules[].”75 Just as firms warn their lawyers about the latest fraud schemes being perpetrated via the Internet, so too should they educate their lawyers about the dangers of careless use of social media.

2. Nonlawyer Staff

Rule 5.3(b) holds a lawyer responsible for any unethical conduct of his nonlawyer staff.76 Therefore, just as Rule 5.1 requires a firm to educate its lawyers about social media, so, too, would Rule 5.3 require a lawyer to educate his nonlawyer staff.77 It may be difficult to imagine that lawyers have an ethical duty to provide social-media training to paraprofessional and administrative staff when so many lawyers have no knowledge in this area themselves. But this is no defense to a disciplinary action. So, it seems necessary for lawyers to get up to speed quickly, despite how daunting or unfamiliar social media may appear.

The Pennsylvania Ethics Committee addressed a lawyer’s ethical obligations in the context of a nonlawyer staff member’s use of social-networking sites for informal discovery.78 The committee concluded that it would be unethical for a lawyer to instruct (or permit) a non-attorney staff to send a friend request to a nonparty witness for the purpose of accessing information on the witness’s Facebook profile.79 Unless the staff member expressly disclosed his identity, his affiliation with the supervising attorney, and the purpose of his friend request, the staff member would be engaged in impermissible deception in violation of Rule 8.4.80

73. Id. at 5.3(b). See Steven C. Bennett, Ethics of Lawyer Social Networking, 73 ALB. L. REV. 113, 117 (2009). According to one survey, approximately 25 percent of Delaware law firms have a written social-media policy in place. Margaret M. DiBianca, By the Numbers: Tech. Use by Del. Lawyers, DEL. LAWYER, Winter 2009/2010, at 27.

74. Model Rules of Prof’l Conduct R. 5.1, cmt. 2.

75. Id.

76. Del. Rules Prof’l Conduct R. 5.3(b).

77. See id.


79. Id.
turn, pursuant to Rule 5.3, the supervising attorney would be responsible for the staff member’s conduct. 81

The committee’s opinion is in accord with Delaware requirements for nonlawyer staff’s contact with witnesses. 82 Delaware law requires that, when attempting to contact a witness, a lawyer’s agent properly disclose the purpose of his contact and his affiliation with the lawyer. 83 Failure to comply with the “Monsanto requirements” of an interview by a lawyer’s agent constitutes a violation of Rules 4.2 and 4.3 by the lawyer. 84 Thus, the committee’s opinion merely extends the Monsanto duty of disclosure into the virtual world.

In addition to Rules 4.2 and 4.3, the committee’s opinion implicates several other rules of professional conduct. For example, if the nonlawyer personnel had suggested the friend-request idea to the supervising attorney, Rule 1.1 seems to require that attorney have at least a basic understand the concept of before responding to the suggestion. 85 Further, Rule 1.3 seems to suggest that the diligent attorney would ask the nonparty witness about her social-networking use during her deposition and issue additional information via formal discovery requests where appropriate. 86 Finally, Rule 5.3 seems to require that the attorney take affirmative steps to educate his nonlawyer staff about the committee’s rulings and to ensure that they comply with the decision. 87

III. THE RISKS OF SOCIAL-MEDIA PARTICIPATION

A. Confidentiality-Related Risks

Preserving the confidentiality of attorney-client communications is at the very heart of our ethical duties, 88 yet, stories of breached confidences continue to make headlines. 89

80. Id.
81. Del. Rules Prof’l Conduct R. 5.3(b).
83. Id. at 1016.
84. Id.
85. See Del. Rules Prof’l Conduct R. 1.1
86. See id. at 1.3.
87. See In re Otlowski, 976 A.2d 172 (Del. 2009) (finding that the respondent violated Rule 5.3 by failing to have “reasonable safeguards in place” to prevent ethical violations and, by failing to “supervise his employee(s) generally with respect to compliance with the Rules”).
requires lawyers to maintain the confidentiality of information “relating to the representation of a client” unless the client authorizes the disclosure, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure would qualify for one of several exceptions. Comment 16 provides that lawyers “must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”

1. By Blog Post

There are numerous stories of confidentiality breaches by way of attorney blog post. This is not surprising; blogging is, after all, a form of storytelling. The narrative style of a blog makes it very easy for the unwary attorney to share too much.

One of the most widely publicized stories involving a lawyer’s disclosure of confidential client information via blog post is that of Kristine Ann Peshek. Peshek, a former Illinois assistant public defender, was charged with violating several ethical rules, including Rule 1.6, for information she posted on her blog. In her posts, she regularly referred to clients by first name,

89. See Debra Cassens Weiss, Ethics Officials Seeing More Cases from Lawyers’ Online Foibles, ABA J. (May 11, 2010), at http://www.abajournal.com/news/article/ethics_officials_seeing_more_cases_from_lawyers_online_foibles/.

90. Del. Rules Prof’l Conduct R. 1.6(a). Exceptions are set forth in Rule 1.6(b):

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services; (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services; (4) to secure legal advice about the lawyer’s compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or (6) to comply with other law or a court order.

91. Id. at cmt. 16.


nickname, or jail identification number, and described in detail the clients’ cases, personal lives, and drug use, among other private and potentially detrimental or embarrassing information.\(^{94}\) Although she made some meager attempts to cloak the identity of her clients, other information in the posts made the clients easily identifiable.\(^{95}\)

### 2. Via LinkedIn

Some might say that Ms. Peshek exercised poor judgment when she chose to write and publish such seemingly obvious confidential information about her clients. But what about confidentiality issues in other, nonnarrative forms of social media where disclosure seems more like an inadvertent oversight and less like a conscious decision? There are several scenarios wherein conduct far less offensive than Ms. Peshek’s could result in the inadvertent disclosure of confidential client information.

Take, for example, the social-networking site, LinkedIn, which is geared towards professionals, including attorneys.\(^{96}\) Users “connect” with other users, who are then added to each other’s “network.” Once connected, users can view all of the connections in each other’s networks. For example, if Lawyer X connects with Client A, Client A will be able to view all of the users in Lawyer X’s network. Thus, every connection in a user’s network will be able to view who is in the user’s online Rolodex, which could lead to the inadvertent disclosure of an attorney-client relationship.\(^{97}\) The same risk exists in the context of friend lists in a user’s Facebook profile.\(^{98}\)

Another, perhaps more likely scenario, involves requests for “recommendations” made via LinkedIn. Once connected, users can request that another user “recommend” them by writing a positive narrative, which then becomes part of the requestor’s profile. An attorney who makes a recommendation of a client’s employee risks violating Rule 1.6. Consider the following example.

Attorney Smith, an employment lawyer, receives a call from the Director of Human Resources at Company X, a long-time client of Smith’s firm. The Director seeks advice

\[^{94}\text{Id.}\]
\[^{95}\text{Id.}\]
\[^{96}\text{See http://www.LinkedIn.com; LinkedIn.com What Is LinkedIn?, at http://learn.linkedin.com/what-is-linkedin/ (describing the site as the “world’s largest professional network”); LinkedIn.com, User Guide for Attorneys, at http://learn.linkedin.com/attorneys/ (one of nine user guides in LinkedIn’s Learning Center).}\]
\[^{97}\text{See Del. Rules Prof’l Conduct R 1.6, cmt. 4 (prohibiting a lawyer from revealing information if there is a “reasonable likelihood that the listener will be able to ascertain the identity of the client”).}\]
\[^{98}\text{See Bennett, supra, note 73, at 119 (“Simply making a list of contacts public on a networking site, for example, could disclose a confidential relationship.”).}\]
regarding the Company’s desire to incorporate LinkedIn into its strategic recruiting initiative. Attorney Smith meets with the HR team about their initiative and is aware that, as part of the company’s strategy, the members of the team will attempt to obtain as many “recommendations” as possible, which will improve the company’s visibility on the website and, hopefully, improve their marketability with candidates.

A few weeks after the meeting, Attorney Smith receives a request for a recommendation from the Director. She agrees to provide the recommendation by clicking the link provided in the email. On the LinkedIn site, she is asked to select the context in which she is making the recommendation. The Director had indicated that he knew her in his capacity as HR Director of Company X, which he had selected from his list of “experiences” already contained in his LinkedIn profile. Now Smith must do the same.

If Smith were to select “Partner at Smith, Jones, Brown, LLP” as the context in which she knows the Director, would she not be disclosing the attorney-client relationship with Company X? Certainly she would. But would such a disclosure be in violation of Rule 1.6 in light of the fact that the Director is the one making the request? In other words, hasn’t the client consented to the disclosure of the relationship? No, the client has not consented to any such disclosure. The *client*, after all, is Company X—not the HR Director. Without consent from an appropriately authorized agent, Attorney Smith cannot make the recommendation without violating Rule 1.6.

3. Via Geotagging

A similar risk arises from social-networking applications that utilize geotagging. Geotagging “tags” information and pictures with GPS coordinates. Foursquare is a popular location-based, social-networking service that utilizes geotagging. As explained on its website, “Foursquare lets users ‘check in’ to a place when they’re there, tell friends where they are and track the history of where they’ve been and who they’ve been there with.”

Each time a user announces his location, he is awarded points. Businesses register with Foursquare and award promotional discounts and prizes to the users with the most visits. For

99. See Josh Blackman, Omniveillance, Google, Privacy In Public, & the Right to Your Digital Identity: A Tort for Recording & Disseminating an Individual’s Image Over the Internet, 49 SANTA CLARA L. REV. 313, 332 (2009) (describing the geotagging feature on the Apple iPhone 3G, which “automatically records the latitude and longitude coordinates where a photograph is taken”).


101. See http://foursquare.com/about.


example, a user can announce to his friends that he is currently at the local coffee shop by accessing the Foursquare application through his mobile phone.

Foursquare is not the only social-networking application that utilizes geotagging. Twitter users can include their location when they post a tweet using the “Tweet Your Location” feature. And Facebook announced Facebook Places in August 2010.

An example may illustrate the potential ethical issues arising from a lawyer’s use of location-based, social-media applications. Consider again the divorce attorney, who, coincidentally, is very successful and is well-known in the local community. He is contacted by a prominent politician, who tells him that she intends to file for divorce, which she expects will be a surprise to her spouse.

The lawyer agrees to meet with the politician to discuss her case. Because of her high-profile stature, she cautions the lawyer not to disclose their meeting, lest her plans be revealed. The lawyer suggests an out-of-the-way restaurant where they are not likely to be recognized. The meeting goes well and she retains the lawyer to represent her in the divorce.

On his walk back to his car, the lawyer tweets, “Had a great meeting with new client. Life is good.” The lawyer has just recently started to use Twitter as a business-development tool and already has several hundred followers. Because he has enabled the “Tweet Your Location” feature in his Twitter account, his update includes his exact coordinates at the time of his post.

As luck would have it, the waiter from the out-of-the-way restaurant takes a break after the lawyer and client leave and has logged into Twitter from his iPhone. The waiter, who makes it a point to follow local businesspeople, including the lawyer, on Twitter, sees the lawyer’s tweet about meeting with his “new client.” The tweet, which is geotagged, appears with an address one block away from the restaurant.

The waiter quickly figures out that the “new client” is the prominent politician, Mrs. Y, and posts to his several thousand Twitter followers: “Just waited on Lawyer X, who lunched with Mrs. Y—does this mean Mrs. Y is soon to be ex-Mrs. Y and back on the dating scene??” So much for not disclosing the attorney-client relationship.

104. For a detailed discussion of the ways in which geotagging and related technologies are being used, see Mark Burdon, Privacy Invasive Geo-Mashups: Privacy 2.0 & the Limits of First Generation Info. Privacy Laws, 2010 U. ILL. J.L. TECH. & POL’Y 1 (2010).

105. See Twitter Help Center, Twitter Places and How to Use Them, at http://support.twitter.com/groups/31-twitter-basics/topics/111-features/articles/194473-twitter-places-and-how-to-use-them.


107. See Twitter Help Center, About the Tweet Your Location Feature, at http://support.twitter.com/forums/10711/entries/78525-geotagging-on-twitter.
A word of caution to those readers who are quick to blame the lawyer in the example above—similar disclosures can occur without any action by the lawyer at all. Facebook Places enables users to “check in” to a location (i.e., the out-of-the-way restaurant). It also enables users to “tag” their friends and check them in, as well. So, in the example above, assume that the lawyer got a call from his son, a college student, during lunch. The son had come home for a surprise visit but had forgotten his key. The lawyer tells his son to stop by the restaurant and pick up the lawyer’s key.

The son is at the restaurant for just a moment but, being a devoted Facebook user, he “checks in” to the restaurant via Facebook Places, which he accesses via his mobile phone. He checks in his father, as well. All of the son’s Facebook friends now know where the lawyer had lunch, thereby reducing, if not eliminating, the secrecy the lawyer took great pains to ensure.

B. Litigation-Related Risks

1. Improper Trial Publicity

Rule 3.6(a) prohibits attorneys from making extrajudicial statements that have a “substantial risk of materially prejudicing a legal proceeding.”[^108] Rule 3.6(c) provides an exception to the prohibition against trial publicity by permitting an attorney to “protect a client from the substantial undue prejudicial effect of recent publicity” initiated by a third party.[^109] Thus, if a third party’s blog post or comment is adversely prejudicial to the lawyer’s client, the carve-out could allow the attorney to respond defensively with a rebuttal post or comment of his own—but only if a reasonable lawyer would believe that a mitigating response is required.[^110] Given the free market of ideas that the internet creates, it may be difficult to argue that a response by the lawyer is, in fact, “required.”

The story of Florida Assistant State Prosecutor Brandon White serves as an example of how a lawyer may violate the prohibition against trial publicity.[^111] At the end of a “trial from hell,” in which he was second chair for the State, White posted about the case on his Facebook page.[^112] His post was written as a parody of the theme song from [Gilligan’s Island](http://www.gilligansisland.org) and described his own performance during the trial as “totally awesome.”[^113]

[^108]: Del. Rules Prof’l Conduct R. 3.6(a).

[^109]: Id. at 3.6(c).

[^110]: See id. at 3.6(a) (prohibiting a lawyer from making an extrajudicial statement that the lawyer knows or reasonably knows “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter”).


[^112]: White’s co-prosecutor, Robyn Stone, commented on White’s Facebook update: “Hahahah – Brandon and I are in the trial from hell – it is just unbelievable – Brandon has been awesome
At the time White posted the update, the jury had completed deliberations but had not returned its verdict, so the risk that the post would “materially prejudice” the outcome of the case


113.    Id. The lyrical post in full:

Just sit right back and you'll hear a tale, a tale of a fateful trial,
That started from this court in St. Lucie County.
The lead prosecutor was a good woman, the 2nd chair was totally awesome,
Six jurors were ready for trial that day for a four hour trial, a four hour trial.

The trial started easy enough but then became rough.
The judge and jury confused,
If not for the courage of the fearless prosecutors,
The trial would be lost, the trial would be lost.

The trial started Tuesday, continued til Wednesday
And then Thursday, with Robyn and Brandon too,
The weasel face
The gang banger defendant
The Judge, clerk, and Ritzline
Here in St. Lucie.

So this is the tale of the trial
it’s going on here for a long, long time,
The prosecutors will have to make the best of things,
It's an uphill climb.

The New Guy and Robyn
Will do their very best,
To make sure justice is served
In the hornets nest.

No rules of evidence or professionalism,
Not a single ounce of integrity
Like My Cousin Vinny,
No ethics involved, no ethics involved.
was not significant. But, unless White actually knew that deliberations had concluded, his post would seem to violate the prohibition against trial publicity.

White’s boss, Chief Assistant State Attorney Tom Bakkedahl, was not troubled by the post, and described it as “harmless joking among family and friends who believed it would remain private.” Bakkedahl did emphasize that the conduct was not a behavior that his office would encourage and afforded a social-media “training moment” for lawyers in the state’s attorney’s office.

Rule 5.1 supports the need to educate other lawyers about the hasty nature of White’s post. But a paralegal could publish information about the case on his or her Facebook profile just as easily as a lawyer. Thus, Rule 5.3 suggests that the training should be extended to the office’s nonlawyer staff, as well.

The story of attorney Frank R. Wilson demonstrates that trial-publicity concerns are not limited to the parties’ lawyers. Wilson was impaneled on a jury in a criminal burglary trial. Despite the court’s instruction not to discuss the case in writing or orally, Wilson posted an entry on his blog that identified the crimes, the first name of the defendant, and the name of the judge, whom he described as “a stern, attentive woman with thin red hair and long, spidery fingers that


115. The judge in the case declared a mistrial for reasons unrelated to White’s post. See id.

116. Id.

117. Id.

118. See Douglas R. Richmond, Prof’l Responsibilities of Law Firm Assocs., 45 BRANDEIS L.J. 199, 204 (2007) (contending that firms should provide form in-house training for associates on professional-responsibility issues, particularly on “ethical problems that associates are likely to encounter”).


120. See In re Otlowski, 976 A.2d 172 (Del. 2009).


as a grandkid you probably wouldn’t want snapped at you.”123 As a result of his posts, the judgment was vacated and remanded for a new trial.124

Judges, too, have fallen prey to the lure of social media as a medium for discussing the matters pending before them.125 In Pennsylvania, for example, a special-education hearing officer who posted about the matters before her was removed from her position.126 And a criminal-court judge in New York was transferred allegedly in part because of his social-networking activities.127 He was reported to have updated his Facebook status while on the bench and to have posted a picture he took of his crowded courtroom.128

In one particularly troubling case, an Ohio common pleas judge was alleged to have posted more than eighty comments on a local newspaper’s website using a pseudonym.129 The pseudonym was created using the judge’s name and e-mail address and the comments were posted from a computer in the judge’s chambers.130 Many of the comments discussed cases that were being tried before her. And, many of the comments were about a high-profile murder trial

123. See CAL. B. J., (Aug. 2009), available at http://archive.calbar.ca.gov/%5CArchive.aspx?articleId=96182&categoryId=96044&month=8&year=009 #s10. His post also stated, “Nowhere do I recall the jury instructions mandating I can’t post comments in my blog about the trial. (Ha. Sorry, will do.) So, being careful to not prejudice the rights of the defendant — a stout, unhappy man by the first name of Donald . . ..” Id.

124. See Disciplinary Summary, supra, note 122.

125. DEL. JUDGES’ CODE OF JUDICIAL CONDUCT 2.10(a) (2008), Judicial Statements on Pending and Impending Cases, provides that a judge “should abstain from public comment on the merits of a pending or impending proceeding in any court” and, as stated in the comment to the rule, “particular care should be taken” where the public comment involves a case from the judge’s own court.


128. Id.


130. Id.
over which she was presiding. The Ohio Supreme Court removed her from the case after she refused to recuse herself.

2. Improper Ex Parte Communications

Rule 3.5 prohibits a lawyer from seeking to “influence a judge, juror, or prospective juror or other official” by unlawful means. The inferences that others may draw from online connections led the Florida Judicial Ethics Advisory Committee to issue an opinion banning state judges from becoming “friends” (as in “Facebook friend”), with lawyers who may appear before them. According to the Committee, by extending or accepting friend requests with lawyers, judges would be conveying or permitting others to convey the impression that the lawyer holds a position of special influence.

South Carolina, on the other hand, has taken an opposite position, permitting judges to participate in social networking and recognizing such participation as a way to promote the public’s understanding of the judiciary. New York takes a middle-of-the-road approach, giving judges the option to participate in social networks, provided the judge exercises “an appropriate degree of discretion” and stays current on the technology. And Kentucky permits judges to participate in online social networking but offers strong words of caution about the potential dangers of such participation.


133. Del. Rules Prof’l Conduct R. 3.5.


135. Id.


There are several stories that demonstrate the ethical issues relating to judges’ participation in social media. For example, a Texas judge reportedly requires every juvenile who appears before her to friend her on Facebook or MySpace. If the minor’s status updates reveal involvement in illegal activities, he is summoned to court for a compliance hearing. This “extra-courtroom monitoring” was lauded by some and questioned by others as possibly unconstitutional.

Although the judge has not been subjected to disciplinary charges for her unusual use of social media, other judges have faced serious consequences for their online activities. One North Carolina judge was issued a public reprimand for engaging in ex parte communications, through Facebook, with one of the attorneys in a case pending before him. And a superior court judge in Georgia resigned just days after his relationship with a woman who was a defendant in a case before him.

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141. Id.

142. See Miriam Rozen, Social Networks Help Judges Do Their Duty, TEX. LAWYER, Aug. 25, 2009, available at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202433293771 (reporting that the judge admitted that “a handful of defense lawyers have objected to her monitoring, . . . suggesting she is violating their right to free speech); Ky. Op., supra, note 138 (questioning whether a judge’s active monitoring of offenders under his jurisdiction via social-networking sites would be appropriate under the state’s judicial code of conduct and whether “such conduct raises separation of powers concerns”); see also In re Baker, 74 P.3d 1077 (Or. 2003) (censuring a judge who witnesses alleged probation violation, ordered the offender into court, and then presided over a probation-violation hearing).

143. In re: B. Carlton Terry, Jr., supra, note 32.
matter pending before his court became public. The relationship had developed and was documented via Facebook.

Another example involved a Florida judge, who was accused of having an inappropriate relationship with a prosecutor. According to the complaint filed by the Florida’s Judicial Qualifications Commission, the judge and lawyer exchanged an average of 9.35 communications per day over the course of approximately five months. At the time, the prosecutor was trying a capital-murder case before the judge. The defendant in the case, who had been found guilty and sentenced to death, was awarded a new trial in light of the allegations and the judge resigned prior to appearing before the state agency.

C. Integrity-Related Risks

1. Honesty

“Candor to any tribunal must be the hallmark of lawyer conduct.” The general prohibition against dishonesty is set forth in Rule 8.4, which instructs lawyers to avoid “dishonesty, fraud, deceit or misrepresentation” in all facets of their professional and personal lives. Similarly, Rule 4.1 prohibits the making of a “false statement of material fact or law” in the course of representing a client. And Rule 3.3 requires the exercise candor in the specific


145. Id.


147. Id.

148. Id.


152. Id. at 4.1.
context of litigation and related proceedings. Furthermore, Rule 4.1(b) prohibits a lawyer from knowingly “fail[ing] to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.”

New York personal injury attorney and popular blogger Eric Turkewitz executed an April Fool’s prank that has drawn fire from some ethics commentators. On April 1, 2010, he posted on his blog that he had accepted a position as the official White House blogger. His post spread quickly around the blogosphere, fooling several reporters, including the New York Times.

Not everyone appreciated the humor in his joke. Authors of the Ethics Alarm blog wrote that a “web hoax” by a lawyer constitutes misconduct, regardless of the day on which the hoax is performed. Turkewitz disagreed and argued that the hoax was not connected to his representation of a client. In a post responding to his critics, Turkewitz wrote, “if you make the April Fool's joke an ethical violation, then so too are misrepresentations surrounding surprise parties, Santa Claus and The Tooth Fairy.”

153. Id. at 3.3, cmt. 1 (explaining that the rule governs the conduct of a lawyer who is representing a client in the proceedings of an adjudicatory body, and all ancillary proceedings, such as depositions).

154. Id. at 4.1(b).


2. Civility

Civility is the Delaware standard. This standard is set forth in the Principles of Professionalism for Delaware Lawyers (the “Principles”), which are intended to “promote and foster the ideals of professional courtesy, conduct, and cooperation.” The Principles define professional civility as conduct that “shows respect not only for the courts and colleagues, but also for all people encountered in practice.” It requires “emotional self-control” and prohibits “scorn and superiority in words or demeanor.” Conduct by a lawyer that is “abusive, rude, or disrespectful” violates the duty of civility.

Although the duty of civility is emphasized in the Principles, it is, by no means, absent from the rules of professional conduct. For example, Rule 3.5(d) prohibits a lawyer from engaging in conduct “intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal.” And Comment 3 to Rule 8.2 encourages lawyers to “continue traditional efforts to defend judges and courts unjustly criticized,” thus suggesting an affirmative duty to act if others violate the decorum rule, as well as a duty to refrain from engaging in conduct that would itself constitute a violation.

Less-than-favorable commentary directed towards judges has been a common theme. For example, Kristine Ann Peshek was brought before the disciplinary commission not only for revealing confidential information about clients but also for making disrespectful comments about the judges before whom she frequently appeared, including describing one as “Judge Clueless.” Florida attorney Sean Conway was reprimanded for calling a judge an “evil, unfair witch” in a blog post, criticizing her practice of setting what he claimed to be unreasonably short time periods before trial.

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163. Id.


165. Id. at 8.2, cmt. 3. See also Id. at 8.2(a) (a lawyer “shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer”).

166. See In re Pesheck, supra, note 93.

Court on constitutional grounds, arguing that his comments were protected by the First Amendment.168

Social media also has been a forum for the unfortunate display of lawyers’ incivility towards their adversaries. For example, Assistant State Attorney White, of the Gilligan’s Island-themed blog post, referred to his opposing counsel as “weasel face.”169 Jay Kuo was working as a temporary prosecutor through a work-exchange program when he blogged about a case, calling his opposing counsel a “chicken” for requesting a continuance. After being alerted to the posts, the presiding judge described Kuo’s conduct as “juvenile, obnoxious and unprofessional.” The judge also noted that Kuo’s choice of a public medium for the publication of his commentary was likely reckless due to the possibility that a post will be “distributed uncontrollably.”170

3. Fairness

Rule 3.4(e) requires a lawyer to act with fairness to the opposing party and counsel in trial.171 Specifically, the rule prohibits the lawyer from alluding to any matter he does not “reasonably believe is relevant or that will not be supported by admissible evidence.”172 Rule 4.4(a) prohibits a lawyer from using “means that have no substantial purpose other than to embarrass, delay, or burden” in representing a client.173 Thus, a lawyer may be limited in how he uses what he finds as the result of an online investigation. In other words, just because information may be titillating does not mean that it is relevant to the case or ethical to use.

For example, imagine a worker’s-compensation claimant who alleges to have suffered an on-the-job back injury. He claims that his injury precludes him from enjoying his favorite hobby, deep-sea fishing. The lawyer for the defendant-insurer discovers a video on YouTube of the claimant at a deep-sea fishing competition, clearly as a participant, being interviewed at the start of the event. This evidence would certainly be relevant in the discovery context and one could imagine its purpose for impeachment as well.174


172. Id.

173. Id. at 4.4(a).

174. See Embry v. Indiana, 923 N.E.2d 1, 4-5 (Ind. Ct. App. 2010) (finding that prosecution’s use of witness’ MySpace profile as evidence of impeachment was proper).
But what if there was a second video of the same interview but posted on YouTube by a different user. The quality of the second video is quite poor and the sound is barely audible. But, at the end of the clip, the plaintiff is shown receiving a good-luck-kiss from a beautiful woman, who, it turns out, is not his wife. The lawyer shows both clips to the plaintiff at his deposition. He is clearly discomforted by the first video but becomes quite upset when he sees the second.

During pretrial preparations, the lawyer identifies the second video for inclusion as a trial exhibit. He chose the second video over the first because, despite its poor quality, he thinks it will give the plaintiff sufficient motivation to settle the case. Under these facts, the lawyer risks violating Rule 4.4(a) because the true purpose of using the video is to embarrass the plaintiff by exposing his extramarital affair.\(^{175}\)

**IV. CONCLUSION**

All lawyers should be cautious to comply with their ethical duties in the context of social media. Even those who do not participate in social media should be knowledgeable about the potential dangers that exist. The issues are many and complex and should be expected to change and develop with time. Until the duty of competence require actual knowledge of social media, ethical best practices suggest that we familiarize ourselves with the medium at least enough to consider the issues in an educated manner.

\(^{175}\) See Del. Rules Prof’l Conduct R. 4.4(a).
Chapter 2

Third-Party Discovery Challenges

Katherine Heekin
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IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF OREGON
PORTLAND DIVISION

IDYLWilde, Inc., an Oregon corporation, and Zach Mertens, an Oregon resident, Plaintiffs,

v.

UMPQUA Feather Merchants, LLC, a Colorado corporation, Mirabel, Inc., a Philippines corporation, Bien Tan, a Philippines resident, and Does 1 through 10, Inclusive,

Defendants.

Case No. 3:13-cv-02009-HZ

PLAINTIFFS’ MEMORANDUM OF LAW REGARDING DISCOVERABILITY OF TEXT MESSAGES

At issue before the court is whether or not text messages are discoverable under Fed. R. Civ. P. 45. This issue arose in the context of Defendant Umpqua’s Motion for a Protective Order regarding subpoenas that Plaintiffs issued to fly shops. (See Dkt. No. 103.) As explained in the Advisory Committee Notes to the Federal Rules of Civil Procedure and related federal case law, text messages are discoverable.

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PAGE 1 — PLAINTIFFS’ MEMORANDUM OF LAW REGARDING DISCOVERABILITY OF TEXT MESSAGES
I. Text Messages Constitute Electronically Stored Information and Are Therefore Discoverable

Fed. R. Civ. P. 45(a)(1)(C) states a party may include “[a] command to produce documents, electronically stored information, or tangible things or to permit inspection of premises” in a subpoena. *Id.* (Emphasis added). The 2006 Amendment to the Advisory Committee Note to Rule 45 states, “Rule 45(a)(1)(C) is amended to recognize that electronically stored information, as defined in Rule 34(a), can also be sought by subpoena.” *Id.* Rule 34(a)(1)(A) states, a party may request another party to produce and permit the requesting party to copy “any designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations – stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form[.]” *Id.* (Emphasis added.)

The 2006 Amendment to the Advisory Committee Note to Rule 34 states, “The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as an e-mail. The rule covers – either as documents or as electronically stored information – information ‘stored in any medium,’ to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to ‘electronically stored information’ should be understood to invoke this expansive approach. . . . More generally, the term used in Rule 34(a)(1) appears in a number of other amendments, such as ... [Rule] 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1).”

*Id.* Indisputably, text messages are an electronic communication, just like an e-mail. Thus, text messages are discoverable under Fed. R. Civ. P. 45. *See, e.g. Robinson v. Jones Lang Lasalle*
Chapter 2—Third-Party Discovery Challenges

_Americas, Inc., 2012 WL 3763545_ (D. Or. 2012) (granting in part and denying in part defendant’s motion to compel text messages and social media from plaintiff); _Flagg v. City of Detroit, 2008 WL 787061_ (E.D. Mich. Mar 20, 2008) (denying defendants’ motion to quash subpoenas to SkyTel for the production of text messages and establishing a protocol for review and production of text messages); see also, _City of Ontario v. Quon, 560 U.S. 746, 764_ (2012) (holding search of police officer text messages was reasonable because it was motivated by a legitimate work-related purpose and it was not excessive in scope).

Text messages are stored in cellphones and servers housed by phone companies. Attempting to subpoena the relevant text messages from the phone company rather than sending a document request or subpoena for the relevant text messages to the cellphone owner can cause problems under the Stored Communications Act, 18 U.S.C. § 2701 et seq, prohibiting a provider from disclosing a user’s content without the user’s consent. See, e.g., _Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892_ (9th Cir 2010), rev’d on other grounds, _City of Ontario v. Quon, 560 U.S. 746_ (holding Arch Wireless violated Stored Communications Act when it produced transcripts of text messages to the City, which was a subscriber, but not an addressee or intended recipient of the communications); see also, _Crispin v. Christian Audigier, Inc., 717 F.Supp.2d 965_ (C.D. Cal 2010) (addressing impact of Stored Communications Act on requests for subscriber information and communications from Facebook, Media Temple, Inc. and MySpace, Inc.)

The better practice is to do a request for production to or subpoena the records from the cellphone owner. For example, in _Flagg v. City of Detroit, 252 F.R.D. 346_ (E.D. Mich. 2008), the court rejected the argument that the Stored Communications Act wholly precludes the production in civil litigation of electronic communications stored by a non-party service provider. The court acknowledged under the Stored Communications Act a service provider can produce communications only with the “lawful consent of the originator or an addressee or
intended recipient of a text message. *Id.* at 358. Additionally, the court recognized that a party has to produce documents in its custody or control under Fed. R. Civ. P. 34. *Id.* at 352. Because the originator or recipient of a text message has the right to consent to disclosure of those communications by the service provider, the originator or recipient of the text message has control over those documents stored by the non-party service provider and thus must produce them in response to a discovery request. *Id.* at 354-55 and 363. As a result, the court directed the plaintiff to reformulate his third-party subpoena to the service provider as a Rule 34 request for production to the defendant, who was the originator and recipient of the text messages. *Id.* at 366.

In this case, plaintiffs subpoenaed the originator or recipients of text messages at the fly shops, not their service providers, avoiding any objections under the Stored Communications Act. Because the scope of a request for electronically stored information under Rule 45 is the same as for Rule 34, the court’s reasoning in Flagg applies to the subpoenas to the fly shops in this case as well.

II. **Plaintiffs Do Not Seek to Impose an Unreasonable Form of Production on the Fly Shops**

During the conference call regarding Defendant Umpqua’s Motion for a Protective Order, the court expressed concern about the mechanics of producing text messages. Plaintiffs recognize that a person responding to a subpoena does not have to produce “electronically stored information from sources that are not reasonably accessible because of undue burden or cost.” Fed. R. Civ. P. 45 (d)(1)(D). However, thus far, no fly shops have expressed any concerns about the burden or cost of producing relevant text messages during telephone calls between plaintiffs’ representatives and the fly shop personnel about plaintiffs’ subpoenas.

In fact, Defendant Umpqua did not provide any declarations from any fly shop owners complaining about the scope of the subpoenas or the cost of complying with them. Instead, a
paralegal from Defendant Umpqua’s lawyer’s office made assumptions. She declared, “Without knowing anything about each location, we will assume the following scope for the collection of hard copy documents . . . “ and “Without knowing anything about each location, we will assume the following scope for the collection of ESI . . . “ and then concluded that the cost to comply with the subpoenas would be $155,250 to $338,250. (Dkt No. 106, Armentrout Decl ¶¶ 9, 10, and 14.)

Under Rule 34(a)(1)(A), the electronically stored information “can be obtained either directly or, if necessary, after translation by the responding party into a reasonably useable form.” As explained already, the same approach to electronically stored information applies to Rule 45. To comply then, with a subpoena for text messages, the responding person can produce the cellphone that has the relevant text messages or use another method to provide the relevant text messages in a reasonably useable form.

Under Rule 45(a)(1)(C), “[a] subpoena may specify the form or forms in which electronically stored information is to be produced.” Id. (Emphasis added.) The person responding to the subpoena can object to the form and propose another reasonably useable form. Fed. R. Civ. P. 45(c)(2)(B) and (d)(1)(B). If the requesting party is not satisfied with that form, then the court can resolve the dispute by a motion to compel or for a protective order. Fed. R. Civ. P. 45(c)(2)(i).

There are several, relatively easy and inexpensive forms in which the fly shop owners can produce relevant text messages:

(1) Print text messages using screenshots as explained in Exhibit A.

(2) Hire a vendor to plug the cellphone into a device that extracts the text messages and then organizes them in a spreadsheet that the cellphone user can review to identify just the text messages that are relevant and then delete the ones that are not from the spreadsheet and produce those that are. The cost would be approximately $250/hour and would probably take no more than an hour for each fly shop owner, but not every fly shop will have responsive text messages.

(3) Connect the iPhone to their computer and then do a back-up using iTunes and then
print the text messages.

(4) Contact the phone service provider and request copies of the text messages.

The court should keep in mind that no fly shop owner has complained to plaintiffs yet about producing documents responsive to the subpoenas. If fly shop owners ask how to comply with the request for text messages, plaintiffs will work with the fly shop owners to identify the easiest and most inexpensive methods possible. Finally, as directed by the court, plaintiffs will tailor the subpoena requests more narrowly to the claims and defenses in the case.

Dated: April 4, 2014

HEEKEN MEDEIROS P.C.

By: /s/Katherine R. Heekin
   Katherine R. Heekin, OSB # 944802
   Attorney for Plaintiffs
ATTORNEY CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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Attorneys for Mirabel, Inc. and Bien Tan                                                                      Attorneys for Defendant Umpqua Feather Merchants, LLC

DATED this 4th day of April, 2014.

HEEKIN MEDEIROS P.C.

By: /s/Katherine R. Heekin
Katherine R. Heekin, OSB # 944802
Attorney for Plaintiffs
Chapter 2—Third-Party Discovery Challenges

How to Print Text Messages Off of Your iPhone

by Jeff Grady, Demand Media

Most text messages you receive on your iPhone are not so important that you'll want to keep them forever. Nevertheless, there are times when you receive important messages containing communications you want to keep safe or refer to later. While the iPhone saves your text messages, accidental deletion is possible. If you have important SMS messages you want to keep, printing them is a simple permanent solution.

Save a Screenshot

Unlike some native iPhone apps, Messages -- the SMS app -- does not support direct AirPrint printing. The Photos app does support AirPrint printing, and creating a screenshot of a text message and then opening it as an image is simple. Open the text message on the iPhone and then press and release the "Home" button and the "Sleep/Wake" button simultaneously. You'll hear a clicking sound indicating the phone saved the screenshot.

AirPrint the Screenshot

After saving the screenshot on your iPhone, you can print it to a nearby AirPrint-capable printer. If you haven't already done so, connect to the same wireless router that the AirPrint uses by first tapping "Settings" and then "Wi-Fi." Slide the "Wi-Fi" switch to the "On" position. Tap the applicable network and enter the key or password if necessary. Press "Home" to return to the main menu and then tap "Photos." Tap the screenshot image of the text message and then tap the "Share" icon. Select the "Print" button. Choose the AirPrint-capable printer and tap "Print." After a few seconds, the screenshot image prints to the printer.

Email Yourself

An uncomplicated way to print the contents of a text message is to email it to yourself. Open the SMS message that you want to print; tap and hold the message for a couple of seconds. Tap the "Copy" button to copy the message text to the clipboard. Open the "Mail" app on your iPhone, enter your email address in the "To" field and then tap inside the message body text box and tap the "Paste" button when it appears to paste the contents of the text message. Tap "Send," open the email on your desktop computer and print it out on your local printer. You should note, though, that the time and date information does not transfer when you copy and paste the SMS message in an email.

Export Messages

If you want to not only print some of your text messages but also to save texts to your computer, there are many Windows and Mac applications you can use to accomplish this. Programs such as Disk Aid, SMS Export and Tansee iPhone Transfer SMS all come in Mac and Windows versions that are relatively simple to install and use. To use these applications, you must have iTunes installed on the computer. After you download one of the SMS applications, open iTunes and connect your iPhone. Launch the SMS application on your computer and then select the "Backup," "Sync" or "Copy" button. Wait a few minutes for the application to import the SMS messages from the iPhone. Select the message you want to print and then select the "Print" or other similar option on the toolbar or menu bar.

Extract From iTunes Backup

If you don't want to purchase an app or application to view your messages on a computer, there is a way to access the messages directly from an iTunes backup of your iPhone on a PC. The method used to view and print a message from an iPhone backup is not particularly straightforward and requires a little more work than other methods, but it is practical if you don't have access to an AirPrint printer or want to avoid paying for a commercial application. To access the text messages you want to print, perform a backup of your iPhone in iTunes on your PC as you normally would. After completing the backup, open File Explorer by pressing "Windows-E" and then navigate to the "C:sourcesyousurnameAppDataRoamingApple ComputerMobileSyncBackup" folder. Locate the file in the folder with the ".mbackup" or ".mbackup" file extension, right-click it and click "Open with Notepad." Scroll down to the messages you want to print, highlight the message text and then print it out from Notepad.

References

- Apple Support: AirPrint Setup and Troubleshooting
- Digital Inspiration: Capture Screenshot of Your iPhone or iPad Screen
- CopyTrans: How to Print iPhone SMS Text Messages
- Ask Dave Taylor: Print Out Text Messages from My iPhone
- Transfer iPhone Recovery: How to Print iPhone SMS Text Messages
- iPhone to PC: How to Print SMS/Text Messages on a PC
- Lena Shore: How to Print Texts From an iPhone
- Computer Performance LTD: Windows 8 AppData Folder Location

Resources

- CopyTrans: Download CopyTrans Contacts
- Apple iTunes Store: SMS Export
- Disk Aid: Disk Aid
Preserving Text Messages for Use in Court

By J. Clifton Smith
In family law, parties frequently have to prove what information has been exchanged between two spouses. When the parties communicate via letter or e-mail, it is easy to produce reliable evidence: just photocopy the letter or print the e-mail message. Text messages, however, are not quite so easy. It is not practical to physically take a cell phone into court, and it is certainly not possible to send a cell phone to an adverse attorney during discovery. Given the wild popularity of text messaging in recent years—in 2011, more than 6 billion text messages were sent per day in the U.S. alone—odds are good that if you go through a divorce, you will need to preserve a text message to show a judge or attorney.

There are several ways to document a text message thread for use in court, though none of them is a perfect solution. The simplest method is to take one or more screenshots of the text message thread. On an iPhone, press the home button and the lock button on your phone at the same time. If you have done so correctly, the screen will flash white briefly. For Android phones, the easiest way to take a screenshot varies from phone to phone. For example, the Samsung Galaxy S3 and S4 can be configured so that you can swipe the edge of your hand (in a karate-chop gesture) across the screen from left to right. Search the web for information specific to your phone model if you use an Android device. Whichever platform you use, the screen shot will appear in your phone’s photo gallery, and you can then distribute it as an e-mail attachment just like any other photo.

The drawback of using screenshots is that if you need to document a long exchange of messages, it may take quite a few screenshots to capture everything. For longer text message threads, there are several options for iPhones and Android phones.

**iPhone**

- Several companies sell software packages that manage the music, photos, videos and apps on an iPhone that also back up and save your text messages, voicemails and call history. Two examples are iExplorer and DiskAid. Each one will let you export the text messages you have exchanged with one person and save them as a text file, CSV file (a tabular format that can be read by spreadsheet programs such as Microsoft Excel) or a PDF file. At $35.50 and $29.90 respectively, they are not cheap, but they are probably some of the more user-friendly solutions available.

- There are a few apps on the iTunes App Store that will help you export your text messages. One example is SMS Export ($5.99), which will also export your text messages into various file formats. This app may be a bit more confusing to set up—it requires you to download the app through iTunes and then download another file through your web browser and install it on your computer—but it is relatively straightforward to use.

- Finally, there is a way to extract your text message history from the backups that iTunes regularly makes of all your iPhone’s contents. The website [http://www.iPhone-sms.com](http://www.iPhone-sms.com) will let you upload one of these backup files and export your text messages to an easily viewable format. There is no charge for using this service, but it takes a little bit of tech-savvy to find the correct backup file on your computer. This service also does not let you see your text messages exchanged with just one contact. You will need to open the list of text messages in a spreadsheet program to pare the file down so it contains only your texts with one particular contact.

**Android**

- **SMS to Text Pro** is an app available for $1.29 from the Google Play store. It will allow you to export messages.
your texts from one or more contacts and filter them by date, then export the resulting list to one of several file formats. The exported file can be saved to your phone’s SD card or sent as an e-mail attachment, either to yourself or to someone else.

- **SMS to Text** is the free version of the SMS to Text Pro app described above. The free version’s only limitation is that it will not let you send the exported file as an e-mail attachment. To access the file, you will need to use a USB cable to connect the phone to your computer and use your computer to find the file on your phone’s SD card.

- Another free app called **SMSBackup** will back up your text messages as individual e-mail messages and store them in your Gmail account. You can then log into your Gmail account through a web browser and use Gmail’s flexible search and filter features to find the messages you want and print them out.

**It is important when going through family law litigation that you discuss with your attorney the best method for you to preserve your text messages if they are important to your case.**

*Posted by Attorney J. Clifton Smith. Smith is a litigator who assists in representing individuals and corporations in civil litigation primarily related to public pensions, business law, securities, trusts, entertainment law, and intellectual property.*

Comments are closed.
How to Print Text Messages Off of Your Galaxy S III

by Danielle Fernandez, Demand Media

While there is no native way to print the text messages from your Samsung Galaxy S III, a number of workarounds exist. The Backup Message & Call to Email app, for example, transfers your SMS and MMS messages to Gmail, where you can then print them. The PrinterShare Mobile Print app, on the other hand, faciliates Wi-Fi printing from your Galaxy S III device -- and its paid version allows unlimited printing.

For a computer-based solution instead of a third-party app installed on your phone, synchronize with the Android SMS + MMS Transfer software and then use its "Print SMS and MMS" command.

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Print Texts After Backing Up to Gmail

Step 1
Install and launch the free "Backup Message & Call to Email" app. Tap "Go" and then tap "Accounts."

Step 2
Tap your Gmail address -- the app will automatically list any Gmail addresses linked on your phone -- and then tap "Allow" to grant the app's access to your Google account.

Step 3
Chapter 2—Third-Party Discovery Challenges

Press the "Back" button and tap to place a check next to the data you wish to back up. In addition to your SMS and MMS, you can also back up your call log.

**Step 4**
Tap "Back Up" and allow the sync to process. This can take several minutes depending on the number of messages and attachments stored in your SMS and MMS.

**Step 5**
Log in to your Gmail account using your computer's browser.

**Step 6**
Select the "Message" folder on the left side of your Gmail account -- you may need to hover over the list to expand it if you have several folders listed.

**Step 7**
Click on one of the conversations to open it, and click the printer icon at the top right. Gmail will automatically open a new window containing a print-ready copy of the messages and then will prompt you to send it to print.

**Print Directly from an Android Device**

**Step 1**
Install the PrinterShare software to your computer -- available for both PC and Mac (link in Resources). During installation, you will be prompted to select which printer you would like to make available to your Samsung Galaxy S III.

**Step 2**
Install and launch the PrinterShare app from the Google Play Store. Select "Messages" to command the app to print SMS and MMS.

**Step 3**
Navigate to the specific messages when PrinterShare prompts you to locate the item you wish to print. Once you have found the appropriate selection, tap "Print."

**Print Texts Using the Backuptrans Android SMS + MMS Transfer Software**

**Step 1**
Install and launch the Backuptrans Android SMS + MMS Transfer software on your computer (link in Resources).

**Step 2**
Connect your Samsung Galaxy S III to the computer using a USB cable. The software will read your Android's text messages and display them in its preview window.

**Step 3**
Right-click on your device's name in the left navigational menu and select "Print SMS + MMS." Alternately, you can right-click on a single message on the right or a contact's name on the left and select "Print SMS + MMS" to print only specific messages.

**Step 4**
Select either the "Standard" printing style, which displays only the text data, or the "Conversation" printing style, which displays conversations in bubbles.

**Step 5**
Preview your text output and then click the printer icon at the top right to finalize printing.

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[TripCurator](http://TripCurator)

Explore Toronto's Best Tastes and Tonics
[Expedia Viewfinder](http://Expedia Viewfinder)
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Tip

The free version of the PrinterShare app allows you to print up to 20 pages for free. The paid version allows unlimited printing.

Warning

Information in this article applies to the Samsung Galaxy S III device or any device running Android OS 2.2 or higher. It may vary slightly or significantly with other versions or products.

References

Tech Republic: Backup Your Android SMS, MMS, and Phone Logs to Gmail(http://www.techrepublic.com/blog/smartphones/backup-your-android-sms-mms-and-phone-logs-to-gmail/5920)

Tech Hive: How to Print from an Android Phone(http://www.techhive.com/article/212203/how_to_print_from_android.html)


Resources

Google Play Store: Backup Message & Call to Email(https://play.google.com/store/apps/details?
About the Author

Danielle Fernandez has spent more than 15 years working as a writer, editor and illustrator of all things lifestyle, education and technology. She holds a bachelor’s degree in English from the University of South Florida and is a self-proclaimed techie geek to the core.

Photo Credits

George Doyle/Stockbyte/Getty Images
Dear Katie Connor,

I am writing in regard to the results of Nye Everett and Polk’s Motion for Protective Order and request for an emergency hearing.

United States District Judge Richard Gearheart granted Frobisher International’s request for an emergency hearing and it was held Tuesday morning.

During the hearing, Judge Gearheart ruled in Frobisher International’s favor by quashing all the subpoenas recently issued by Ellen Parsons, at Hewes and Associates on behalf of George Moore. Attached is Judge Gearheart’s ruling. While Ms. Parsons has the right to reissue the subpoenas, provided they are more narrowly tailored, you are not required to respond to existing subpoenas.

Additionally, since oftentimes considerable expense can be accrued for nonparties while complying with subpoenas, Frobisher International requested the court to require a $15,000 bond per subpoena to help offset your potential cost. Unfortunately, Judge Gearheart did not rule in our favor on this issue. However, it is apparent from court records that one shop was promised reimbursement from Ms. Parsons so keep that in mind if you get additional subpoenas.

Lastly, it was apparent from Ms. Parson’s statements to the court that the restaurants agreed to comply with the subpoenas via their phone conversation with her office. (See attached court transcript) If I have learned anything from this mess, it is when dealing with legal issues and attorneys, it is irresponsible and extremely risky not to have a legal expert of your own, who represents your best interests. I strongly recommend that if you receive additional inquiries regarding this or any other legal issue, consult your attorney so that you are aware of your rights, especially prior to waiving them either intentionally or unintentionally. Most everyone hates paying attorney fees, but a couple of hundred dollars for a consultation is a small price to pay versus getting wrapped up in a lengthy legal battle.

It is unfortunate that George Moore has gone to the ridiculous measures of unnecessarily involving you in his lawsuit. Hopefully this will provide you with some temporary relief. I encourage you not to waive your rights via phone calls without consulting your legal counsel.

Best Regards,

Arthur Frobisher  
President & CEO  
Frobisher International
2013 ORS § 9.460¹
Duties of attorneys

An attorney shall:

(1) Support the Constitution and laws of the United States and of this state;

(2) Employ, for the purpose of maintaining the causes confided to the attorney, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of law or fact;

(3) Maintain the confidences and secrets of the attorney’s clients consistent with the rules of professional conduct established pursuant to ORS 9.490 (Formulation of rules of professional conduct); and

(4) Never reject, for any personal consideration, the cause of the defenseless or the oppressed. [Amended by 1989 c.1052 §9; 1991 c.726 §5]

• • •

Notes of Decisions

Attorney-client privilege is not meant to protect discussion of future crime or fraud designed to conceal past wrongdoing even if the crime could not be prevented by disclosure. State v. Phelps, 24 Or App 329, 545 P2d 901 (1976)

Where attorneys delay in handling probate of estate was inexcusable, and such delay was compounded by misrepresentations to the court, attorney was suspended from practice of law for period of thirty days. In re Hedges, 280 Or 155, 570 P2d 73 (1977)

Where attorney who was indicted for wilfully failing to file timely income tax returns pleaded guilty to one charge and remaining charges were dismissed, his failure to file returns violated duty to uphold laws of United States as required by this section. In re DesBrisay, 288 Or 625, 606 P2d 1148 (1980)

Where attorney for guardian petitioned for permission to use proceeds of guardianship estate to purchase real estate interests for benefit of wards and deliberately failed to advise court that property being purchased was then owned by conservator, attorney was in violation of this section. In re Greene, 290 Or 291, 620 P2d 1379 (1980)
Intentional violation of prohibition against misleading court or jury by artifice or false statement did not create private cause of action for damage to reputation or attorney fees. Bob Godfrey Pontiac v. Roloff, 291 Or 318, 630 P2d 840 (1981)

Attorney violated this section where, in representing creditor whose debt was due upon sale of land, attorney wilfully concealed from court that sale was pro forma. In re Hiller, 298 Or 526, 694 P2d 540 (1984)

Where untruthfulness of lawyer cannot be said to have arisen for purpose of maintaining clients cause, this section does not come into play. In re Willer, 303 Or 241, 735 P2d 544 (1987)

Where attorney, who represented client in guardianship proceedings misled probate court by preparing and submitting to court document he knew to contain false statements, attorney violated this section. In re Hawkins, 305 Or 319, 751 P2d 780 (1988)

Attorneys violation of duty to exercise reasonable care in preserving client secrets is not grounds for suppressing evidence. State v. Charlesworth/Parks, 151 Or App 100, 951 P2d 153 (1997), Sup Ct review denied

Offense for purposes of ORS 9.527 (Grounds for disbarment, suspension or reprimand) that is misdemeanor involving moral turpitude or felony cannot also be willful violation of provision requiring that attorney support laws of state. In re Allen, 326 Or 107, 949 P2d 710 (1997)

Atty. Gen. Opinions

Private attorneys liability in performing duty of reporting child abuse, (1978) Vol 38, p 2039

Law Review Citations

74 OLR 665 (1995)

Related Statutes³

- 9.527
  Grounds for disbarment, suspension or reprimand

- 9.565
  Tax return information from Department of Revenue


3 OregonLaws.org assembles these lists by analyzing references between Sections. Each listed item refers back to the current Section in its own text. The result reveals relationships in the code that may not have otherwise been apparent.
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact when disclosure is necessary to avoid assisting an illegal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Adopted 01/01/05

 Defined Terms (see Rule 1.0):

“Fraudulent”
“Knowingly”

Comparison to Oregon Code
This rule has no direct counterpart in Oregon, but it expresses prohibitions found in DR 1-102(A)(3), DR 7-102(A)(5) and DR 1-102(A)(7).

Comparison to ABA Model Rule
This is the ABA Model Rule, except that MR 4.1(b) refers to “criminal” rather than “illegal” conduct.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client or the lawyer’s own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;

(b) the lawyer is authorized by law or by court order to do so; or

(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person’s lawyer.

Adopted 01/01/05

 Defined Terms (see Rule 1.0):

“Knows”
“Written”

Comparison to Oregon Code
This rule retains the language of DR 7-104(A), except that the phrase “or on directly related subjects” has been deleted. The application of the rule to a lawyer acting in the lawyer’s own interests has been moved to the beginning of the rule.

Comparison to ABA Model Rule
This rule is similar to the ABA Model Rule, except that the Model Rule does not apply to a lawyer acting in the lawyer’s own interest. The Model Rule also makes no exception for communication required by a written agreement.

RULE 4.3 DEALING WITH UNREPRESENTED PERSONS

In dealing on behalf of a client or the lawyer’s own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client or the lawyer’s own interests.

Adopted 01/01/05

 Defined Terms (see Rule 1.0):

“Knows”
“Matter”
“Reasonable”
“Reasonably should know”

Comparison to Oregon Code
This rule replaces DR 7-104(B). It is expanded to parallel Rule 4.2 by applying to situations in which the lawyer is representing the lawyer’s own interests. The rule is broader than DR 7-104(B) in that it specifically prohibits a lawyer from stating or implying that the lawyer is disinterested. It also imposes an affirmative requirement on the lawyer to correct any misunderstanding an unrepresented person may have about the lawyer’s role. The rule continues the prohibition against giving legal advice to an unrepresented person.

Comparison to ABA Model Rule
This is essentially identical to the ABA Model Rule, with the addition “or the lawyers own interests” at the beginning and end to make it clear that the rule applies even when the lawyer is not acting on behalf of a client.

RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS

(a) In representing a client or the lawyer’s own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Adopted 01/01/05

 Amended 12/01/06:
Paragraph (a) amended to make applicable to a lawyer acting in the lawyer’s own interests.

Amended 01/01/14:
Paragraph (b) amended to expand scope to electronically stored information.
Chapter 2—Third-Party Discovery Challenges

**Defined Terms (see Rule 1.0):**

“Knowingly”
“Knows”
“Reasonably should know”
“Substantial”

*Comparison to Oregon Code*

This rule had no equivalent in the Oregon Code, although paragraph (a) incorporates aspects of OR 7-102(A)(1).

*Comparison to ABA Model Rule*

This is essentially the ABA Model Rule, except that the MR does not include the prohibition against “harassment” nor does it contain the modifier “knowingly” at the end of paragraph (a) which makes it clear that a lawyer is not responsible for inadvertently violating the legal rights of another person in the course of obtaining evidence.
RULE 8.4 MISCONDUCT

(a) It is professional misconduct for a lawyer to:

(1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(2) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law;

(4) engage in conduct that is prejudicial to the administration of justice; or

(5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law, or

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer’s conduct is otherwise in compliance with these Rules of Professional Conduct.

"Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

Adopted 01/01/05
Amended 12/01/06:

Paragraph (a)(5) added.

Defined Terms (see Rule 1.0):

“Believes”
“Fraud”
“Knowingly”
“Reasonable”

Comparison to Oregon Code
This rule is essentially the same as DR 1-102(A).
Paragraph (b) retains DR 1-102(D).

Comparison to ABA Model Rule
Paragraphs (a)(1) through (6) are the same as Model Rule 8.4(a) through (f), except that MR 8.4(a) also prohibits attempts to violate the rules.
Paragraph (b) has no counterpart in the Model Rules.
Chapter 3

Don’t Be That Guy: Real-Life Lessons for Attorneys When Using Social Media

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1Submission to the Oregon State Bar Bulletin December 2014 issue.
Don’t Be That Guy: Real Life Lessons for Lawyers Using Social Media

This is about things you should not say in social media and electronic communications.

My first brush with social media going awry was just after I joined Facebook. A friend of a friend posted that she was looking forward to an upcoming Coldplay show. Amidst the shower of “aww-jealous” and “congrats” reply posts, I quoted *Knocked Up*. It’s the scene where Seth Rogen and Paul Rudd are dudes playing a video game while trash-talking, each trying to top the other’s “You know how I know you’re gay?” The best retort was simple, elegant, devastating: “You know how I know you’re gay? *How*? You like Coldplay.” I posted that. Apparently, she had not seen the movie. What I intended as mirthful comedic homage was instead interpreted as homophobic Internet trolling. I apologized profusely and explained the movie reference. (“No harm meant. Just a fan of Judd Apatow. Love the gays!”) Thankfully, others confirmed my story, someone helpfully posted a link to the scene, and everyone saw it was all just a big misunderstanding. Not all stories end so well.

[http://www.youtube.com/watch?v=-9uBvoYLvYE](http://www.youtube.com/watch?v=-9uBvoYLvYE) (Warning: explicit language)

One of the early, epic social media self-immolations wasn’t social media per se, but an email that went viral before going viral was a thing. In 2001, financial associate Peter Chung left Merrill Lynch to work in Seoul for the Carlyle Group. He sent an email to his Merrill buddies crassly and bro-daciously bragging about his lux life and female conquests (“CHUNG is going to *expletive* every hot chick in Korea over the next 2 years [5 down, 1,000,000,000 to go]*”).¹ His Merrill buddies proved unsurprisingly indiscreet, and the email—work email, mind you—went global, eventually boomeranging back to Chung’s superiors. He, of course, was fired. But Chung achieved something greater, the rare, lasting grace of Internet infamy, ascending to the realm of lore and myth. Snopes.com, the urban legend website, actually features an entry (“Chung King”) where they verify the story’s truth. And Chung is also forever immortalized in *Time* magazine’s Top 10 Regrettable Emails, *Cracked.com*’s 6 Most Disastrous Uses of Email Ever, and *Gawker*’s Douchebag Hall of Fame.


Anything you put on the Internet, presume two things: It will be public. It will be permanent. You can probably add a third presumption: the results will be unpredictable.

Adria Richards illustrates this third presumption. Richards was a tech blogger who attended a Silicon Valley computer programming conference in 2013. The industry was already wrestling with gender equality and male culture concerns, especially after the publication of Facebook COO Sheryl Sandberg’s book *Lean In*. Richards, a woman in an overwhelmingly male room, grew annoyed with two men seated behind her making crass jokes about “big dongles” (a dongle is a hardware that attaches to a computer) and other Beavis-and-Butt-Head-level sexist remarks. Richards took a photo of the men, and tweeted about them. The conference organizers met with Richards and the men, and eventually their employers got involved. The result was that two people were fired. But not the two men. Only one of them. The other person fired was Adria Richards. Richards’s employer stated, “Her decision to tweet the comments and photographs of

¹ This is undoubtedly exaggeration. The Korean population was only 48 million in 2001.
the people who made the comments crossed the line. Publicly shaming the offenders—and the bystanders—was not the appropriate way to handle the situation."

https://twitter.com/adriarichards/status/313417655879102464

Perhaps a more exasperating and inexplicable social media reaction is to Rhonda Lee, a meteorologist at a Louisiana ABC news affiliate. On the TV station’s Facebook page, a viewer posted a rather tone-deaf and arguably ignorant comment regarding Lee’s short Afro hair style. While positive in calling “the black lady that does the news” a “very nice lady,” the viewer opined that “she needs to wear a wig or grow some more hair. I’m not sure if she is a cancer patient. But its still not something myself that I think looks good on tv.”

Ms. Lee posted a reply to the viewer:

“I am very proud of my African-American ancestry which includes my hair... I’m very proud of who I am and the standard of beauty I display. Women come in all shapes, sizes, nationalities, and levels of beauty. Showing little girls that being comfortable in the skin and HAIR God gave me is my contribution to society... Conforming to one standard isn’t what being American is about and I hope you can embrace that.”

Pretty good response, huh? It shows restraint, class, and respect, and Lee used the social media platform for a positive teaching moment. The viewer himself apologized to Lee and the station for his original comment. And Lee was immediately fired by the station.

In the uproar that ensued, the station claimed that they terminated Lee for violating its social media policy, a policy that, at the time, was unwritten or otherwise nonexistent in any concrete form. For good measure (and perhaps to stave off the cries of racism and sexism) they fired a white male for violating the unwritten policy. But hey, their Facebook account, their rules, right? That’s what happens when you “misuse” your employer’s stuff. Lee now works in Colorado for WeatherNation TV, where they presumably have a clear, stated social media policy. Her Afro remains short and beautiful.


At OSB’s Opportunity for Law In Oregon program, we teach the following lessons in social media to entering law students. We use three government lawyers engaging in three differing levels of personal and professional social and communications media to show the hazy, diminishing space between professional and private lives.

Case Study #1 is Kwame Kilpatrick. He was a lawyer, and the mayor of Detroit in 2002. Kilpatrick had an affair with his chief of staff, Christine Beatty. The police learned of the affair; Kilpatrick’s reaction was to fire them. In the ensuing retaliatory termination lawsuit, Kilpatrick denied in sworn deposition testimony both the affair and that its discovery was the impetus for the firings. The litigation, and a freedom of information action by the Detroit Free Press, yielded text messages between Kilpatrick and Beatty on their government Blackberries. (Remember those?) A barrage of sexually explicit messages convincingly evidenced the affair, and other
messages, the retaliatory firings. Subtle stuff, like: “I’m sorry we are going through this mess because of a decision we made to fire [Deputy Police Chief] Gary Brown.” The communications also thus revealed Kilpatrick’s perjury, for which he was prosecuted.

So the takeaway here is: If you’re having an affair with your subordinate, when the cops discover your affair and you fire them in retaliation to cover up your indiscretion, in the inevitable unlawful termination litigation, if you documented this behavior in incriminating text messages using government-issued equipment, don’t lie about it under oath. That’s just baseline.

The coda to this fall from grace ends with Kilpatrick later, for actions unrelated to the affair, sentenced to 28 years in prison after being found guilty of conspiracy, fraud, extortion, and tax crimes for years of schemes to shake down contractors and reward his cronies. Some of the most damning evidence against Kilpatrick came from a familiar source: his own text messages.


Case study #2 is Andrew Shirvell, a former Michigan Assistant Attorney General. For some reason, he developed a bizarre obsession with the student body president of his alma mater, Michigan State, who is gay. Shirvell crusaded an escalating homophobic one-man campaign to have the SBA president impeached. His blog and Facebook attacks grew increasingly extreme, decrying the student’s “radical homosexual agenda,” calling him a “gay Nazi,” and expressing other similar sentiments. Shirvell grew stalker-esque, following the student around, appearing at the student’s house late at night, calling Nancy Pelosi’s office (where the student was interning) to try to have him fired. Shirvell caught the attention of national media, and unwisely agreed to interviews. He endured CNN anchor Anderson Cooper’s scathing questioning, and Comedy Central’s withering derision. At first, Michigan’s Attorney General supported—not Shirvell himself, whose views the AG publicly denounced, but—Shirvell’s First Amendment right to express his idiocy. Investigation into Shirvell’s tactics revealed he was acting during work hours (e.g., calling Pelosi’s office during office hours from work) and that he deceived Michigan DOJ investigators. Shirvell was fired.

The coda to Shirvell’s fall came after the student body president sued Shirvell for defamation, stalking and invasion of privacy. He offered to drop the lawsuit if Shirvell just apologized. Shirvell did not. Shirvell represented himself at the trial. The student body president won $4.5 million in damages.


Case study #3 is brief. Jeff Cox was a respected Indiana Deputy Attorney General. In 2001, Cox took an interest in government union protests in neighboring Wisconsin. Riot police were eventually called in, and Mother Jones magazine tweeted about that development. Jeff Cox tweeted back: “USE LIVE AMMO.” Harsh. Witty (in a trolling sort of way). Fatal. Mother Jones’s investigation into Cox’s blog, and inquiries to the AG’s Office, revealed other incendiary posts, but it was the live ammo tweet that undid him. In three words, while using his personal account on personal time, Cox destroyed a career of doing well and doing good. In firing Cox, his AG stated, “Individuals have the First Amendment right to post their own personal views in online forums on their own time, but as public servants, state employees also should strive to
conduct themselves with professionalism and appropriate decorum in their interactions with the public." Apparently, advocating violence against peaceful protests is frowned upon in public servants. At least in Indiana.


So be aware. In the good old days, we could say something stupid, correct the error with an apology, and often suffer only the consequences of morning-after embarrassment and lesson learned. The concept of privacy on the Internet—its oxymoronic—is largely gone. The sun never sets on the social media empire. Continuing in Internet eternity are your misinterpreted jokes and slurs, braggadocio and bravado, good intentions backfiring, “private” messages, overzealous ire, political overreach, dumb posts, drunken comments, terrible Tweets. They beat on, borne back ceaselessly into the past, to haunt our future selves.
Chapter 4

Social Networking: Litigation Tips and Strategies—Presentation Slides

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Social Networking: Litigation Tips and Strategies

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December 12, 2014

Overview

• Social networking
  – In Discovery
  – In Trial
  – In Your Practice
**In Discovery - Requests for Production**

- You can ask for an individual’s Facebook, Twitter, and Google+ feeds just like you can ask for their journal or diary.
  - Jurisdictions differ on scope of relevance and probative value
  - Oregon seems to allow generous discovery of social networking data

**In Discovery**

- Photos of an individual from that individual’s friends’ pages are likely not within their possession or control.
- Warn your client not to delete posts (spoliation), but also not to post anything related to the litigation.
Requests for production:
sample language

- Copies of all of plaintiff’s social networking pages created, maintained, or updated since (DATE OF INCIDENT), in which the plaintiff has chronicled her emotional well-being, her activities, the subject incident, her medical condition and/or other issues or claims asserted by any of the parties to this lawsuit. Such social networking sites include but are not limited to blogs, microblogs (e.g., Twitter, Tumblr, Plurk), MySpace, Google+, Instagram, and Facebook. (A complete archive of plaintiff’s Facebook account can be obtained through the “Account Settings” on plaintiff’s Facebook page. Plaintiff should select “Download a copy of your Facebook data” and follow the instructions.)

Investigating opposing parties and witnesses: part 1

- Most social networks have portions of the page that are visible to everyone and portions that are only visible to “friends.”
- Nothing is wrong with looking at what’s publicly available. It’s like reading a book the individual has published.
- **Twitter:** Everything is visible to everyone.
- **Facebook, Google+:** Check to see if they have photos or status updates visible to the public.
Investigating opposing parties and witnesses: part 2

- Contacting a represented party and investigating through false pretenses are both prohibited.
- So... no friend requests.
- Do not have a mutual acquaintance send a friend request so that you can access private information.

Applicable Ethical Opinions

- For social networks, the same rules apply to electronic communications as traditional.
- 2005-164: Contact with Represented Persons through the Internet.
- 2013-189: Obtaining Information about Third Parties Through a Social Networking Site.
**In Trial - Jurors**

- Voir dire about social networking
  - Some ideas for exposing juror’s opinions
- Investigating jurors during or prior to voir dire
  - What can you learn (or reasonably suspect)?
  - What is almost always on Facebook or Twitter?

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**In Trial - Jurors**

- Observing social networking for juror misconduct during and after trial.

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**Juror gets caught adding female defendant to Facebook Friend’s list**

In Trial - Jurors

**Juror’s tweets get death row inmate new trial**

**Judge removes juror after ‘guilty’ Facebook post**

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**Professionalism in the Age of Social Media**

4-5
In Trial - Jurors

- Jury Instructions:
  - UCJI No. 5.01
  - UCrJl 1004
- Federal Judicial Center’s Report
  - [link to report]
- What Duty Do You Have to the Court?
  - Barry Temkin’s Article: *Twittering Jurors And The Rules Of Professional Conduct: Should Lawyers Avert Their Eyes From Juror Social Network Postings?*

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Posts by members of your own firm

- Make sure both attorneys and staff know of firm’s policies about client confidentiality.
- ORPC 1.6(a) (Confidentiality of Information) covers “information relating to the representation of a client,” not just attorney-client communications.

*Facebook Photo Of Leopard-Print Underwear Leads To Mistrial In Miami Murder Case*
Posts by members of your own firm

- Rants about opposing counsel or judges, even if no names are mentioned, are unwise and can be unprofessional.
- Status updates are easily captured with screenshots and recirculated.

Thank you!