Legal Ethical Implications of Social Networking by Attorneys & Clients

New York State Bar Association

Labor & Employment Committee

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"Proper Attire for Trial"

Facebook post by FL Public Defender Anya Citron Stern (2012)

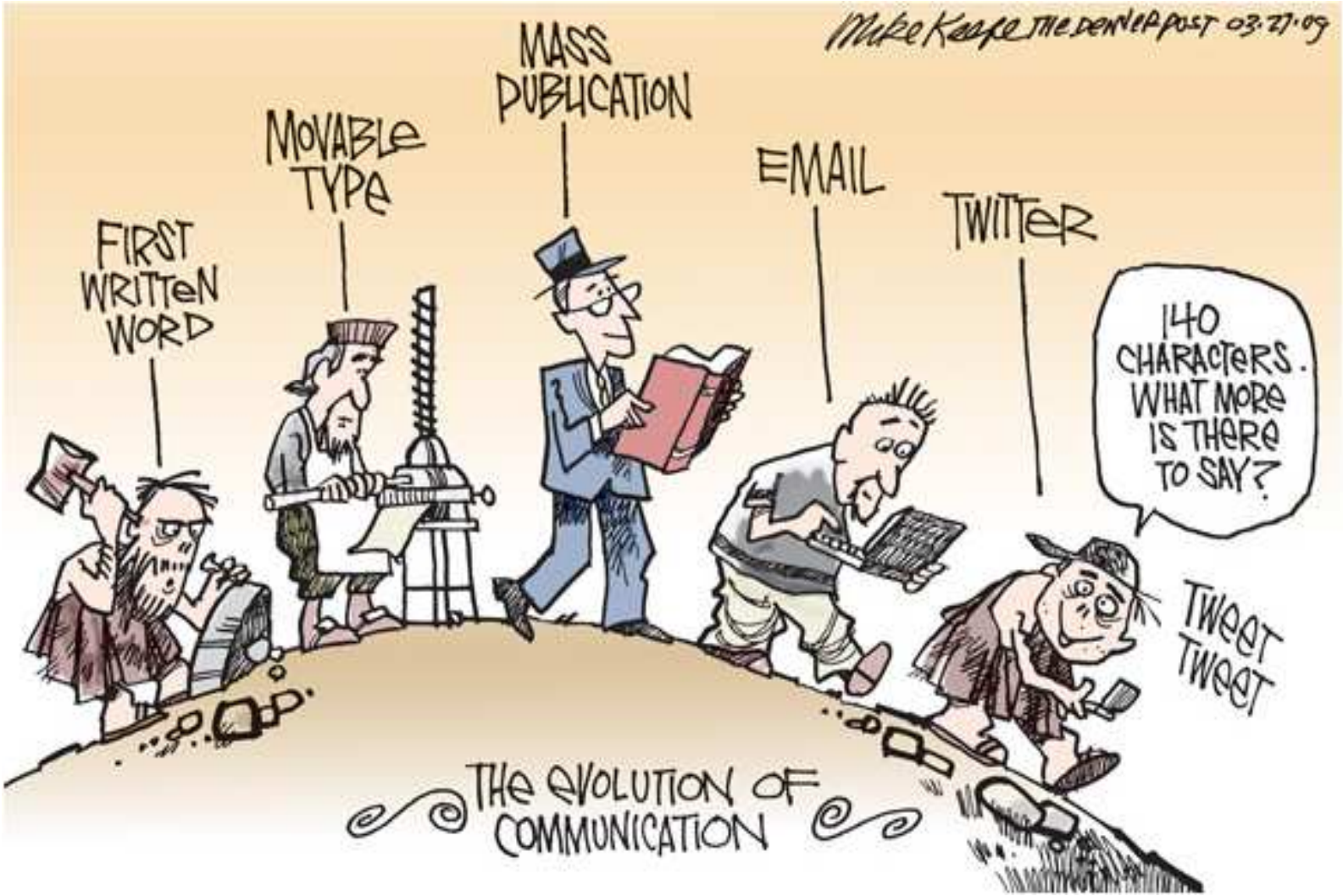
ABA Model Rule 1.1 (Competence)

- "A lawyer shall provide competent representation to a client. Competent representation requires the legal **knowledge, skill, thoroughness and preparation reasonably necessary for the representation**."
- To maintain this competence, as now set forth in Comment 6, **lawyers should keep up with** changes in the law and its practice, "including **the benefits and risks associated with relevant technology**."

NYRPC Rule 1.1(a) (Competence)

- "A lawyer should provide competent representation to a client. Competent representation requires the legal **knowledge, skill, thoroughness and preparation reasonably necessary for the representation**."

Technology Constantly Changes



OBLIGATION TO STAY ABREAST OF CHANGES

PRESENTATION "ROADMAP"

- Preservation of client confidences
- Inadvertent discovery of privileged material
- Accessing metadata
- Communicating with adverse parties, jurors, and judges
- Use of LinkedIn & limitations on attorney advertising

Preservation of Client Confidences

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CONFIDENTIALITY

NYRPC Rule 1.6(a) –

“A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the lawyer or a third person unless . . .” (and exceptions ensue)

WHAT IS CONFIDENTIAL INFORMATION?

"information gained during or relating to the representation of a client, whatever its source, that is:

(a) protected by the attorney client privilege,

(b) likely to be embarrassing or detrimental to the client if disclosed, or

(c) Information that the client has requested be kept confidential."

Social Media is an Online Cocktail Party – Everything is Shared and Everything is Public

Attorney Use of Social Media

In the Matter of Peshek

- Illinois Assistant Public Defender has a blog - "The Bardd (sic) Before the Bar - Irreverant (sic) Adventures in Life, Law, and Indigent Defense."
- About 1/3 of blog are work related postings
- In work related blog postings, she refers to her clients by either their first name, a derivative of their first name, or by their jail identification number

#127409 (the client's jail identification number)This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.

"Dennis," the diabetic whose case I mentioned in Wednesday's post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.

CLIENT USE OF SOCIAL MEDIA

LENZ V. UNIVERSAL MUSIC CORP.

(N.D. CAL. NOV. 17, 2010)

- Federal court compels discovery of client's e-mails, instant message conversations, and blog posts

- "When a client reveals to a third party that something is 'what my lawyers think,' she cannot avoid discovery on the basis that the communication was confidential."

COUNSELING CLIENTS

NYCLA Op. 745 (2013) -

"An attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages, consistent with the principles stated above. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on "private" social media pages, and what may be "taken down" or removed."

LESSON – NO PRIVACY ON SOCIAL MEDIA

“There can be no reasonable expectation of privacy in a tweet sent around the world.”

-*People v. Harris* (N.Y. Criminal Court 2012

(denying motion to quash a subpoena to Twitter for information relating to Defendant’s account)

Other Considerations

- Changing privacy settings

OTHER CONSIDERATIONS

- Response to personal and public messages through social media requesting legal advice – need to avoid unintended A-C relationship
- Preservation of evidence
  - Duty to preserve evidence – sanctions can ensue
  - Advice to clients – be careful!

  ("Clean up" Facebook page - cost client $180K and lawyer $542K in sanctions + $10.6M award was cut in half!)

Inadvertent Disclosure of Privileged Material

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ATTORNEY-CLIENT PRIVILEGE

- CPLR § 4503(a)(1)
  - Confidential communication made between attorney and client in the course of professional employment cannot be disclosed unless client waives privilege
  - Client cannot be compelled to disclose communication between attorney and client in any action, disciplinary trial or hearing, or administrative action, proceeding, or hearing conducted by (or on behalf of)any state, municipal or local government agency or by the legislature or any committee/body thereof
- CPLR § 3101(b): privileged communications are not obtainable in discovery
- Rule 1.6(a) of the New York Rules of Professional Conduct: a lawyer shall not knowingly reveal confidential information or use such information to the disadvantage of client (or for advantage of lawyer or third person) unless:
  - Client gives informed consent
  - Disclosure is impliedly authorize to advance best interests of client and is either reasonable under circumstances or customary in professional community
  - Disclosure is permitted by Rule 1.6(b)

Inadvertent Discovery of Privileged Material

- Not specifically addressed by New York's Rules of Professional Conduct, but existing rule requiring a lawyer to preserve and protect client confidences applies
- Ethical obligations of attorney receiving inadvertently disclosed privileged information:
  - Refrain from reviewing inadvertently disclosed privileged information
  - Notify the sender
  - Follow sender's instructions re: return or destruction
- Hypothetical: you represent a former employee in a discrimination suit against the employer. You receive an email from the attorney for the employer that is addressed to the employer and which appears to be attorney-client privileged information. You should…

To What Extent Can a Lawyer Use Information Learned Prior to Learning Material Was Inadvertently Received?

- NYCBA Formal Opinion 2003-4: blanket prohibition on use extends too far; lawyer *may* use inadvertently disclosed privileged information in certain circumstances but lawyer cannot "freely exploit" the inadvertently received privileged communication
- Two limited permissible uses:
  - Lawyer can use material to argue that inadvertent disclosure, in appropriate circumstances, has waived privilege; and
  - Lawyer can argue that communication does not contain confidence or secret and should be produced in litigation.
  - But not if attorney was already put on notice that s/he inadvertently received a privileged communication before reviewing it.

DISCOVERY

- Fed. R. Civ. P. 26(b)(5)(B):
  - Info produced in discovery is subject to claim of privilege or protection as trial-prep material, party making claim may notify any party that received the info of the claim and basis for it
  - After being notified, receiving party must:
    - Promptly return, sequester, or destroy info & any copies;
    - Not use or disclose info until claim is resolved;
    - Take reasonable steps to retrieve info if party disclosed it before being notified; and
    - May promptly present the info to the court under seal for a determination of the claim.
      - Producing party must preserve the info until claim is resolved.

DISCOVERY (CONTINUED)

- Preservation of privilege: inadvertent disclosure of a privileged document does not waive attorney-client privilege unless producing party's conduct was "so careless as to suggest that it was not concerned with the protection of the asserted privilege"
- Inadvertency analysis: when determining whether a document was produced inadvertently, courts consider:
  - Reasonableness of the precautions taken to prevent inadvertent disclosure;
  - Time taken to rectify the error;
  - Scope of the discovery & extent of disclosure; and
  - Issues of fairness.
- Protective orders as an alternative – agree in advance

Accessing Metadata

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METADATA

- Data about data
- Electronically-stored evidence that describes the history, tracking, or management of an electronic document
- Secondary information not apparent on face of document itself which describes the document's characteristics, origins, and usage
- Examples:
  - Hidden text
  - Formatting codes
  - Formulas
  - Electronic file's name
  - File's location
  - File format or type
  - File size
  - Date file was created
  - Date file last modified
  - Date data last accessed
  - File permissions

METADATA (CONTINUED)

- Types of metadata
  - Substantive / application metadata (created as a function of the application software used to create the document/file and which shows modifications to a document, prior edits, etc.)
  - System metadata (reflects info created by user or by organization's information management system, such as author, date/time of creation, date of modification, etc.)
  - Embedded metadata (text, numbers, content, data, etc directly or indirectly inputted into native file by user not typically visible to user viewing output display, such as spreadsheet formulas, hidden columns, linked files, hyperlinks, references)

Discovery of Metadata

- Metadata is discoverable in federal and state actions (subject to showing of relevance, materiality, and necessity, plus burden/cost analysis)
  - Even pre-action discovery under CPLR § 3102(c) (see *Lemon Juice v. Twitter*)
- Ethical obligations of producing party:
  - Reviewing document productions for confidential information in metadata before producing documents
  - Requesting return or destruction of confidential information, including inadvertently produced confidential metadata
- Ethical obligations of receiving party:
  - Review metadata fields upon receiving electronic document productions for relevant information

Ethical Considerations in Handling & Accessing Metadata

- Rule 1.6: lawyer generally shall not knowingly reveal confidential information or use such information to disadvantage of client
  - Rule prohibiting disclosure of confidential information also applies to confidential information in metadata
- Lawyer must use reasonable care in electronic communications not to disclose client confidences
- Duty of competence: lawyer should understand metadata and know how to preserve client confidentiality when creating, generating, and transmitting electronic documents/communications, along with related metadata
- No mining for metadata (in New York)

Ethical Considerations in Handling & Accessing Metadata (continued)

Hypotheticals:

- Metadata in client-to-client communications?
- Can a client mine for metadata?
- Scrubbing programs?

Obtaining Metadata Under FOIL

- Freedom of Information Law requires state and municipal bodies and agencies to allow public access to government document and records in their possession, unless an applicable exemption permits the documents to be withheld
  - "Record" broadly defined
  - FOIL encompasses electronic documents and information that can be electronically retrieved
- *Irwin v. Onondaga County Resource Recovery Agency*, 72 A.D.3d 314 (4th Dep't 2010)
  - Individual sought metadata about photographs he received after FOIL request (file names, extensions, sizes, creation dates, & latest modification dates)
  - Appellate Division held that county agency was required to disclose electronically stored photographs in its possession, as well as the "system" metadata associated with the photographs

Attorney Social Network Communications with Judges & Jurors

Patricia E. Salkin, Dean

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Relevant Ethics Rules to Keep in Mind

- Rule 3.3 Conduct before a Tribunal
- Rule 3.5 Maintaining and Preserving the Impartiality of Tribunals and Jurors
- Rule 3.6 Trial Publicity
- Rule 8.2 Judicial Officers and Candidates
- Rule 8.4 Misconduct (catch-all)

Extrajudicial Statements

- Rule 3.6 prohibits a lawyer involved in a matter from making "an extrajudicial statement that the lawyer knows or reasonably should know
  - will be disseminated by means of public communication and
  - will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter"

Ex Parte Communications

- Lawyers must be careful not to engage in *ex parte* communications with judges regarding pending matters

- Bar opinions have been inconsistent whether lawyers and judges can be social media “friends”

Examples of Unprofessional Conduct Using Social Networking Sites

- A lawyer asked for a continuance due to the death of her father, but posted status updates and pictures on Facebook illustrating a week of drinking and partying

- A lawyer who blogged about a judge, calling her an “Evil, Unfair Witch” was called to appear before the Florida bar, which issued him a $1,200 fine and a reprimand for his comments (materials p. 194)

Judges Have Rules to Follow Too

- Judge Alex Kozinski, 9th Circuit Court of Appeals; investigation over web page on a “private server”
- Chief Judge Cebull of the Montana Fed. Dist. Court – email
- Judge McCree of Michigan – selfie
- Judge Elizabeth Coker of Texas – texting during trial

Florida Supreme Court Judicial Ethics Advisory Committee

- Judges may use social networking sites individually and for campaigns.
- Judges cannot be “friends” with lawyers who may appear before them.
  - Due to perceivable impression of special influence
    - Disclaimers would be ineffectual.
- Judicial candidates may “friend” lawyers who could appear before them, should they win.
- Judicial assistants may be “friends” with lawyers who may appear before the judge they work for.

South Carolina Department of Justice's Advisory Committee on Standards of Judicial Conduct

- There would be no "appearance of impropriety" if a magistrate judge was a member of Facebook and friends with law enforcement officials and employees so long as they do not discuss any aspect relating to the judge's duties as magistrate.

Ethics Advisory Committee of the South Carolina Bar

- The Ethics Advisory Committee of the South Carolina Bar also adopted a policy in which judges were held accountable, even if they were unaware of the information that the social networking website was generating about them.

ETHICS COMMITTEE OF THE KENTUCKY JUDICIARY

- Can Judges be “friends” with those who may appear before them in court?
  - The answer is a “qualified yes.”

NEW YORK STATE BAR ASSOCIATION

- Provided the judge does not violate the Rules Governing Judicial Conduct, he or she may join an Internet social network.
- A judge must also exercise an appropriate amount of discretion in how they use the social networking site and how it may impact his or her duties under the Rules Governing Judicial Conduct.
- A judge may socialize with attorneys who appear in his court in person or via technology. However, the judge must consider whether his conduct rises to the level of a "close social relationship" that would give the appearance of impropriety.
  - The judge is required to avoid impropriety and conduct himself or herself so that activities do not detract from the dignity of this position.

North Carolina

- A judge was reprimanded for contacting an attorney through a social network in an active case.

Facebook and Witness Investigation

- The Philadelphia Bar Association was asked whether an attorney could use a third party to “friend” a witness to gain access to her Facebook page.
- The Answer: No.

JURORS

- The Association of the Bar of the City of New York Committee on Professional Ethics

  Formal Opinion 2012-2

  Jury Research & Social Media

- American Bar Association Standing Committee on Ethics and Professional Responsibility

  Formal Opinion 466 April 24, 2014

  Lawyer Reviewing Jurors' Internet Presence

Use of LinkedIn & Limitations to Attorney Advertising

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ADVERTISING

The Basics of "Advertising" and "Solicitation"

"Advertisement" – "any public or private communication . . ., the primary purpose of which is for the retention of the lawyer or law firm"

"Solicitation" – "any advertisement initiated by or on behalf of lawyer or law firm that is directed to, or target at, a specific recipient or a group of recipients . . ., the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain."

Social Media Profiles and Accounts - Personal v. Professional?

- If personal – not subject to Rules
- If professional – subject to Rules
- If multi-purpose – assume Rules apply

NYSBA Social Media Ethics Guidelines
Guideline No. 1(A)

- "In the case of a lawyer's profile on a hybrid account that, for instance, is used for multiple purposes, it would be prudent for lawyer to assume that the attorney advertising and solicitation rules apply."
- "A lawyer's post, including a 'Tweet,' that is used to promote the lawyer's legal services or the services of the law firm for which the lawyer works is subject to the ethical rules where the post's primary purpose is to bring in or retain legal business."

HYPOTHETICAL 1

Excited after a string of courtroom victories, a lawyer hastily posts on Facebook "Just won another motion to dismiss! Looks like I'm on a roll."

HYPOTHETICAL 2

A friend, wishing to be supportive, posts a glowing recommendation of a lawyer's legal services on LinkedIn

HYPOTHETICAL 3

Attorney who primarily practices Employment Law includes "Employment Law" in LinkedIn's "specialties" field, also lists it under "skills and expertise."

HYPOTHETICAL 4

A lawyer re-tweets the following tweet from one of her clients without comment: "My lawyer just got me a huge settlement. She's the best lawyer in town!"

HYPOTHETICAL 5

An EEO lawyer posting a response to a question in a chat room devoted to discrimination issues adds: "feel free to e-mail me directly if you have more questions about this issue or are looking for representation."

HYPOTHETICAL 6

A plaintiff's lawyer searches on Twitter for tweets by victims of a recent hostile work environment problem at a major corporation and tweets back "I have represented other victims in similar situations. Contact me if you need a lawyer."

HYPOTHETICAL 7

A lawyer offers a prize as an incentive to join his social media network.

California Attorney Svitlana Sangary

According to her website –

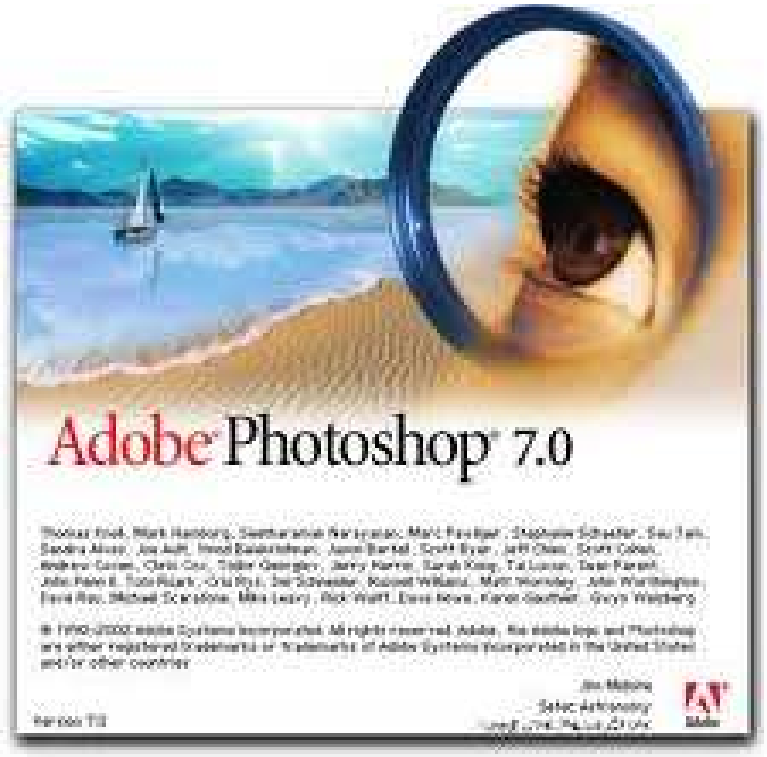
- Sangary is a graduate of Pepperdine Law School
- Her offices "concentrate on trial practice and civil litigation, specializing in all types of litigation and dispute resolution in various forums.“
- Pictures on website…

California Lawyer Svitlana Sangary and President Barack Obama

California Lawyer Svitlana Sangary and NBA Hall of Famer Magic Johnson

California Lawyer Svitlana Sangary and Real Estate Mogul Donald Trump

The Problem…



The pictures weren't real!

They were all Photoshopped!

ETHICS VIOLATION?

- Legal analyst and celebrity lawyer Mark Geragos does not think an attorney's photoshop frenzy is troublesome or worth suspension.

- "If that kind of puffery is actionable by the state bar, you are going to put the entire membership of state bar out of business," Geragos told CNN. "There is no greater group of self-promoters than lawyers, and puffery goes with the territory."

ETHICS VIOLATION?

Stan Goldman, a Loyola Law School of Los Angeles professor with a background in legal ethics, argues:

"You may not be misrepresenting law school, grades or experience, but this (attorney's website) is untrue. It's suggesting you are more well-connected, more important, more successful and talented than you are."

RESULT: VIOLATION!

This was considered to be deceptive advertising.

The ruling - because the "photographs were part of an advertisement and solicitation for future work ... they were false, deceptive, and intended to confuse, deceive and mislead the public.“

Suspension of law license for 6 months

In the Matter of Dickey
(South Carolina, 2012)

Websites – www.divorcelawyercolumbia.com

and www.dmd-law.net

- Mischaracterized legal skills and prior successes
- Falsely stated handled matters in federal court
- Falsely stated graduated from law school in 2005
- Listed approx. 50 practice areas in which had little or no experience

Also sets up Internet Profiles on:

www.lawyers.com

www.lawguru.com

www.linkedin.com

- Relies on company reps, some who were lawyers and some who were non-lawyer web designers who "assured him that the advertisements would comply with [Dickey's] ethical requirements."
- Profiles overstate and exaggerate reputation, skill, experience, past results; also uses "specialist" without certification

RESULT: VIOLATION!

- “Respondent began using these websites without adequate review of the relevant provisions of the South Carolina Rules of Professional Conduct.”

- “Respondent did not review the applicable provisions of the South Carolina Rules of Professional Conduct prior to posting the internet profiles.”

WHICH BRINGS US BACK TO…

CLE Take-Aways

SOCIAL MEDIA & LEGAL ETHICAL DON'TS

- DON'T embarrass clients, yourself, your firm, others
- DON'T disclose confidential information
- DON'T try to hide behind anonymity
- DON'T misrepresent or exaggerate qualifications
- DON'T communicate with represented parties
- DON'T engage in ex parte communications with judges
- DON'T insult or disparage judges, attorneys (or anyone else!)
- DON'T engage in deception
- DON'T overlook social media evidence
- DON'T destroy social media evidence

SOCIAL MEDIA & LEGAL ETHICAL DOS

- **DO Know the Rules**
- **DO Stay current on relevant ethics opinions and decisions (or at least look it up before you "post," "tweet," or "send."**
- **DO Be professional**
- **DO Avoid divulging client confidences**
- **DO Review and vet endorsements and recommendations**
- **DO Counsel clients appropriately about social media**
- **DO Use social media as investigatory and discovery tools (but be transparent and follow the Rules)**
- **DO Use disclaimers on social media sites**

AND IN CONCLUSION…

"The world of social media is evolving, as is the law around it. . . . As the laws, rules and societal norms evolve and change with each new advance in technology, so too will the decisions of our courts. While the U.S. Constitution clearly did not take into consideration any tweets by our founding fathers, it is probably safe to assume that Samuel Adams, Benjamin Franklin, Alexander Hamilton and Thomas Jefferson would have loved to tweet their opinions as much as they loved to write for the newspapers of their day (sometimes under anonymous pseudonyms similar to today's twitter user names). Those men, and countless soldiers in service to this nation, have risked their lives for our right to tweet or to post an article on Facebook; but that is not the same as arguing that those public tweets are protected. The Constitution gives you the right to post, but as numerous people have learned, there are still consequences for your public posts. <u>What you give to the public belongs to the public. What you keep for yourself belongs only to you</u>."

- People v. Harris, 36 Misc.3d 868, 878 (Crim Ct., NYC 2012)