



Social Media Ethics: Attorneys' Affirmative Duty to Address Social Media Evidence

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Social Media Ethics

Introduction & agenda



Moderated by Josh Rosenberg of LexisNexis

About the presenters



Josh Rosenberg

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Today's Agenda

- The explosion of social media evidence
- Ethical duty to address social media
- Social media evidence and spoliation
- Ethical considerations for juror and witness contacts
- Case law update: public search and discovery of social media evidence
- Best practices technology for social media discovery
- Closing comments and Q&A

Social Media Ethics

The explosion of social media evidence

Top 3 Most Active World-Wide Social Networking Websites



facebook

- 800,000,000 registered users
- **Registration:** open to people 13 and older
- **Purpose:** general, updates



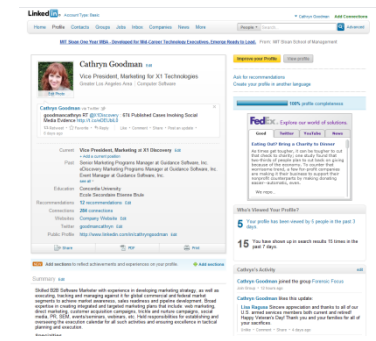
twitter

- 300,000,000 registered users
- **Registration:** open to all ages
- **Purpose:** general, micro-blogging, updates



LinkedIn

- 120,000,000 registered users
- **Registration:** open to people 18 and older
- **Purpose:** business and professional networking



Source: http://en.wikipedia.org/wiki/List_of_social_networking_websites

Legal Database Search: 688 federal and state court published decisions involving social media (2010 & 2011)

- MySpace (315), Facebook (303), Twitter (30), LinkedIn (39)

Top 5 matter types:

1. Criminal
2. Employment
3. Insurance Claims/ Personal Injury
4. Family Law
5. Trademark Infringement/Trade Libel

11 cases involving possible juror misconduct from social media use

Social Media Ethics

Ethical duty to address social media

John Browning

- “[I]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites.”
 - Griffin v. Maryland
(Maryland Court of Special Appeals, May 2010)

- **Rule 1.1 of the ABA Model Rules requires lawyers to be competent in representation of their clients.**
- **Comment 6 – Lawyers “should keep abreast of changes in the law and its practice.”**

- **I-Med Pharmia v. Biomatrix (D.N.J. 2011)**
 - e-discovery case highlighting the importance of knowing your client's computer system.
- **Munster v. Groce (Ind. App. 2005)**
 - lawyer's "duty to Google" as part of due diligence.

- **Dubois v. Butler (Fl. App. 2005)**
 - lawyer's duty to use Internet resources as part of due diligence, not to use methods that have gone "the way of the horse and buggy and the eight track stereo."

- **Weatherly v. Optimum Asset Management (La. App. 2005)**
 - lawyer's need to perform Internet research as part of the diligence, to uncover information the court found "reasonably ascertainable."

- **Johnson v. McCullough (Missouri Supreme Court 2010)**
 - Attorneys have greater responsibilities “[i]n light of advances in technology allowing greater access to information.”
 - This case involved online research and jury selection.

- **Carrino v. Muenzen (N.J. appellate decision 2010)**
 - Court granted new trial to medical malpractice plaintiff after trial judge barred attorney from performing online research during jury selection.

Social Media Ethics

Social media evidence and spoliation

New Guidance for Litigation Holds

Make Sure Your Hold Notice is in Writing and That You are Fully Transparent

Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities (2010)

U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan 15, 2010)

- “the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.” The overall message is that the best way to avoid sanctions is through full transparency and disclosure, key even as to known deficiencies. This case also raised key issue around back-up tapes and inaccessible data.

Crown Castle USA Inc. v Fred A. Nudd Corp. (2010)

U.S. Dist. LEXIS 32982 (W.D. N.Y. Mar 31, 2010)

- Plaintiff was grossly negligent in failing to issue a written litigation hold notice, monitor collection of responsive documents or ensure that relevant documents were not destroyed warranted sanctions.

Jones v. Bremen High School District (2010)

U.S. Dist LEXIS 51312 (N.D. Ill. May 25, 2010)

- The Court held that the defendant was grossly negligent in relying on employees to select and preserve responsive documents. The court stated that "[i]t is unreasonable to allow a party's interested employees to make the decision about the relevance of such documents, especially when those same employees have the ability to permanently delete unfavorable email from a party's system." In-house counsel should not rely on self-identification as a best practice for litigation holds.

Lester v. Allied Concrete Company (2011) **Attorney Sanctioned \$522,000 by Virginia State court**

- Told client to “clean up” his Facebook with incriminating photos
- Spoliation conduct also likely influenced Courts decision to reduce Jury verdict of 10.6 million.
- Largest spoliation sanction ever levied against an individual attorney



Social Media Ethics

Case law update: public search of social media evidence

- ***Tompkins v. Detroit Metropolitan Airport (2012)***
 - Motion to compel production of private Facebook data
 - Public Facebook page reviewed for good cause determination
- ***Davenport v. State Farm Mut. Ins. Co. (2012)***
 - Plaintiff ordered to produce Facebook photos on her account and where she has been tagged by others
 - Not easy to search for and produce manually
- ***Bradley v. State of Texas (2012)***
 - “Facebook...will undoubtedly play an ever-increasing role in identifying and prosecuting suspects.”

Rejected Approach:

- ***Crispin v. Christian Audigier (2010)***



- Defendants directly served subpoenas on Facebook
- Plaintiff successfully quashed, citing Stored Communications Act.

Successful Approach:

- ***Zimmerman v. Weis Markets, Inc. (2011)***



- Court compelled production of plaintiff's Facebook user name and password
 - Publically available information provided good cause basis
- ***Largent v. Reed (2011)***

Social Media Ethics

Ethical considerations for juror and witness contacts

Model Rule 4.2

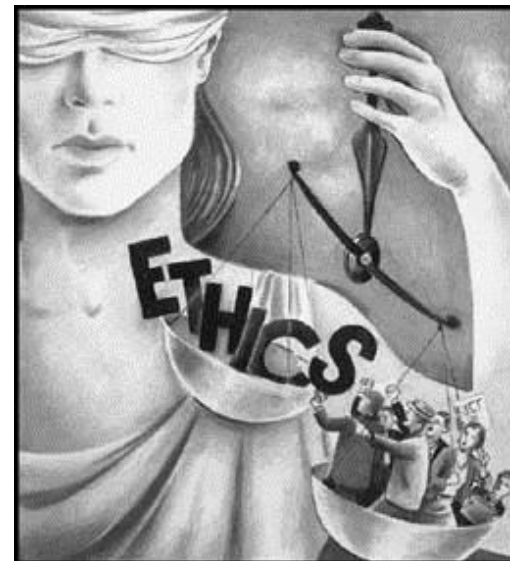
- Communication with Represented Person Involved in Matter Prohibited

Model Rule 4.3

- When communicating with unrepresented party a lawyer shall not state or imply that the lawyer is disinterested.

Model Rule 8.4

- It is professional misconduct for a lawyer to. . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation”



NY State Bar Ethics Opinion 843 (2010)

NYC Bar Formal Opinion 2010-2

San Diego CBA Opinion 2011-2

- Attorneys may view, access social media public postings of an adverse party
- May not “friend” a represented party
- May “friend” an unrepresented party if no deception is used and no direct or implied claim of disinterest

Attorney Deception Prohibited

NY Rules of Prof. Conduct:

- 4.1 prohibits acts involving "dishonesty, misrepresentation"
- 8.4 (c) proscribes knowingly making "a false statement of fact or law to a third person" while "in the course of representing a client."

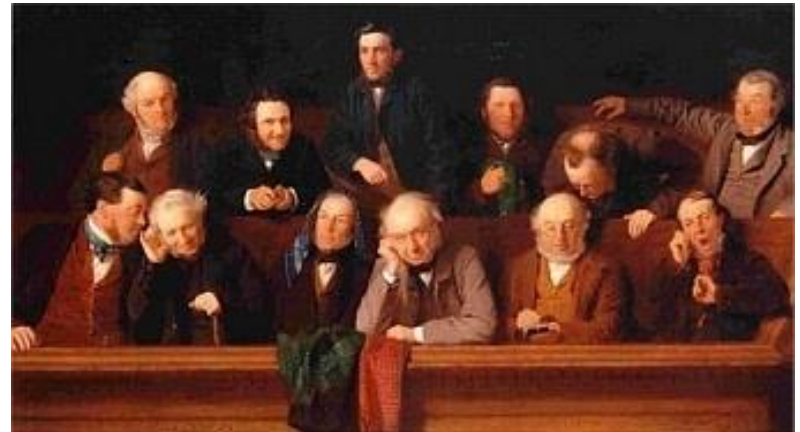


Misdemeanors Under California Law:

- Attorney participation in deceit or collusion with intent to deceive. (Cal. Bus. & Prof. Code § 6128(a))
- Impersonation of another person "on an internet website or by other electronic means" with intent to defraud (Penal code § 528.5)

Model Rule 3.5

- Any communication with juror or prospective juror is prohibited
- California Prof. Rule of Conduct 5-320(E)
- An attorney shall not directly or indirectly conduct an out of court investigation of a current or prospective juror in a manner likely to influence their state of mind in connection with present or future jury service.



NY County Lawyer's Assoc Opinion 743

Philadelphia Bar Assoc Opinion 2009-2

- Passive monitoring of jurors, such as viewing a publicly available Facebook page is permissible
- Attorneys may not act in any way by which the juror becomes aware of the monitoring
- Merely following a current or prospective juror would constitute such contact.

Social Media Ethics

Best practices technology for social media discovery

Twitter:

- Robust Public Twitter Search
 - Detailed Monitoring Keywords
 - Approximately 3 Days of Historical Information
- “Follow” without Formal Follow Request
- 3200 Historical Tweets Made Available by Public API
- Twitter TOS: All Tweets are Owned by Twitter and Made Available Via APIs
 - Deep and Intelligent Integration with Twitter API Needed

Facebook:

- Public Facebook Search and Capture
- Read Only Display
 - Prevent Inadvertent Friend Requests
 - To “Like” an Item Will Generate an Indirect Communication

Production:

- Maintain Native File Format
- Metadata, Chain of Custody

Social Media Ethics

Closing comments and Q&A

Contact us

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Publication: The Lawyer's Guide to Social Networking (2010)

John Patzakis, X1 Discovery

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Publication: blog.x1discovery.com

Josh Rosenberg, LexisNexis

joshua.rosenberg@lexisnexis.com

Publication: "Risk of Spoliation as it Relates to the Handling of Litigation Holds".
Intellectual Property & Technology Law Journal, May 2011

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