

# Social Media and Legal Ethics - A Global Perspective



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Advising client on the content of social media

## **NYCLA Ethics Opinion 745 (July 2, 2013):**

**“DIGEST: It is the Committee’s opinion that New York attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas including RPC 3.1, 3.3 and 3.4.” (footnote omitted).**

**Philadelphia Bar Ass'n Prof. Guidance Comm. Op. 2014-5 (July 2014):**

**“It is the Committee’s opinion that, subject to the limitations described below:**

- (1) A lawyer may advise a client to change the privacy settings on the client’s Facebook Page.**
- (2) A lawyer may instruct a client to make information on the social media website ‘private,’ but may not instruct or permit the client to delete/destroy a relevant photo, link, text or other content, so that it no longer exists.**
- (3) A lawyer must obtain a copy of a photograph, link or other content posted by the client on the client’s Facebook page in order to comply with a Request for Production or other discovery request.**
- (4) A lawyer must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client.” (footnote omitted).**

**Professional Ethics Committee of the Florida Bar Advisory Opinion 14-1  
(June 25, 2015):**

- ▶ **Attorney may advise client to make social media content inaccessible to the public.**
- ▶ **“Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the inquirer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as the social media information or data is preserved.”**

# CORPORATE SOCIAL MEDIA POLICIES

# Employees

- ▶ Firms need a social media policy
- ▶ The policy should differentiate between the firm's official social media accounts and an employee's personal account
- ▶ All employees must be instructed not to post anything on their personal account so as to undermine the firm

# Social media and employment

- ▶ Before employment
- ▶ During employment
- ▶ After employment



# Social media during employment

- ▶ Risks of social media use by employee:
  - Unacceptable employee behaviour
    - \* Posting negative comments/ discriminatory comments/ insults
    - \* Posting wrong/ misleading/ confidential information
  - Disproportionate private use of social media
  - Using information from social media

# Case law shows the importance of:

- ▶ Previous warning of the employee
- ▶ Having clear rules of conduct and creating employee awareness with regard to the use of social media
- ▶ Consistency in applying the rules of conduct
- ▶ Warning employees of the consequences in case of violation of the rules of conduct

This can all be adopted in a 'social media policy'

# Using information on social media

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### Sick leave shark wrestler Paul Marshallsea sacked



Paul Marshallsea, from Merthyr Tydfil, worked at a youth club in the town

A charity worker has been sacked after his bosses saw footage of him wrestling a shark in Australia while he was on sick leave for stress

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# Social media after employment

- ▶ Non competition clause
- ▶ Confidentiality clause
- ▶ Business relations clause

- ▶ Create awareness among employees about both the positive and negative aspects of social media.
- ▶ Set rules about the use of social media during working hours
- ▶ Set rules about behaviour and representation on social media (what is allowed and not allowed?)
- ▶ What is to expect in case of violation of these rules (sanctions/disciplinary measures).
- ▶ Capture that the employee will be held to the noncompete clause, confidentiality clause and business relations clause in the employment contract.

# Client Confidentiality

# Duty of Confidentiality

*“A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client’s engagement to any person...” – rule 9 ASCR*

## **Risks**

- ▶ Adding locations to your social media posts
- ▶ Viewing Facebook ‘friends’ list
- ▶ Sharing information that identifies a case, client or colleague

## August 2012 Amendments to the ABA Rules of Professional Conduct:

- **Model Rule 1.6 requires confidentiality. Rule amended to require lawyer to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”**



- ▶ **What attorneys should be expected to be is competent within the meaning of the Model Rules of Professional Conduct and/or its federal and state equivalents. For example, and at a minimum, an attorney should understand how to reasonably ensure client confidences when using email.**

# Inadvertent Retainer

# Inadvertent Retainer

- ▶ Social media may lead to unintended client engagements
- ▶ Innocent questions and answers may be construed as legal advice

# Communicating with Parties & Witnesses

# ETHICS

**Pennsylvania Bar Ass'n Formal Op. 2014-300 ("Ethical Obligations for Attorneys Using Social Media") (Sept. 2014):**

- ▶ **Attorneys may not contact a represented person through social networking websites.**
- ▶ **Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.**

# 'No Contact' Rule (Australia)

*“A solicitor cannot deal directly with another practitioner’s client except in urgent and limited circumstances” – rule 33 ASCR*

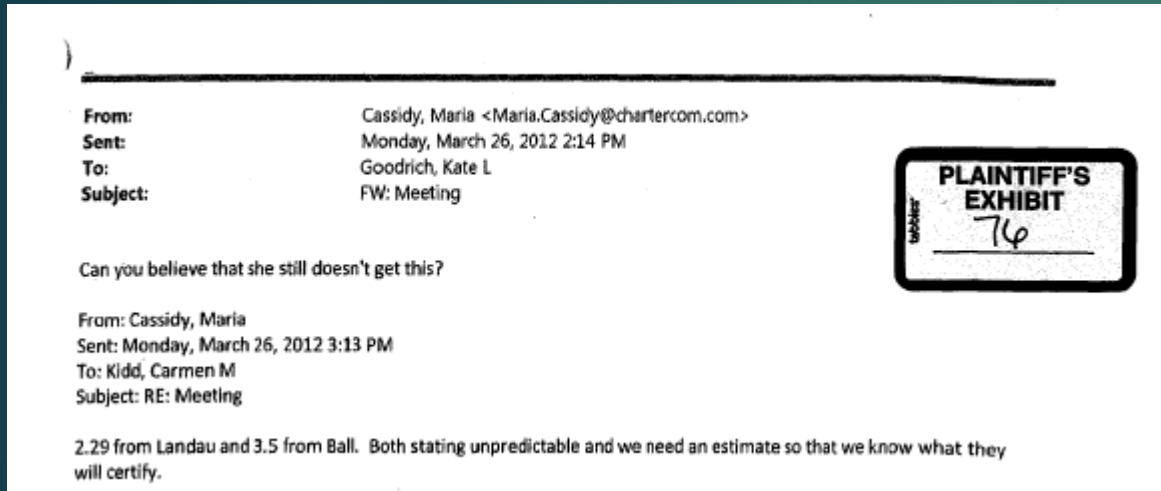
## **Risks**

- ▶ Making or accepting Facebook ‘friend’ requests to/from another practitioner’s client

# Evidence (Australia)

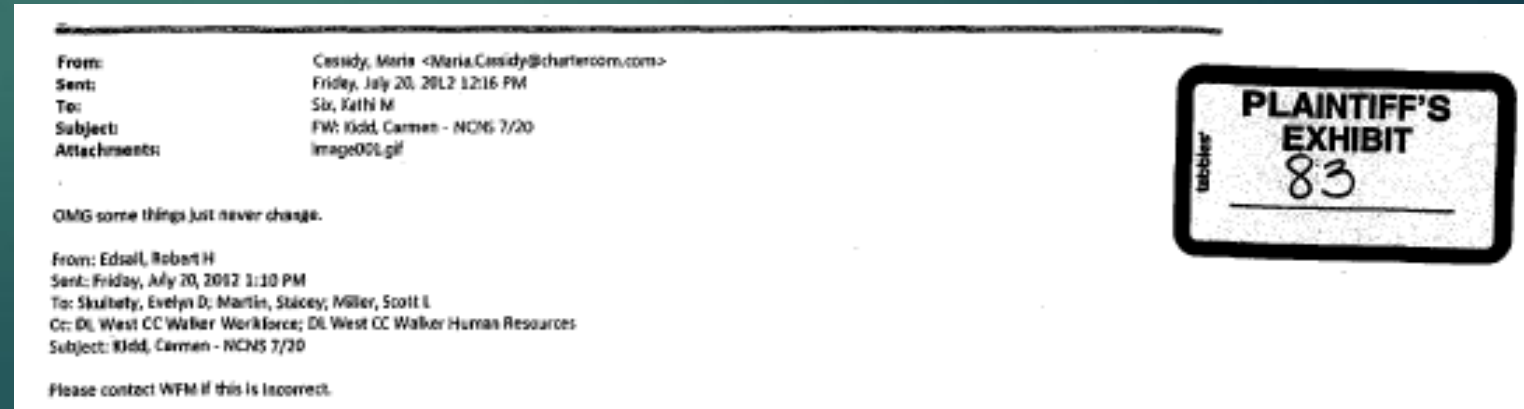
- ▶ Facebook pages commonly contain information or photographs useful for legal proceedings
- ▶ Accessing information publicly available on someone's Facebook is not unethical
- ▶ However, purposely 'friending' someone to access their secured webpages without disclosing the intent is unethical
- ▶ Practitioners must not be party to the destruction of evidence in current or anticipated legal proceedings – this applies to social media

WHILE A WITNESS MAY APPEAR UNBIASED IN COURT, PREVIOUS EMAILS CAN SHOW THEIR FEELINGS AT THE TIME OF THE EVENT. ALTHOUGH EMAIL/TEXT IS OFTEN CRITICIZED FOR NOT CONVEYING EMOTION, THE SENDER'S FEELINGS ARE OBVIOUS IN THESE MESSAGES.



“Can you believe that she still doesn't get this?”

“OMG some things just never change.”





WHILE THESE ADMINISTRATORS ARE DISCUSSING A PROMOTIONAL APPEAL, THEIR CONTENT IS SEEMINGLY NEUTRAL, BUT THE SUBJECT LINE ALTERS THE TONE OF THE EMAIL. WERE THEY JUST REPLYING TO A DIFFERENT TOPIC WITH A DISCUSSION OF THE PROMOTION OR WERE THEY “LAUGHING” AND “CRYING” AT THE PLAINTIFF’S PROSPECT OF A PROMOTION?

“FW: laughing? or crying? Thanks!”

**Subject:** FW: laughing? or crying? Thanks!  
**Date:** Wednesday, May 16, 2012 10:08:28 AM Eastern Daylight Time  
**From:** Davison, Ian Raymond  
**To:** Serra, Matt, Shaplo, Gary

Again see highlights in yellow. Another example where KB asks if she needs to go to the departmental retreat - remember she was on 0 teaching in the fall with reassigned time - not on sabbatical - I think this shows why the department is frustrated.

**From:** Morgan, Sven S  
**Sent:** Friday, April 13, 2012 4:18 PM  
**To:** Davison, Ian Raymond  
**Subject:** FW: laughing? or crying? Thanks!

Here is one where Kathy asks if she has to go to the first faculty meeting. This is AFTER we both told her she had to do service.

Sven

# Reviewing your plaintiff's social media content is crucial.

IN A RECENT CASE, THE PLAINTIFF HAD A FORMER BOYFRIEND AND FATHER OF HER CHILD THAT WAS A CONVICTED DRUG DEALER. WHILE SHE HAS DISTANCED HERSELF FROM HIM AND HE WAS IRRELEVANT TO HER EMPLOYMENT CASE, THE DEFENSE WAS ABLE TO SHOW THAT SHE MAY NOT HAVE BEEN AS DISTANT AS SHE CLAIMED.

Q. All right. And as an example, on January 15th, 2014, on your Facebook page you posted, "Missing my prayer warrior, best friend, my love, my king, and great father. Minor setback for major comeback. God chases those he loves, and he got you, Baby." Right? With pictures of Mr. Cook?

A. That sounds about right. I could have said that.

This post was over 2 years after he was incarcerated.

The post has since been deleted by the plaintiff.

K, you will be the lead.  
Never mind brad  
4:08PM

No I want to get along with  
him  
4:26PM

Yup, I want the same thing.  
But you will be my lead  
4:38PM

Alright I understood it as  
joint leads  
4:40PM

Somewhat  
4:41PM

160/1

Somewhat  
4:41PM

Well I guess we will see  
what happens tomorrow  
4:41PM

Have patience. You know  
your my girl  
4:42PM

Much respect  
4:44PM

Thanks I just hope their  
serious this time  
4:46PM

160/1

Luv, trust me. I got your  
best interest. I promise you  
7:56PM

I will give it to you always,  
but we have to be discrete  
8:03PM

I hate to be so secretive,  
but damn You looked good  
today  
4:03PM

TEXT MESSAGES IN THIS RECENT CASE SHOW A MANAGER PLANNING TO PROMOTE AN EMPLOYEE WITH WHOM HE WAS INVOLVED IN A SEXUAL RELATIONSHIP. WITHOUT THE MESSAGES THE MANAGER COULD SIMPLY SAY IT WAS A CONSENSUAL RELATIONSHIP. HOWEVER, THE CONTENT OF HIS TEXTS PROVE HE GAVE PREFERENCE TO THE WOMAN HE WAS HAVING SEX WITH AND THAT THEIR RELATIONSHIP NEEDED TO BE A SECRET.

# WHAT CAN WE LEARN ABOUT A JUROR FROM PUBLIC SOCIAL MEDIA?

- What causes they support
- Their political beliefs
- Racial makeup of friends
- Education level
- Views on the justice system
- Employment history

This potential juror was 'telling' us she supported gay marriage, minority rights, has friends of different races, and may not feel the justice system is the best route for addressing wrongs. All this from a quick scan of her Facebook Timeline, and none of this reflected in her juror survey questionnaire.

The screenshot shows a Facebook profile for a user named Nikki [redacted]. The profile page includes a cover photo, a profile picture, and a grid of photos of friends. A post from September 9, 2013, is highlighted, featuring a photo of George Zimmerman and a link to a GMA article titled "George Zimmerman in Custody After Gun Incident". The post text reads: "this guys deserves to get the shit kicked out of him. i fully believe he killed Trayvon Martin, And now this. smh". Below the post, there are three likes and two comments. The first comment is from Alexis Jasmine [redacted] saying "this dude just keeps slippin lol" and the second is from Nikki [redacted] saying "right, he gets off the hook the first time then goes in does this. smh #dumbass".

# Monitoring Jurors & Jury Misconduct

*J.T. v. Anbari*, No. SD32562 (Mo. Ct. App. Jan. 23, 2014)  
(affirming defense verdict in medical malpractice  
action and rejecting argument that juror engaged in  
misconduct):

“We now live in an age of ubiquitous electronic  
communications. To say the comments in this case,  
which simply informed people Doennig [a juror] was  
serving jury duty, were improper simply because they  
were posted on Facebook would be to ignore the  
reality of society’s current relationship with  
communication technology.”

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

“in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters [nondisclosure by a juror] to the court’s attention at an earlier stage. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search for jurors’ prior litigation history \*\*\*.”