

Legal Ethics and Social Media

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Why You Should Care

- No Expectation of Privacy

- *Largent v. Reed*, 2011 WL 5632688 (Nov. 18, 2011, Pa. Com. Pl.)
- *Moreno v. Hanford Sentinel, Inc.*, 2009 WL 866795 (Cal.App.4th 2009).

- Devastating Effect:

- *Zimmerman v. Weis Markets, Inc.*, 2011 WL 2065410 (Pa. Court of Comm Pleas, May 19, 2011). (Too embarrassed to wear shorts...)
- Insurance Benefits for Depression Denied After Partying/ Chippendales Photos on Facebook: <http://latimesblogs.latimes.com/technology/2009/11/facebook-photos-could-be-hazardous-to-your-health-benefits.html>
- College Student Accepts Friend Request From “Good-Looking Girl”—arrested for underage drinking: http://lacrossetribune.com/news/local/article_0ff40f7a-d4d1-11de-afb3-001cc4c002e0.html
- “The “Like” Button leads to arrest of sex offender and obstruction of justice charge. Virginia—girlfriend of sex offender like sheriff’s page to be aware of any updates regarding the search for her boyfriend. Sheriff noticed her photos included the wanted man.

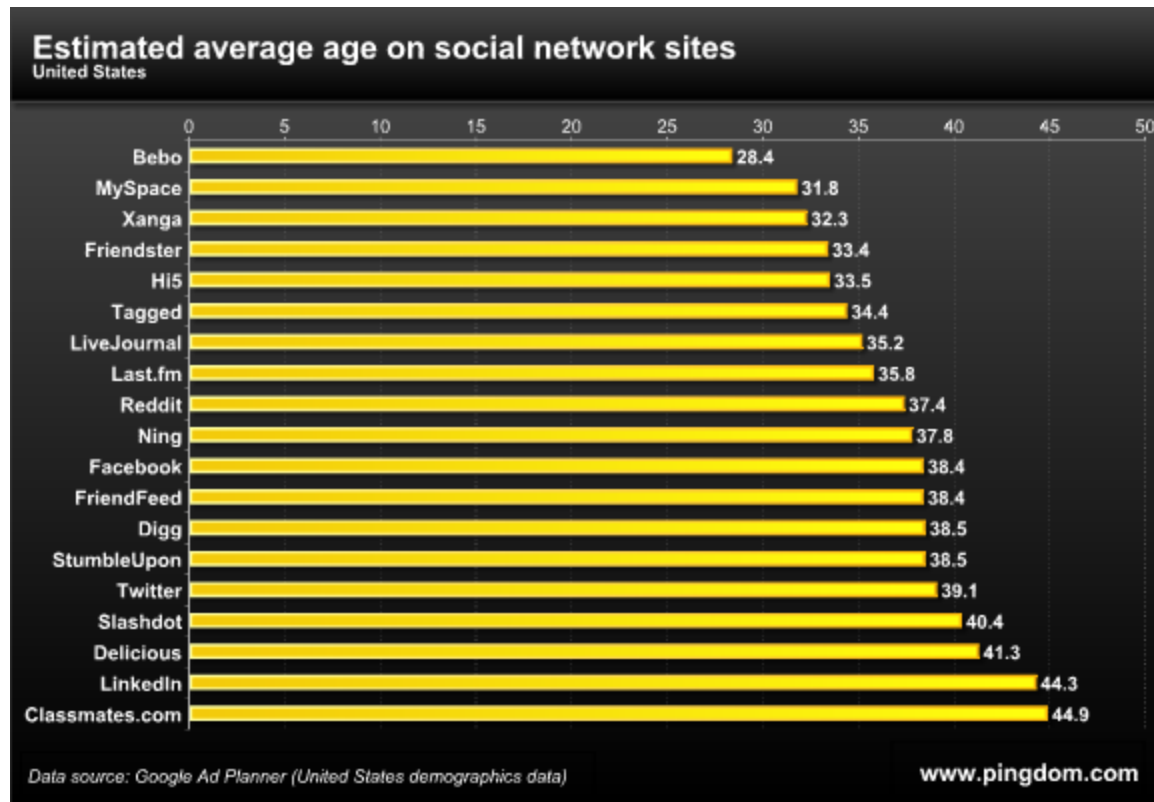
Privacy...what privacy?

- Social Media is based on sharing—which means almost every communication has already been shared at least once. *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 437 (S.D. Ind. 2010)
- Not Anonymous: Ohio Judge posted comments under pseudonym using Judge's name and e-mail address from computer in judge's chambers. *Judge removed from Ohio serial killing cases*, CNN.com, (Apr. 23, 2010), at <http://www.cnn.com/2010/CRIME/04/23/ohio.bodies/?hpt=Sbin>
- Case in North Idaho—*Jacobson v. John/Jane Doe*—motion to quash subpoena seeking names of posters on Huckleberries Online—decision is imminent...

Where is everybody?

- 2012: 800 million active Facebook users
 - Increased by 200 million since 2011.
 - Avg. user: 130 friends and connected to 80 pages/ events/groups
 - 100 million U.S. Twitter users (50 million log in at least once per day).
 - 2011: 140 million tweets per day...
 - Twitter (31.9%) now growing faster than Facebook (13.4%)
 - More than 150 Million Linked in Users.

Not Just Kids...



Be Aware!

- Difference—
 - Must know how it works (RT/DM)???
 - Interconnectivity—user to user
- Bound By Rules of Ethics—2 Primary Caveats:
 - Do not Deceive/Mislead—attorneys right after disaster claimed to be “investigating situation” or “representing victims.”
 - New Jersey Ethics Complaint for Attorneys ordering paralegal to friend plaintiff.
 - Arose in course of deposition based upon questions with regard to travel, dancing, wrestling, or activities tending to disprove his claims of serious injury after being struck by a police cruiser doing pushups in his driveway.
 - Rule 4.2 Contact with represented party
 - Rule 5.3 Failure to supervise a non-lawyer assistant
 - Rule 8.4(c) Conduct involving dishonesty through another’s actions
 - Rule 8.4(d) Conduct prejudicial to administration of justice
 - Don’t create an attorney/client relationship online
 - Give and take nature of online discussion—reveal confidences
 - Jurisdictional issues—are you advising in state where you are not licensed?
- Routine Search for many attorneys/law offices

Ostrich Approach

- Rule 1.1 Competence
 - Can't just ignore technology at this point
 - Comment [6] “keep abreast of changes in the law and its practice.”
 - Example: Friend request = Violation of No contact Order, *People v. Fernino*, 851 N.Y.S. 2d 339 (N.Y. Crim. Ct. 2008).
 - Ignore at your Peril: Case dismissed with prejudice/attorney fees awarded because Sole Shareholder texted CFO while on the stand. *Sky Development Inc., v. Vistaview Development, Inc., et al.*, Fla. Ct. App. 3d Dist. July 8, 2010) available: <http://www.scribd.com/doc/34224018/Sky-Development-Inc-v-Vista-View-Development-Inc-Fla-App-July-8-2010>

Social Media = Evidence

- Basis: Facebook depicts snapshot of user's relationship/state of mind at time of posting—relevance not limited to plaintiff's own determination of relevance...*Bass v. Miss Porter's School*, 2009 WL 3724968 (D.Conn., Oct 27, 2009).
- Service: *Munster v. Groce*, 829 N.E.2d 52 (Ind. Ct. App. 2005)—Google defendant prior to claiming diligent attempts.
- Venue: MySpace page showing employment in Utah, *Partee v. United Recovery Group*. 2010 WL 1816705 *2 (C.D.Cal.2010) (Not published in F.Supp.!!).
- Inferences regarding Facebook “joins” *Zamecnik v. Indian Prairie School Dist. No. 204 Bd. Of Educ.* 710 F.Supp.2d 711, 718 (N. D. Ill. 2010).
- *Mann v. Dep't of Family & Protective Services*, 2009 Tex. App. LEXIS 7326 at *4
 - Mother endangered child based on photos of her drinking while not of legal age (MySpace)

Discovery Battle

- *In re Penthouse Executive Club*
([http://www.ediscoverylawalert.com/uploads/file/Acrobat%20Document\(3\).pdf](http://www.ediscoverylawalert.com/uploads/file/Acrobat%20Document(3).pdf))
 - Dancers alleged that clubs were charging fees for them to perform and “pinching” tips resulting in them earning less than minimum wage.
 - Facebook messages are correspondence;
 - Portions of messages written by parties to action in preparation for litigation are eligible for qualified privilege.
 - Non-party messages do not qualify under the common interest rule

Smoking Guns

- *Offenback v. L.M. Bowman, Inc.*, 2011 WL 2491371 (M. D. Pa. 2011).
 - Personal Injury Action—P claimed limited physical abilities including walking, riding motorcycles and in cars.
 - P’s profile showed him riding motorcycles, hunting, purchase of a new Harley, etc...
- *In re: Welding Fume Products Liability Litigation* [Ernest Ray, No. 04-18252], MDL 1535, No 03-1700.
 - Bellwether plaintiff dismissed after Facebook photos discovered of him racing Motorboats.

Client Awareness

- Ask about social media profiles
 - One in three texters would rather text than talk (know where the info is...)
 - 73% of people think employees over-share on social media
 - What do we share online?
 - 4.8 million post when they are leaving house
 - 4.6 million—love life
 - 4.7 million—health conditions
 - 2.6 million—alcohol use
 - Even the most private will disclose for a “price” (discounts).

Search & Review

- Privacy Controls?
 - 20% have none
 - 28% share wall with more than friends
 - 63% have not customized privacy settings
- Search and review (Competence?)
 - DUI/Remorse/Halloween Costume Pics
 - Gun Charge/Found Religion/Profile pics
 - YouTube video of a fight—proved another party was the aggressor

Can't Just Delete

- *Torres v. Lexington Ins. Co.*, 237 F.R.D. 533, (D.P.R. 2006)
 - Π sued hotel claiming sexually assaulted in spa. Claimed depression social isolation.
 - Π's website depicted active social life/aspiring singing/modeling career.
 - Δ notified not to remove, removed anyway.
 - Removal called unconscionable, barred from introducing evidence of mental anguish.
- Rule 3.4 (Cannot obstruct/alter/conceal evidence or counsel client to...)

Authentication

- Chat log:
 - *State v. Churchill*, 32 A.3d 1026 (December 6, 2011).
 - Detective observed each line of chat as it appeared.
 - Victim provided copy of the chat/identical to that observed by detective
 - Time stamp on each message showed uninterrupted sequence.
- Social Media Page:
 - *The People v. Valdez*, 201 Cal.App.4th 1429, 1434-37 (Cal App. 4th December 16, 2011).
 - Page icon displayed Valdez's face
 - Greetings from friends
 - Interests met background/(photo of Valdez w/gang sign).

Blogs & Websites

- Trial Publicity (3.6)
 - “Trial from He__!” *See Melissa E. Holsman, Facebook Poem Gets Prosecutor in Hot Water, Sun Sentinel, Apr. 22, 2010, available at http://articles.sun-sentinel.com/2010-04-22/news/fl-facebook-poem-ada-20100422_1_jurors-trial-facebook*
- Be wary of commentary on other lawyers qualifications/or judges.
 - **Frank Wilson:** identified the crimes, the first name of the defendant, and the name of the judge, whom he described as “a stern, attentive woman with thin red hair and long, spidery fingers that as a grandkid you probably wouldn’t want snapped at you. *See Discipline Summary, Cal. B. J., (Aug. 2009), available at <http://archive.calbar.ca.gov/%5CArchive.aspx?articleId=96182&categoryId=96044&month=8&year=009#s10>*
- May need to check with your Bar (e.g. NY/TX)

Court's Are Aware



2012 Special Issue Trial Credential Application

People Vs. W. Balfour
Cook County (IL) Sheriff's Office
Thomas J. Dart, Sheriff



Media Organization: _____ Website: _____

Office Address: _____ City _____ State _____ Zip _____

Name of Applicant: _____ Title: _____

Date of Birth: _____ Height: _____ Weight _____ Hair Color: _____ Eye Color: _____

Work Phone: _____ Cell Phone: _____ email: _____

Social Networking Handles (please list ALL work AND personal user names for facebook, twitter, myspace, etc):



Facebook(1): _____

Facebook(2): _____

Twitter(1): _____

Twitter (2): _____

Other: _____

Other: _____

Juror Issues

- “Score...I got dismissed!!apparently they frown upon sending a friend request to the defendant...haha” Jacob Jock, Facebook post.
 - Sentenced to three days in jail for contempt.
- \$4.75 million verdict put at risk by blogging juror. (Illinois Supreme Court refused to hear the appeal)

Perils of Social Media Friends/ Updates/Likes Etc...

- Rule 3.4(f) request another to not give relevant information
- Rule 3.5 Communicate ex parte with judge/juror/prospective juror
- Rule 3.7 Lawyer as a witness/advocate
- Rule 4.1 Truthfulness in Statements to Others
- Rule 4.3 Dealing with unrepresented persons

The Problem with “Friends” & Followers

- Rule 1.18
- Are Facebook interactions creating prospective client issues. (From AG FB page: “Hey can you help me out with some tickets?”)
- Duty of confidentiality, may create conflicts
- Cannot regulate who posts (trolls)
- Be sure of who is following on Twitter...Mother Jones/
Fox News???
- Avoid mixing work/personal accounts on a single phone/
tablet etc...

Client Confidentiality 1.6

- Casual nature of social media/blogging
- Economy of social media—have to share information to receive information (risk factor)
- Ex: “Just got out of a meeting with idiots who refuse to follow my advice.”
 - If tweeted or facebook—it is time/date stamped which anyone with access to your calendar would know who the client is, and perhaps even the topic.
 - Recognize capabilities of social media—use same example, then search for “concealing offshore accounts!”
 - Facebook caught monitoring after logged out...what about Google Plus—search platform as an integrated component of social media.

Ex Parte Communications

- Several reported examples of attorneys and judges friending on Facebook and discussing cases. Florida Judge/Prosecutor exchanged almost 10 posts per day (while trying a Capital Case in front of the judge). *See Tonya Alanez, Broward judge accused of inappropriate relationship with prosecutor, Sun Sentinel, Mar. 4, 2010, available at http://articles.sun-sentinel.com/2010-03-04/news/fl-judge-gardiner-investigated-20100303_1_gardiner-judicial-qualifications-commission-state-judicial-watchdog-agency*
- Be aware of hearing officers who may be friends
- Be aware of the appearance of such contacts even if not “active” friends

Lack of Candor Towards Tribunal

- Assume everyone reads your Facebook profile
- That means JUDGES
- Lawyer sought a continuance due to “sickness”—sickness revealed to be a week of partying based on Facebook updates. Continuance denied and disciplined by Bar.

Location Based Services

- Smartphones...most have geotagging features.
- Autoupdates could reveal information that should be kept confidential
- Find My Friends APP/New I-phone
 - Increasing deployment of “find my friend” location apps
- **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.
 - We may display posts to which you’ve attached your location to users who seek to view Google+ posts "nearby" the location where you created your post. Those posts will be viewable only by those with whom the content has been shared.

Balancing Social Media

- Tremendous Resource
 - Deposition Research
 - Juror Research
 - Opponent Research
 - NO PRETEXTING!!!!
- Contemplate mixing work/social
 - Facebook for friends
 - LinkedIn for Work/Colleagues
 - Don't forget Reputation/Credibility
 - Act/Look like a lawyer
 - No Smack Talk!

Balancing Social Media

- Remember Confidentiality
 - Technology Risk Factors:
 - Reply All!!!
 - Social Media Economy (Share to receive)
 - Privacy settings
 - Loss of message control (“SEND”)
 - Don’t get sucked into the mud
- Remember—if you can find it—so can:
 - Judges, Jurors , Witnesses, Opposing Counsel
 - Voters
 - Trolls
 - Your mother