

“Ethical Use of Social Media” (October 2, 2018)

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Overview

- **Duty of Technological Competence**
- **Investigation Using Social Media**
- **Discovery of Social Media**
- **Advising Your Clients About Social Media**



Technology and Competence

Amended Comment to Model Rule Rule 1.1 (Competence): lawyers should “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”

Can you be a competent lawyer without using social media?



Investigation Using Social Media

- You want to find out more information about the plaintiff.
Where should you look?
- Take advantage of publicly available information.
 - Lawyers may view public areas of social media accounts. (NYSBA Opinion 843 (2010))
 - [Arguably,] lawyers have a duty to take advantage of publicly available internet sources. (Rule 1.1 and new comment to Model Rule 1.1)



Investigation Using Social Media

- Can a lawyer “friend” a represented party?
 - Rule 4.2: “In representing a client, a lawyer shall not communicate about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter....”
 - Lawyers cannot friend represented parties....
 - Oregon Bar Formal Opinion No. 2005-164;
 - San Diego County Bar Association Legal Ethics Op. 2011-2
 - And neither can their paralegals. Rule 8.4; Rule 4.2.
 - Lawyers also cannot “friend” high-ranking executives of a represented corporation. SDCBA Leg. Eth. Op. 2011-2.



Investigation Using Social Media

- Can a lawyer “friend” a witness?
 - Not if the witness is represented. *See* Rule 4.2 and the previous slide.
- If the witness is unrepresented, consider:
 - Rule 4.1 (Truthfulness in Statements to Others),
 - Rule 8.4(c) (prohibiting dishonesty and deceit), and
 - Rule 4.3 (Dealing with Unrepresented Person)



Investigation Using Social Media

- So what do you say in your “friend request?”
 - “Hi, my name is Ben Cooper and I would like to be your friend on Facebook.”
 - “Hi, my name is Ben Cooper and I represent the defendant in Jones v. Smith and I would like to be your friend on Facebook.”
 - “Hi, my name is George Costanza and I would like to be your friend on Facebook.”
 - Not (c)!!!
 - NY City Bar Formal Opinion 2010-02 says (a)
 - The Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 says (b)



Discovery of Social Media

- Social media is generally discoverable.
 - *Farley v. Callais & Sons, LLC*, 2015 WL 4730729 (E.D. La. Aug. 10, 2015)
 - *Baxter v. Anderson*, 2016 WL 4443178 (M.D.La., Aug. 19, 2016);
 - *Johnson v. PPI Tech. Servs., L.P.*, 2013 WL 4508128 (E.D. La. Aug. 22, 2013).
 - *O'Malley v. Public Belt Railroad Commission for City of New Orleans*, 2018 WL 733227, E.D.La., Feb. 06, 2018.
- Targeted discovery requests are more likely to succeed.



Advising Clients About Social Media

- Advise your clients about their use of social media.
- There is nothing wrong with telling your clients to be careful what they say in the virtual world just as you would tell them to be careful what they say in the real world. *See New York County Lawyers' Ass'n Comm. On Prof'l Ethics, Formal Op. 745 (2013).*
 - [Arguably,] the lawyer's duty of competence requires this!



Advising Clients About Social Media

- BUT also advise your clients about the doctrine of spoliation.
 - NYCLA Op. 745 (2013) (whether lawyers can advise clients to take down social media posts is a question of substantive law of spoliation)
 - Phila. Bar Association Professional Guidance Committee Opinion 2014-5 (lawyers can advise clients to take down social media posts if they retain a copy)
- Cautionary tale: *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013)
 - “I Love Hot Moms” t-shirt
 - Lawyer: “[w]e do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace!”
 - Result: \$722,000 in sanctions and plaintiff’s counsel resigns from bar.

