

Lawyers Online: The Ethical Pitfalls (and Pratfalls) of Social Media

Wednesday, June 18, 2014

3:00 p.m. – 4:30 p.m.

Dena'ina Civic and Convention Center
Anchorage, Alaska

Open Reception immediately following CLE

*Hosted by Seattle University School of Law
and Dorsey & Whitney LLP*

Judge John Erlick

Judge John Erlick was first elected to the King County Superior Court in September 2000 and is currently on the Superior Court's Executive Committee. He recently served as Chief Civil Judge for King County Superior Court and now presides over juvenile offender trials and hearings. He serves on the State Commission on Judicial Conduct and chairs the Superior Court Judges' Association (SCJA) Ethics Committee. He is on the Executive Committee and is President Emeritus of the William L. Dwyer Inn of Court (2012-13). Judge Erlick has been appointed as the Dean of the Washington State Judicial College.

Judge Erlick previously was the SCJA appointee to the State's Ethics Advisory Committee and also served as the chair of the King County Superior Court Ex Parte and Probate Committee, Jury Committee, Governance Committee, and Ad Hoc Duty Time Committee and the King County Bench/Bar Efficiencies Task Force. He was the 2004 judicial co-chair of the King County Bench-Bar Conference. Judge Erlick is an adjunct professor in professional responsibility and the judicial externship program at Seattle University, where he received the Outstanding Adjunct Faculty Award in 2011, and is a Visiting Professor at the Far Eastern Federal University, in Vladivostok, Russia. He has also been involved as a coach and instructor in countless mock trial and moot court competitions. Prior to his election in 2000, he was in private practice, concentrating on defense of professional liability cases.

Judge Erlick graduated from Harvard College in Cambridge, Massachusetts with honors and from the Georgetown University Law Center with honors. He is a graduate of the National Judicial College.

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LAWYER MAROONED AFTER "GILLIGAN'S ISLAND" FACEBOOK POEM

► Just sit right back and you'll hear a tale, a tale of a fateful trial that started from this court in St. Lucie County. The lead prosecutor was a good woman, the 2nd chair was totally awesome. Six jurors were ready for trial that day for a four hour trial, a four hour trial.



► The trial started easy enough [lut] then became rough. The judge and jury confused, If not for the courage of the fearless prosecutors, the trial would be lost, the trial would be lost. The trial started Tuesday, continued til Wednesday and then Thursday With Robyn and Brandon too, the weasel face, the gang banger defendant, the Judge, clerk, and Ritzline here in St. Lucie.



MISTRIAL



LAWYERS ONLINE



ETHICAL PITFALLS AND PRATFALLS OF SOCIAL MEDIA



PRESENTED BY
Judge John Erlick
To the Alaska Bar Association
In Cooperation with Seattle University
School of Law
June 18, 2014



WHY RULES OF CONDUCT?

- ▶ In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to *clients*, to *the legal system*, and to the lawyer's own interest in *remaining an ethical person* while earning a satisfactory living.

- ▶ In context of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of **sensitive professional and moral judgment** guided by the basic principles underlying the Rules. These principles include the lawyer's obligation *zealously* to protect and pursue a client's *legitimate interests*, **within the bounds of the law**, while maintaining a **professional, courteous, and civil** attitude toward all persons involved in the legal system.

- ▶ Trial Publicity
- ▶ Ex Parte communications (parties, witnesses, jury, court)
- ▶ Lawyer Advertising
- ▶ Breach of Confidentiality
- ▶ General Misconduct = *Dissin'* the Judge

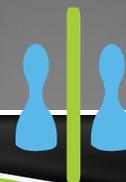
RULE 3.6: TRIAL PUBLICITY

- ▶ (a) A lawyer who is participating ...in the ... litigation of a matter shall not make 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.

RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

- ▶ (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have **a substantial likelihood of heightening public condemnation of the accused**

CONTACT WITH REPRESENTED PARTIES





RPC RULE 4.2

- ▶ COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL
- ▶ In representing a client, a lawyer shall not communicate about subject of representation with a person the lawyer *knows* to be represented by another lawyer in the matter,
- ▶ unless consent of other lawyer or by a court order.

▶ Facts:

- ▶ Lawyer A discovers that Lawyer B's client has a public Web site.
- ▶ Information on the Web site may be relevant to the litigation pending between the two clients. Lawyer A wishes to visit the Web site and, perhaps, to communicate with representatives of the adverse party via the Internet.

▶ Questions:

1. May Lawyer A visit the Web site of Lawyer B's client?
2. May Lawyer A communicate via the Web site with representatives of Lawyer B's client?

ДА

Accessing an adversary's public Web site is no different from reading a magazine article or purchasing a book written by that adversary. A lawyer who reads information posted for general public consumption simply is not communicating with the represented owner of the Web site.

НЕТ

On the other hand, written communications via the Internet are directly analogous to written communications via traditional mail or messenger service and thus prohibited under RPC 4.2. The question is whether the individual is or is not a represented person



- ▶ May a lawyer view and access the Facebook or MySpace pages of a party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit, including impeachment material, if the lawyer does not "friend" the party and instead relies on public pages posted by the party that are accessible to all members in the network? (NY)

▶ Lawyer may access and review the public social network pages of that party to search for potential impeachment material.

AS LONG AS.....

- ▶ the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate:
- ▶ Rule 8.4 (prohibiting deceptive or misleading conduct),
- ▶ Rule 4.1 (prohibiting false statements of fact or law), or
- ▶ Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).

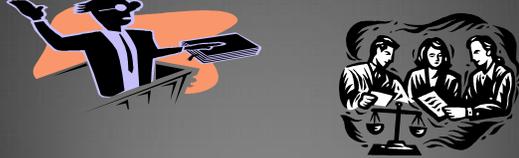
WHERE IS THE INFO STORED?

▶ PUBLIC ▶ PRIVATE



WHOSE INFO IS IT?

▶ WITNESS ▶ PARTY



SOME COURTS HAVE STATED THAT USE OF MEDIA IS THE STANDARD OF CARE

- ▶ •"[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)

- ▶ •Lawyer's "duty to Google" as part of due diligence.

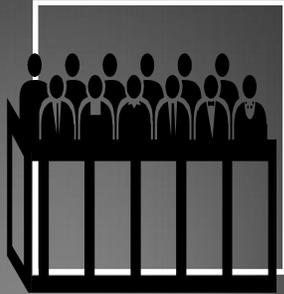
Munster v. Groce (Ind.App. 2005)



- ▶ •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." *Dubois v. Butler* (Fl.App. 2005)
- ▶ •Lawyer's need to perform Internet research as part of the diligence, to uncover information the court found "reasonably ascertainable."

Weatherly v. Optimum Asset Management (La. App. 2005)

WHAT ABOUT JURORS?



ABA OPINION

- ▶ A lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

- ▶ A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public.
- ▶ This would be the type of **ex parte** communication prohibited by Model Rule 3.5(b).

TAKE – AWAY.....

- ▶ There should be no deceptive Facebook friending AKA "false friending" or "pretexting"; you can't have your paralegal friend somebody to find out information about them.
- ▶ **Ex parte**
 - ▶ RPC 3.5-jurors;
 - ▶ 4.2 rep'ed parties;
 - ▶ 4.3 - unrep'ed parties)
- ▶ **Deceptive and misrepresentation (RPC 8.4)**

JUDGES USE FACEBOOK TOO....

- ▶ Judge Criss (Texas trial court) keeps track of what lawyers are doing.
- ▶ According to the story....

Criss recalls that recently a lawyer told her she needed a continuance because of a death in her family. The judge previously had given the lawyer a weeklong continuance, but at a subsequent hearing the lawyer's senior partner, who appeared on her behalf, told Criss his colleague actually needed a month-long postponement.



"I KNEW FROM HER BRAGGING ON A FACEBOOK ACCOUNT THAT SHE HAD BEEN PARTYING THAT SAME WEEK," CRISS SAYS. THE JUDGE SAYS SHE TOLD THE SENIOR PARTNER AT THE HEARING ABOUT HER FACEBOOK DISCOVERY AND DENIED HIS REQUEST.



FRIENDING THE JUDGE



Florida Ethics Opinion

- ▶ A judge's listing of a lawyer as a "friend" on the judge's social networking page — "[t]o the extent that such identification is available for any other person to view" — would violate Florida Code of Judicial Conduct Canon 2B ("A judge shall not... convey or permit others to convey the impression that they are in a special position to influence the judge.")....
- ▶ "The issue ... is not whether the lawyer *actually* is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a 'friend' on the social networking site, *conveys the impression* that the lawyer is in a position to influence the judge.

The Ethics Committee Of The Kentucky Judiciary

- ▶ With certain considerations, a judge may participate in ... social networking sites, including Facebook. However, when doing so a judge must comport with the Code, which includes avoiding *ex parte* communications, disclosing the relationship where otherwise appropriate, and being sure not to convey the impression that the judge's friends are in a special position to influence the judge.

NEW YORK ETHICS COMMITTEE

- ▶ A "judge should be mindful of the **appearance created** when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting.



- ▶ But, the **public nature of such a link** (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, **the appearance of a stronger bond**.

California Ethics Opinion

- ▶ With qualifications, a judge may join a social network, even one which includes lawyers who may appear before the judge, but the **judge must disclose** the social network connection and must defriend the lawyer when the lawyer has a case before the judge.

SOCIAL MEDIA AND SPOILIATION

- ▶ Virginia attorney Matthew B. Murray agreed to a **five-year suspension** last month in a case which stems from advice to his client to “clean up” his Facebook page in response to a discovery request.

- ▶ Murray instructed client, Isaiah Lester, to clean up his Facebook page after opposing counsel sought a copy of the Facebook account in discovery and attached a damaging photo from client's page.



- ▶ Client originally deactivated his Facebook page in accordance with attorney's instruction
- ▶ Later in the case, client reactivated FB at attorney instruction
- ▶ Unbeknown to attorney, client deleted sixteen photos before the screen shots were provided to opposing counsel.

- ▶ Attorney and client were ordered to pay **\$722,000 in attorney's fees** to defendants.
- ▶ Virginia State Bar:
- ▶ Murray violated professional ethics rules including
 - ▶ **candor toward the tribunal (RPC 3.3)**
 - ▶ **fairness to opposing party and counsel (RPC 3.4)**
 - ▶ **Misconduct (RPC 8.4).**

Misleading the court is never justified. As stated in *Fisons*:
 “Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.”

LAWYER ADVERTISING

▶ RPC 7.2 comment

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. ...Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.



USE OF SOCIAL MEDIA RECOGNIZED

- ▶ Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. ...
- ▶ Electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

NO DIRECT SOLICITATION

▶ RPC 7.3 comment

▶ There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services.

▶ Use of **general advertising** and written, recorded or **electronic communications to transmit information** from lawyer to prospective client is permitted



GUIDELINES

- ▶ **NO** false or misleading within the meaning of Rule 7.1
- ▶ **NO** coercion, duress or harassment within the meaning of Rule 7.3
- ▶ **Write only what is true.** Rules 4.1, 7.1 and 8.4—require lawyers to avoid misrepresentations
- ▶ **Avoid answering legal questions.** Some social networking sites like LinkedIn, allow people to post or answer questions. When lawyers post answers, this can create numerous dangers. [Law Practice, Tips for Avoiding Malpractice]:
 - ▶ Are you creating a lawyer-client relationship
 - ▶ Do you have enough info to give informed advice
- ▶ **USE DISCLAIMERS**

EXAMPLES OF FALSE OR MISLEADING STATEMENTS INCLUDE:

- ▶ (a) A statement that “you pay nothing unless we win” if the client is responsible for costs/expenses as required by Rule 1.8(e)
- ▶ (b) A statement that a lawyer handles a particular type of case when in fact the lawyer’s only involvement is to intake a client and then refer the client to another lawyer outside the firm
- ▶ (c) A statement that a lawyer charges a certain fee for a particular type of case when the lawyer does not actually charge that fee in those types of cases

AND MORE EXAMPLES.....

- ▶ d) A statement that omits a material fact, such as a statement that “We won a \$2 million verdict in this case” when in fact the verdict was overturned on appeal
- ▶ (e) A statement that an outcome was not or will not be related to the facts or merits of the particular matter
- ▶ (f) An unsubstantiated comparison of the lawyer’s services or fees with the services or fees of other lawyers
 - ▶ (Minnesota Bar)

BREACH OF CONFIDENTIALITY

- ▶ RPC 1.6
- ▶ Attorney-client privilege
- ▶ Attorney work product doctrine: CR 26(b)(3)



ATTORNEY BLOG= ILLINOIS DISCIPLINE

- ▶ #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.

PUBLIC DEFENDER BLOG

- ▶ "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.

COMPARE AND CONTRAST: SEXTING "I AM THE PRIZE" DA

- ▶ Some of 30 text messages sent by DA to domestic violence victim:
 - ▶ "Are you the kind of girl that likes secret contact with an older married elected DA...the riskier the better?"
 - ▶ "I'm serious! I'm the atty. I have the \$350,000 house. I have the 6-figure career. You may be the tall, young, hot nymph, but I am the prize!"

PROSECUTOR RESIGNS OVER SEXTING SPREE TO CRIME VICTIM

Ethics Violations:
Former Wisconsin District Attorney Pleads No Contest

- Conflict of interest
- Offensive personality
- Harassment based on sex

BAD JUDGMENT.....

- ▶ Florida attorney blogged that Judge was:
 - ▶ Making defendants waive rights to speedy trial
 - ▶ An "evil, unfair witch"
 - ▶ "Seemingly mentally ill"
 - ▶ Clearly unfit for her position & knows not what it means to be a neutral arbiter
 - ▶ Florida bar concluded there was a violation of ethics rules.



RPC 8.2:

- ▶ “A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer. . .”

TAKE-AWAYS!!!

- ▶ If you put it out there, someone you don't want to, will read it
- ▶ Once it's out there, it's (almost) impossible to take it back
- ▶ Don't exaggerate, lie, or misrepresent:
 - ▶ Your skills
 - ▶ Your experience
 - ▶ Your accomplishments
 - ▶ YOU
- ▶ ALWAYS be aware of the ethical rules regarding:
 - ▶ Ex Parte Contact
 - ▶ Confidentiality
 - ▶ Advertising
- ▶ REMEMBER there are resources
 - ▶ Alaska Bar Association
 - ▶ Ethical opinions



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