

ERICSA 2015: Building Sweet Futures for ...



Social Media as Evidence

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Today we will cover:

- ❖ Ethical Issues of Social Media for Judges and Attorneys (which extends to persons operating under attorney supervision)
- ❖ Social Media Discovery
 - Federal Codes
- ❖ Courtroom practice
 - Evidence in general: Admitting Documentary Evidence
 - Objecting to Documentary Evidence
 - Rules of Evidence:
 - Relevance
 - Foundation
 - Authentication
 - Hearsay
- ❖ Closer look at Facebook and Myspace

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Introduction

❖ Rule 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

❖ Rule 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue.

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Ethical Issues with Social Media

- ❖ Judges: bound by the code of judicial conduct
- ❖ Attorneys: bound by the rules of professional responsibility
- ❖ For both, the existing rules are applicable to the expanding technological world
- ❖ No new for a bright-line rule with social media needed—or is there?

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Ethical Issues for Judges

- ❖ ABA Model Code of Judicial Conduct are sufficient to cover electronic communications and behavior
- ❖ New York Judicial Ethics Committee, Opinion 08-176 (Jan. 29, 2009) found that judges may “join and use internet-based social networks, but should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules.”

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Ethical Issues for Judges

- ❖ North Carolina Public Reprimand, Inquiry No. 08-234, B. Carlton Terry, Jr
 - Judge was reprimanded for using facebook to communicate about a case with father's attorney, a "friend" on fb; he was not "friends" with the mother's attorney; the Judge told the mother's attorney about the communications; Judge googled the mother's photography website on his own and did not disclose to either counsel of his independent research until after the hearing and after he put his order on the record; mother's counsel filed a motion to vacate the order, for a new trial and to dq the judge;

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Ethical Issues for Judges

- ❖ The NC Commission found in No. 08-234 that the judge violated multiple codes of judicial conduct, including failure to preserve the integrity and independence of the judiciary, failure to respect and comply with the law, failure to act to promote public confidence in the integrity and impartiality of the judiciary, and engaged in *ex parte* communication with counsel and conducted independent *ex parte* online research about a party before the Court

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Ethical Issues for Judges

- ❖ Florida: Judicial Ethics Advisory Committee published in Opinion No. 2009-20, 11/17/2009 that Judges may not add lawyers who may appear before them as “friends” on a social networking site of the judge or the attorney
- ❖ South Carolina Judicial Department, Opinion No. 17-2009: Magistrate asked for advisory opinion whether “friending” his co-workers and law enforcement officers on facebook would give the “appearance of impropriety”; Commission says yes, Judge may “friend” them as long as they do not discuss anything related to the judge’s position as magistrate

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Ethical Issues for Judges

- ❖ Tennessee: Judicial Ethics Committee issued Advisory Opinion 12-01 regarding use of social networking sites; yes, Judges may use them, but with caution
 - Referenced Maryland Judicial Ethics Committee No 2012-07 (may use social media—be cautious—nature of the relationship)
 - OK Judicial Ethics Advisory Opinion 2011-3 (judges can't “friend” attorneys that regularly appear before them)
 - MA Judicial Ethics Committee Opinion 2011-6 (judges must recuse themselves if an attorney “friend” appeared before)

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Ethical Issues for Judges

- TN also referenced California Judicial Ethics Committee Opinion 66—judges should consider:
 - The nature of the site, personal sites might create an appearance of favoritism
 - The number of persons “friended” by the judge (more gives the appearance that any one is less influential)
 - Judge’s procedure for “friending” or accepting requests
 - How regularly the “friend” attorney appears in the judge’s court
- TN opinion: “judges must decide whether the benefit and utility of participating in social media justify the attendant risks

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Ethical Issues for Judges

- ❖ American Bar Association, Formal Opinion 462, February 21, 2013: A judge may participate in electronic social networking...but must comply with the Code of Judicial Conduct...
- ❖ *Inter alia*, talked about whether a judge should disclose that s/he is “friends” with counsel prior to or at the 1st appearance before the court
- ❖ Context is significant
- ❖ Warned against posting pictures, videos, “liking” pages, etc

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Ethical Issues for Judges

- ❖ 462 Formal Opinion Conclusion:
“When used with proper care, judges’ use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting.”

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Ethical Issues for Attorneys

- ❖ “There’s an increase in the number of attorneys running afoul of professional conduct rules when they use social media”—Renee Knake, Michigan State University College of Law
- ❖ Ethical Model Rules regarding public communication cover statements made with social media
 - No *ex parte* communications with judges (MRPC 3.5)
 - No case specifics (MRPC 3.6)
 - No knowingly assisting a judge in behavior that violates the rules of judicial conduct (MRPC 8.4)

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Ethical Issues for Attorneys

- ❖ ABA 2010 Legal Technology Survey Report found 56% of attorneys in private practice are on a social network---up from 43% in 2009 and 15% in 2008
- ❖ In ABA's 2012 survey results, 88% of the firms were LinkedIn, 55% on FB and 13% on Twitter
 - 22% of the firms had a blog, up from 15% in 2011
- ❖ ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies is working on this issue and may recommend changes to the ABA Model Rules of Professional Conduct

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Ethical Issues for Attorneys

- State of Wisconsin Case No. 2011AP909-D, (June 24, 2011); Illinois Disciplinary Board v. Peshek, Commission No. 09 CH 89 (May 8, 2010)
 - Attorney Peshek’s license was suspended for 60 days in Illinois and in Wisconsin (reciprocal action)
 - Peshek *inter alia*, published a blog containing confidential information about her clients and derogatory comments about judges—enough detail to identify them
- ❖ The Florida Bar v. Conway, Supreme Court Case No. SC08-326
 - FL attorney blogged about a Judge; entry called “Judge Aleman’s New (illegal) ‘One-week to prepare’ policy; Filled with derogatory remarks about Judge Aleman; called her an “Evil Unfair Witch”
 - Attorney received public reprimand, fine of \$1250 and costs

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Ethical Issues for Attorneys

- ❖ The American Bar Association's Model Rules of Professional Conduct and each state's rules as they exist today are sufficient and clear enough to apply to electronic behavior
- ❖ Philadelphia Bar Association Professional Guidance Committee advisory opinion 2009-02: the attorney that used a non-litigant 3rd party to "friend" a witness in order to get information to seek to impeach that same witness violated the rule requiring the attorney to avoid dishonesty, fraud, deceit or misrepresentation; the attorney would not violate the rule if the attorney would have "friended" the witness and been forthright
CAVEAT: the above is an advisory opinion from 2009, not law; NYC Bar Association would agree, Opinion 2010-2 (September 2012).

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Ethical Issues for Attorneys – Linked In

- ❖ An attorney posting information about him- or herself has to be the truth and correct, or it's a violation of Rule 7.1; the South Carolina Ethics Advisory Committee (Opinion 09-10, 2009) said that the recommendations of you from others is covered by Rule 7.1, too, and must be true and correct; also, Ohio Board of Commissioners, Opinion No. 2000-6 (2000)

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Social Media Discovery

- ❖ Federal Rules of Civil Procedure, Rule 26 amended in 2006 to anticipate electronic explosion; the Rules use language “stored in any medium”
- ❖ The Rule has been a sufficient guide for Courts to determine what information on social networking sites are discoverable
- ❖ *Mackelprang v. Fidelity National Title Agency of Nevada, Inc., et al.*, 2007 WL 119149 (D. Nev. Jan. 9, 2007)
 - MySpace information of Defendant was found discoverable using Rule 26 because information was relevant to the litigation, however, a limited request for production was appropriate because there was irrelevant information also there; Defendant did not have to produce irrelevant information

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Federal Codes

- ❖ Electronic Communications Privacy Act 1986 (“ECPA”), 18 U.S.C. Sections 2510-2522—this updated the Federal Wiretap Act of 1968
- ❖ The ECPA has three Titles:
 - Title 1: “Wiretap Act”—protects communications by individuals and requires a warrant signed by a judge to intercept communications up to 30 days upon a showing of probable cause of the commission or anticipated commission of a crime (exceptions for spies and operators). 18 U.S.C. Sections 2516-18; Section 2515 prohibits illegally obtained information from being used as evidence.

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Federal Codes EPCA

- ❖ Title II—Stored Communications Act (“SCA”) protects privacy of the stored electronic files held by service providers (e.g., facebook) 18 U.S.C. 2701-12
- ❖ Title III—no title; deals with pen register and trap and trace devices—requires governmental entities to have a court order before placing them

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Courtroom Practice

Admitting Documentary Evidence

- ❖ Organization
 - Marking evidence
 - Exhibit List
- ❖ Common practices
 - Have exhibits marked ahead of time

Plaintiff's Exhibit	Defendant's Exhibit	OCS' Exhibit
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 - Provide copies of exhibits to parties
- ❖ Testimony
 - Show exhibit to person testifying as to exhibit
 - Lay a foundation
- ❖ Admit

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Courtroom Practice

Objecting to Documentary Evidence

- ❖ Anticipate documents to be introduced
- ❖ Determine if evidence is harmful
- ❖ Evaluate whether there is basis for objection
- ❖ Common basis for objection pertaining to documentary evidence:
 - Asked and answered
 - Assumes facts not in evidence
 - Misstates facts in evidence
 - Relevance
 - Hearsay
 - Authentication
 - Foundation

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Federal Rules of Evidence

❖ Federal Rules of Evidence:

- 401: Evidence is relevant if: a) it has any tendency to make a fact more or less probable than it would be without the evidence; and b) the fact is of consequence in determining the action
- 403: The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence

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Demonstrative Evidence

- ❖ Photos
- ❖ Digital/video recordings
- ❖ Text messages
- ❖ Social media

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Admitting Demonstrative Evidence

Must satisfy:

1. Relevance
2. 403
3. Accurate
4. Proper foundation
5. Hearsay objection?

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Foundation

1. Witness must be competent
2. Exhibit must be relevant
3. Must be accurate
4. Exhibit must be authenticated

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Authentication

- ❖ Federal Rules of Evidence Rule 901
 - (a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is
- ❖ *Dockery v. Dockery*, 2009 WL 3486662
 - Criminal contempt hearing where husband allegedly violated an order of protection of ex-wife; W testified that H contacted her on MySpace and printed out the pages for trial; H argued that only a rep of MySpace could authenticate; court upheld that W can authenticate

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Authentication

- ❖ Must show exhibit is what it is purported to be
- ❖ Types of exhibits
 - Real evidence
 - Writings
 - Records
 - Demonstrative evidence

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Hearsay

- ❖ Federal Rules of Evidence Rule 801
 - Hearsay: a statement that 1) is made outside the testimony of the current trial or hearing and 2) is offered as evidence to prove the truth of the matter asserted
 - Hearsay is often inadmissible.
 - Exceptions—Big ones for this:
 - statement was made by the party and the party manifested that it adopted or believed to be true
 - Statement used to impeach witness with a prior inconsistent statement

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Hearsay Exemptions

- ❖ FRE 803 & 804
- ❖ The rule is motivated by a belief that hearsay is unreliable. But . . .
- ❖ There are exceptions to the rule for **particularly reliable statements**, and where allowing the evidence advances public policy goals.
- ❖ Declarant Unavailable
 - Not typically applicable to cases in which OCS is involved
- ❖ Declarant's Availability is Immaterial

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Hearsay, See

- ❖ *People v. Fernino*, 851 N.Y.S.2d 339 (N.Y. Crim. Ct. 2008) (Defendant sent friend request to person on MySpace when she had an order of protection prohibiting contact)
- ❖ *In re K.W.*, 666 S.E.2d 490 (N.C. Ct. App. 2008) (MySpace postings used to impeach victim witness because they were inconsistent and regarding the issue pending in litigation)
- ❖ *Clark v. State*, 915 N.E.2d 126 (Ind. 2009) (D's MySpace page statements properly admitted as character evidence)

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Defending the Objection

- ❖ Has the proper foundation been laid?
- ❖ Is the exhibit accurate?
- ❖ Do I have the witness to testify to accuracy and reliability of document, photograph, phone record, business record or any other exhibit?
- ❖ In case of an Expert the proper foundation must be established before Expert gives opinion
- ❖ Does a hearsay exception apply?

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Facebook

- ❖ Disclose records pursuant to fb terms of service and compliance with SCA
- ❖ Require a valid subpoena pursuant to an official criminal investigation to compel disclosure of basic subscriber records
- ❖ Require a court order under 18 U.S.C. § 2703(d) for basic and other records (non content)
- ❖ Require a search warrant under Fed. R. Crim. Pro./state law showing probable cause for the content

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Facebook

- ❖ Account preservation: fb will preserve records for 90 days pending their receipt of process
- ❖ FB asserts on its webpage that it does not provide expert testimony and alleges it is self-authenticating pursuant to law and should not require testimony from a custodian
- ❖ Contact fb by email, web, fax and mail
- ❖ Information was on the fb website as current

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Myspace

- ❖ MySpace basically has the same requirements as facebook for the release of information they hold
- ❖ MS will object to any subpoena requiring them to appear out of state and offers a signed affidavit confirming the authenticity of the records
- ❖ MS requires all out of state civil litigants to domesticate their suit in CA; MS requires personal service
- ❖ MS forms are on the web with this presentation

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Additional Sources

- ❖ Hornberger, Sandra (2011) “Social Networking Websites: Impact on Litigation and the Legal Profession in Ethics, Discovery, and Evidence,” *Touro Law Review*: Vol. 27: No. 2, Article 5. Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol27/iss2/5>
- ❖ Seidenberg, Steven (2011) “Seduced: For Lawyers, the Appeal of Social Media is Obvious. It’s Also Dangerous”, ABA Journal, posted Feb 1, 2011. Available at: http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous/?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Magazine+Stories

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Thank you

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