

Legal Ethics in the Digital Age

CLE

June 15, 2018
Gleacher Center
Chicago, IL

Samuel Fifer

Partner

T +1 312 876 3114

samuel.fifer@dentons.com

Social Media is Everywhere

Social Media is a growing phenomenon--

Not just a phenomenon for Millennials or Generation Y

This is a pervasive form of media and communication—

There is a lot I could show you.....

Social Media is Everywhere

The screenshot shows a Chrome browser window with the address bar displaying www.cnn.com/interactive/2017/politics/trump-tweets/. The page features the CNN logo and a navigation menu with categories like CONGRESS, SECURITY, and TRUMPAMERICA. Two tweets by Donald J. Trump (@realDonaldTrump) are visible:

- Tweet 1:** America is a Nation that believes in the power of redemption. America is a Nation that believes in second chances - and America is a Nation that believes that the best is always yet to come! #PrisonReform <https://t.co/Yk5UJUyGHN>
May 18, 2018, 4:22 p.m.
- Tweet 2:** We grieve for the terrible loss of life, and send our support and love to everyone affected by this horrible attack in Texas. To the students, families, teachers and personnel at Santa Fe High School - we are with you in this tragic hour, and we will be with you forever...
<https://t.co/LtJOD29Hsv>
May 18, 2018, 12:34 p.m.

Social Media is Everywhere

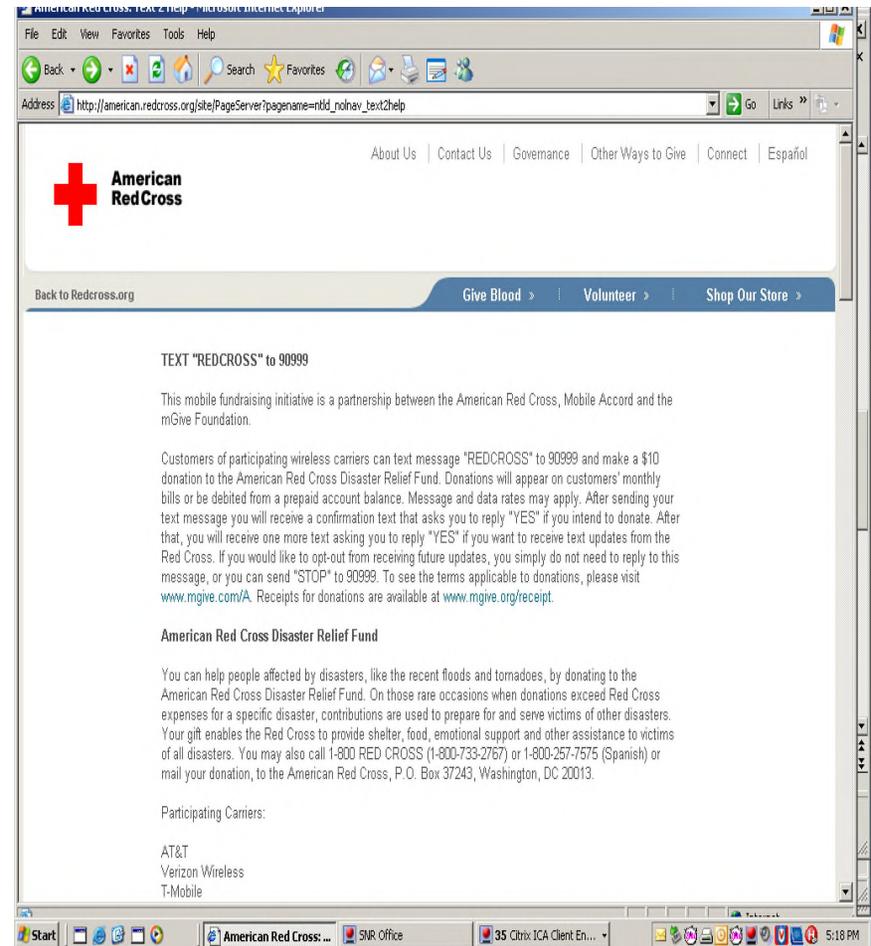
Social Media outlets are a compelling and effective means of communication for business and, it seems, for politics and possibly even governance.

In challenging economic times, people are drawn to these, not simply to be related to one another, but also to create value, compete and operate in a commercial sense.

It's not going away.....

Social Media Has Impact

- You have probably been besieged by a lot of content-based presentations about Social Media
- You have learned a lot about how “tweet” morphed from a noun into a verb and how companies use these tools for marketing purposes
- No one will forget how the American Red Cross employed texting to raise money for Haiti:



So, What do you do About Social Media

- That's not what our presentation today is going to be about; rather, we are going to cover issues of particular interest for you, including:
 - How should your behaviors be altered—if at all—to deal with Social Media
 - Do you want to encourage particular levels of employees to, in effect, speak for your company via Social Media outlets?
 - What about “the cloud”?
 - What the heck is that, anyway?

No, this is not “cloud computing”



So, What do you do About Social Media

- What legal exposure can your organization incur?
- What legal exposure can **YOU** incur?
- Do **you** want to have a Social Media presence? What is that going to look like? What are the issues (and risks) of doing so?
- And even if you **want to abstain** from using tools like Facebook and Snapchat and Instagram, how do you maneuver inside of the new electronic and technical realities that few of us (non-experts) can even navigate, much less explain?
- What do you give up when you say “no, enough”?
- May 30, 2018 Wall Street Journal "Cybersecurity" Section - Articles by Alexandra Samuel (YES) and Sabino Marquez (NO)
- <http://www.wsj.com>

Well, you could miss out on things.....

- Some clients like these tools....
- You want to look and act “hip,” right?
- Well, it’s even worse than that
- You need to be aware and minimally conversant in order to be.....

COMPETENT AS A LAWYER.....

Well, you could miss out on things.....

- Duty of competence – found in the 2012 ABA Model Rules – Model Rule 1.1 – now adopted by 31 states:
- More specifically, the ABA’s House of Delegates voted to amend Comment 8 to Model Rule 1.1, which pertains to competence, to read as follows:

Maintaining Competence

- To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology***, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)

Well, you could miss out on things.....

- Like this nifty piece of “public domain” art, meaning what?



Well, you could miss out on things.....

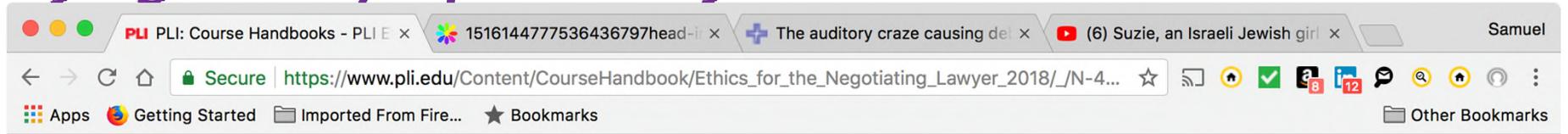
- Illinois rule (1/1/2016) (same as the Model Rule):
 - The [Illinois change](#) mirrors the Model Rule and amends Comment 8 to Rule 1.1, Competence, to read (changed text is underlined):
 - To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
 - The change took effect Jan. 1, 2016.

And lawyers (and occasionally “the profession”) are trying to keep up and stay somewhat relevant....

- Numerous PLI courses available; and this pretty good book – (details on the next slide)



And lawyers (and occasionally “the profession”) are trying to keep up and stay somewhat relevant...



EVER CURRENT

[Login / Forgot Password](#) | [Contact Us](#) | [CHAT OFFLINE](#)

in All Content [Search](#)

Advanced Search

- [Programs & Webcasts](#)
- [On-Demand](#)
- [Interactive Learning Center](#)
- [Publications](#)
- [Patent Office Exam](#)
- [The SEC Institute](#)
- [PLI PLUS](#)
- [Pro Bono](#)

Course Handbook



PLI Ethics Programs: Spring 2018

Publication Date: March 2018
ISBN Number: 9781402430541

Number of Volumes: 1
Page Count: 570 pages

- [Email](#)
- [Share](#)
- [Print](#)

Item# 219132
Format: Course Handbook
\$220.00

[Add to Cart](#)

- TABLE OF CONTENTS**
- [OVERVIEW](#)
- [FACULTY](#)

Table of Contents	
Chapter 1: New York Rules of Professional Conduct (January 1, 2017)	
Chapter 2: Basic Ethics for the Negotiating Lawyer	David Rabinowitz ~ Moses & Singer LLP

Read on **PLI PLUS** [»](#)

RELATED SEMINARS

Patent Office Exam Course 2018
May. 16 - 20, 2018

Private Placements and Hybrid Securities

And lawyers (and occasionally “the profession”) are trying to keep up and stay somewhat relevant....

- Even the ABA has its Legal Technology Resource Center (LTRC) –
- https://www.americanbar.org/groups/departments_offices/legal_technology_resources.html
- And courses like this one today
- And there is even this unintended irony.....

How Ironic – Twitter Has a Legal Ethics Page

Twitter, Inc. [US] | <https://twitter.com/ethicsforum?lang=en>

Home Moments Notifications Messages Search Twitter Tweet

Legal Ethics Forum
@ethicsforum
legalethicsforum.com
Joined December 2009

Tweets 2,696 Followers 691 Following

Suggested

Patrick Ellis
@pmellis Follow

Atlanta Bar Assn
@atlantabar Follow

Who to follow · Refresh · View all

LifeRights.pdf Show All

Social Media has Inherent Risks

- ***Intake Risks (NB: These are NOT unique to lawyers):***
 - Recruiters concerned about alcohol/drug abuse, violence, and similar problems check out potential employees on the Web. *MySpace is Public Space When It Comes to Job Search*, CollegeGrad.com, <http://www.collegegrad.com/press/myspace.shtml> (last visited May 17, 2010)
 - Employers commonly use search engines and other Internet sites such as PeopleFinders.com, Local.Live.com, Zillow.com, Feedster.com, Technorati.com (to search for blogs), and Opensecrets.org and Fundrace.org (to search for campaign donations). According to the National Association of Colleges and Employers (the NACE), more than half of all employers use some kind of online screening technology including social networking sites like Facebook and MySpace. *Id.*
 - Key Issues: Lawful background checks? Invasion of privacy? Lawful off-duty conduct? EEO background?
 - And it is all about inadvertence.....So let's see what there is that is important for **lawyers**

Advertising

- **Social Media Profiles and Posts May Constitute “Legal Advertising”**
- It’s not hard to imagine someone sharing, in a self-laudatory fashion, and in a public way (via FB or Twitter) their latest professional exploits – the new client pitch they won; the great oral argument they made; the big jury verdict they landed (or avoided).
- Or maybe it’s something a little less flashy – maybe it’s a glowing bio on the firm’s new website.
- Or perhaps it’s even less flashy – a “how to” piece on LinkedIn (you know, “Facebook for Grownups”). *(More about this later.)*
- Well, any one of these could be a problem, depending on the jurisdiction.
- See: RPC and Illinois Rules 7.1, 7.2, 7.3 (Lawyer Advertising)
- More on some of these later.

Advertising -- Continued

- **Social Media Profiles and Posts May Constitute “Legal Advertising”**
- Florida Supreme Court [recently overhauled](#) that state’s advertising rules to make clear that lawyer and law firm websites (including [social networking and video sharing sites](#)) are subject to many of the restrictions applicable to other traditional forms of lawyer advertising.
- Similarly, [California Ethics Opinion 2012-186](#) concluded that the lawyer advertising rules in that state applied to social media posts, depending on the nature of the posted statement or content.
- The Model Rules and the Illinois Rules (and both versions of Rule 7.2 were modified in 2016 to make it a bit more lenient, emphasizing the capacity for websites to inform the public that they have choices) are pretty similar.

False or Misleading Statements are a No-No

- The free-wheeling and unconstrained nature of Social Media communications can lead to excess, hyperbole and problems for lawyers who go over the line.
- The ABA Model Rules, including RPC 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), 4.4 (Respect for Rights of Third Persons), 7.1 (Communication Concerning a Lawyer's Services – mentioned two slides ago), 7.4 (Communication of Fields of Practice and Specialization), and 8.4 (Misconduct), as well as the analogous state ethics rules. [ABA Formal Opinion 10-457](#) concluded that lawyer websites must comply with the ABA Model Rules that prohibit ***false or misleading statements***. The same obligation extends to Social Media communications.

False or Misleading Statements – Am I an “Expert”?

- [New York State Ethics Opinion 972](#) concluded that a lawyer may not list her practice areas under the heading “specialties” on a Social Media site without being certified as a specialist – and law firms may not do so at all.
- [South Carolina Ethics Opinion 12-03](#) takes the view that lawyers may not participate in websites designed to allow non-lawyer users to post legal questions where the website describes the attorneys answering those questions as “experts” in their field.
- Illinois RPC 7.4 closely follows the Model Rule – and forbids the use of “expert” or “specialist” and contains other restrictions. One exception: if you are registered with the USPTO as a patent lawyer, you can use the designation “Patent Attorney” (or equivalent).
- ***These are well-known rules, but when third parties are “brokering” the communication, it takes extra care and attention to get it right.***

Prohibited Solicitations – Social Media Risks Here

- Model Rule 7.3 and Illinois RPC 7.3 cover this – it's off limits to solicit legal work in certain ways. You can read the rule on your own (read it carefully) but Comment 1 illustrates what the rule is driving at:
- *[1] A solicitation is a **targeted** communication initiated by the lawyer that is **directed to a specific person** and that offers to provide, or can reasonably be understood as **offering to provide, legal services**. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches. (Emphasis added.)*
- The rule (in Illinois) was significantly altered as of 1/1/2016; the language above in Comment 1 is all new.

Prohibited Solicitations – Inadvertance

- Again, most lawyers understand that soliciting legal work is tricky and you have to pick your targets and the occasions carefully -- the Rules spell this out by identifying a pretty broad range of exceptions.
- But the risk here is that some of the convenience tools and mass distribution of communications to your “peeps” will unintentionally step over one of the ethical lines. Be your own curator.
- That’s the take-away here.

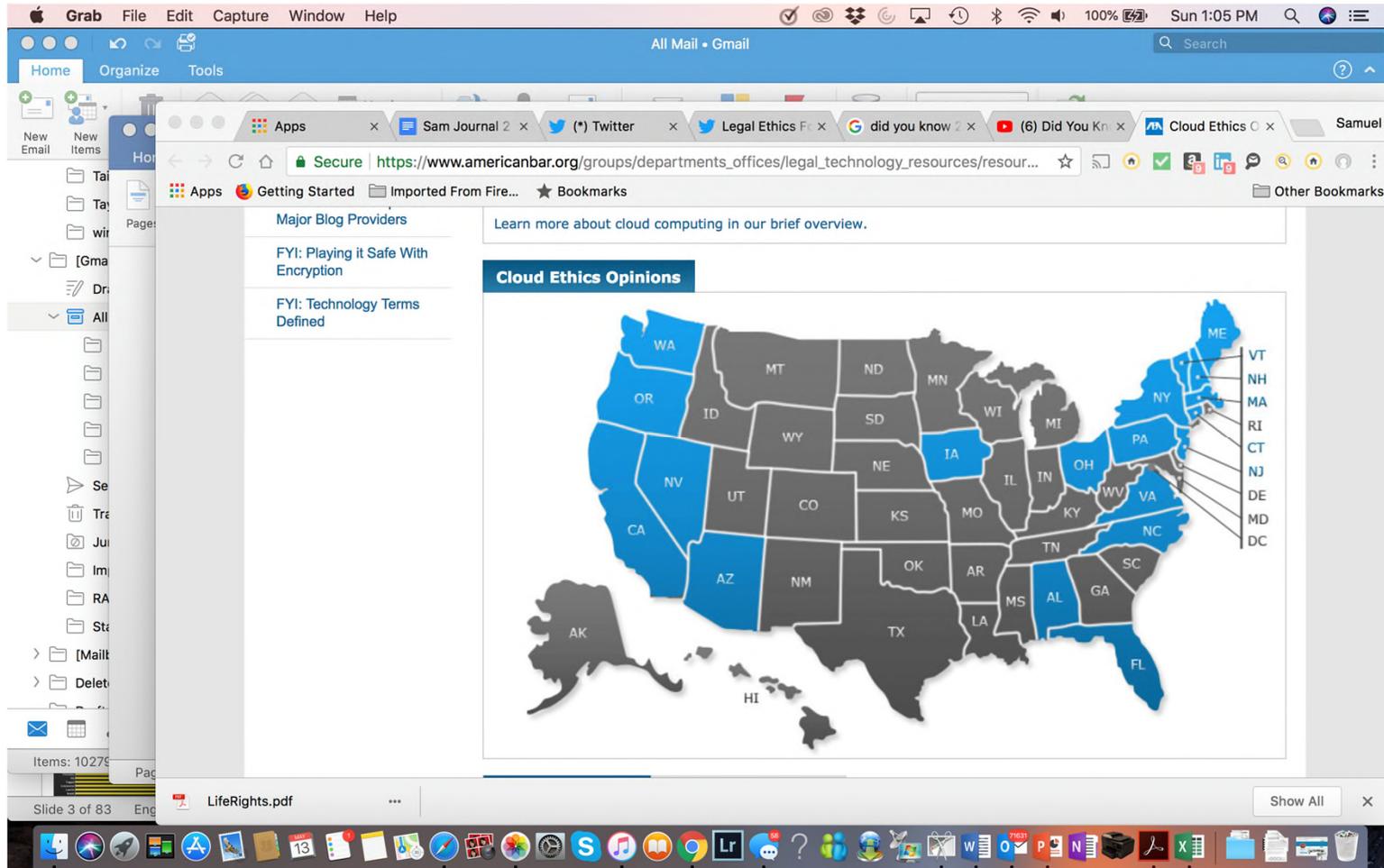
Caution re Confidential Client Information

- Again, most of the lawyers in this room could probably come up here and do a pretty fair job of explaining the prevailing Ethics Rules relating to confidentiality.
- Model Rule 1.6, right? Lots of exceptions; much of the restriction here can be ameliorated by a “rule of necessity”, etc. You have to keep client confidences private. Seems simple, but: ***This concept itself could be the subject of an entire seminar.***
- But because we have limited time, I want to direct your attention to two primary rules (and three comments): Comment 18 to Illinois RPC 1.6 and Comments 3 and 4 to Illinois RPC 5.3. These are complicated textually but conceptually it is possible to boil them down to a couple of observations. (These are in your materials and you can find them online at <http://www.iardc.org>.) These don’t directly relate to Social Media, but rather to “new technologies”. (More later on the Social Media angle.)

Caution re Confidential Client Information....More

- Lawyers use third party vendors. Can we get some examples of third party vendors that lawyers – law departments or law firms – use all the time?
- Special care must be taken (and the exercise of professional competence is required) with regard to entrusting client confidential information to outside vendors. The Comments to Rule 5.3 call out things like this:
 - Document management company hired to handle documents in a complex piece of litigation
 - Sending out client documents for printing or scanning
 - Using an Internet-based service to store client information
 - This would include “cloud storage” systems

Caution re Confidential Client Information...More (2)



Caution re Confidential Client Information....More (3)

- That chart shows the states that have issued ethics opinions on how lawyers have to handle information stored in the cloud:
- https://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html (Cloud use – 20 states – not Illinois)
- Here is a typical entry (boiled down):
- **WASHINGTON–**
- **Advisory Opinion 2215**
- Requires Reasonable Care – which means....
- (1) Conduct a due diligence investigation of any potential provider. (2) Stay abreast of changes in technology. (3) Review providers security procedures periodically.

Caution re Confidential Client Information....More (4)

- Comment 4 to Illinois RPC 5.3 instructs lawyers and clients to “work it out” when it comes to things like monitoring when the client picks the vendor –
- *[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer.*
- The negative implication of that comment is that when the outside lawyer picks the vendor, it’s the outside lawyer’s obligation to manage the vendor.

Communication with Represented Parties – Rule 4.2

- Model Rule 4.2 and equivalent state ethics rules, including Illinois RPC 4.2, are well-known prohibitions against, a lawyer (or her “agent” – investigator, paralegal, etc. – see RPC 8.4(a)) communicating with a person the lawyer knows to be represented by counsel without first obtaining consent from the represented person’s lawyer.
- In the Social Media context, the temptations and the possible mis-steps are not always easy to anticipate:

Communication with Represented Parties – Rule 4.2

- These bright-line restrictions mean that a lawyer may not send Facebook friend requests or LinkedIn invitations to opposing parties known to be represented by counsel in order to gain access to those parties' private social media content.
- In the corporate context, [San Diego County Bar Association Opinion 2011-2](#) concluded that high-ranking employees of a corporation should be treated as represented parties and, therefore, a lawyer could not send a Facebook friend request to those employees to gain access to their Facebook content.
- All these rules do not mean that this never happens....

Communication with Represented Parties – Rule 4.2

“Stalking” and Rule 4.2 – TRUE STORY

- The case of the Tweeting lawyer...Lawyer elects to “follow” (on Twitter) a party in a case; the lawyer knows that the party is represented by counsel—this actually occurred in one of our cases. The lawyer for the opponent, for reasons that we still don’t quite understand, started “following” the client on Twitter. She sent us an email that contained the “approach” from the lawyer for the other side.
- Long story short – we scared the lawyer off; “just a misunderstanding” was how he put it.
- But there is a significant potential for mischief.
- “Raw meat” for lawyers.

Communication with Represented Parties – Rule 4.2

So what is “fair game here”?

- If you can see others, consider this: *others can see you.*
- Frightening statistic – Approximately 66% of divorce lawyers use Facebook as their primary source for online evidence. Am. Acad. of Matrimonial Lawyers, Big Surge in Social Networking Evidence Says Survey of Nation’s Top Divorce Lawyers, (Feb. 10, 2010), at <http://www.aaml.org/go/about-the-academy/press/press-releases/big-surge-in-socialnetworking-evidence-says-survey-of-nations-top-divorce-lawyers/>. Not just divorce lawyers.....
- Ever hear of the movie: “The Fortune Cookie”? *A cameraman is knocked over during a football game. His brother-in law the king of the ambulance chasing lawyers starts a suit while he's still knocked out. The cameraman is against it until he hears that his ex-wife will be coming to see him. He pretends to be injured to get her back, but also sees what the strain is doing to the football player who injured him.* (Source: www.imdb.com)

The Fortune Cookie



The Fortune Cookie – By way of Facebook

- “The Fortune Cookie” – updated, thanks to Facebook –
- Offenback sued Bowman for injuries in a vehicular accident. He claimed as damage that his physical activities were restricted, in particular his ability to ride a bicycle or a motorcycle.
- Offenback’s Facebook account, which was the subject of a pre-trial discovery dispute, showed him as physically active, riding motorcycles, hunting, walking, etc., etc.
- *Robert Offenback v. L.M.Bowman, Inc.*, 2011 WL 2491371 (No. 1:10-CV-1789; M.D. Pa. June 22, 2011).

This Stuff is Pretty Non-Private

So this much is clear - these electronic convenience tools have a flipside that is not always so healthy Example - Location Based Services.

Are you OK with some stranger knowing where you are?

- Smartphones...most have geo-tagging features
- Auto-updates could reveal information that should be kept Confidential
- Find My Friends APP / iPhone+iPad (iOS - Lost Device Locator)
- **Google+ policy: Location**
 - When using Google+ on your mobile device, Google collects your location to provide the service (such as to display nearby posts to you), as described when you sign up for the mobile version of the product. When you post content to Google+ from your mobile device, you may opt out of the collection and display of your location on a per-post basis or choose to exclude your location from all of your posts. When posting from a non-mobile device, you can choose to add your location on a per-post basis.

- *Do you allow your employees to use these tools on company-provided devices?*

Communication with Unrepresented Parties

- In addition to lawyers' contacts with represented persons, the Rules of Professional Conduct evince concern for protecting *unrepresented third parties* against abusive lawyer conduct.
- RPC 3.4 (Fairness to Opposing Party and Counsel),
- RPC 4.1 (Truthfulness in Statements to Others),
- RPC 4.3 (Dealing with Unrepresented Persons),
- RPC 4.4 (Respect for Rights of Third Persons), and
- RPC 8.4 (Misconduct).

Communication with Unrepresented Parties

- In a social media context, these rules require lawyers to be cautious in online interactions with unrepresented third parties. Issues commonly arise when lawyers use social media to obtain information from third-party witnesses that may be useful in a litigation matter. As with represented parties, publicly viewable social media content is generally fair game. If, however, the information sought is safely nestled behind the third party's privacy settings, ethical constraints may limit the lawyer's options for obtaining it.
- BUT HOW AGGRESSIVE CAN A LAWYER BE?
- We hear a lot about a lawyer's duty to vigorously represent a client's interests....how far does this extend?

Communication with Unrepresented Parties

- Generally, state ethics bodies have suggested that lying and trickery are frowned upon; universally, attempting to pierce privacy shields to get information (directly or through intermediaries) is forbidden.
- The State of New York has been the tip of the spear in this field (probably not surprisingly – ok don't be too cynical).
- The process here can be seen as one of “socialization” of the means and methods available in new(er) technologies to traditional values applicable to lawyers and their professional conduct.
- New York, a highly “lawyered” environment, has more experience than other states. Other states lag behind.

Communication with Unrepresented Parties

There is a developing jurisprudence here:

- City Bar of New York issued a Formal Opinion (2010-2) entitled “Obtaining Evidence from Social Networking Websites.”
- The question presented: ***“May a lawyer, either directly or through an agent, contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation?”***
- The short answer: ***“A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.”***
- So, lawyers are warned that the behavior to be avoided is “trickery” and “deception.”

Communication with Unrepresented Parties

But aspects of New York rulings are both helpful and surprising:

- New York County Ethics Opinion 737 (2007) cited in the opinion approved the limited use of “dissemblance” to obtain evidence in investigating **certain civil rights and intellectual property violations** where there is no other way (*Translation: “OK to lie if you have to”*).
- Similarly, secret recording of conversations was approved by a New York City Bar Ethics Opinion (2003-2) as a last resort.
- BUT, this opinion concluded these precedents do not justify using deception to “friend” someone. The reasoning boils down to this: if you can’t be above-board in “friending” someone, use more conventional means, like a subpoena.

What do Lawyers need to think about?

- Your Social Media Policies require constant attention and frequent revision. Why?
- Circumstances change constantly.
- The law changes almost daily.
- What you counted on yesterday cannot be counted on today.
- It's really important for **SOMEONE TO BE IN CHARGE.**
- So, at your company, **WHO' S IN CHARGE?**

Social Media – Love it or hate it

IN CONCLUSION –

***GIVEN THAT THESE TOOLS ARE LIKELY TO BE WITH US,
LEARN TO USE THEM,
BUT LEARN TO USE THEM WISELY...***

Questions?

大成 DENTONS

Samuel Fifer

Partner

T +1 312 876 3114

samuel.fifer@dentons.com

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. www.dentons.com.