

MINNESOTA FAMILY SUPPORT & RECOVERY COUNCIL


2019 ANNUAL CONFERENCE




Technology, Social Media & Ethics


Office of Lawyers Professional Responsibility
Siana C. Brand

Introduction



- **Areas to be Addressed**
 - Cloud Computing
 - Metadata
 - Social Media

Office Statistics



- 2018 Complaints—1107; Steady with 2017-1110
- Active lawyers in MN—25,823 (29,774 licensed) (Also steady)
- 2018 Public Discipline (Up from 2017):
 - 8 Disbarred
 - 23 Suspended
 - 8 Publically Reprimanded/Probation
 - 6 Reprimanded
 - Private Discipline:
 - 14 Private Probations
 - 117 Admonitions (up from 90 in 2017)
 - Open cases as of January 9, 2019: 515

Office Stats Cont'd



- 2018 Dismissals
- 535 Summarily Dismissed (Determination that Discipline is Not Warranted Without Investigation)
- 243 Determination that Discipline is Not Warranted (after investigation)
- Who filed Complaints?
 - Clients (442)
 - Adverse Parties (257)
 - Opposing Counsel (37)
 - Director Initiated (49)—primarily through trust account overdraft program
 - Judges, other interested parties (remainder)

Office Stats Cont'd




- **Most Frequent Areas of Law Involved**
 - Criminal (254)
 - Family Law (156)
 - General Litigation (182) (number up over 2017)
 - Probate (85) (Real estate right behind)
- **Most Frequent Areas of Violations**
 - Rule 1.4—Failure to Communicate
 - Rule 1.3—Diligence

Cloud Computing



- **Defined as...**
 - The shared use of—and remote, universal access to—a third party's computer equipment, software, or services.
 - "Software as a Service" (SaaS) (ABA, Legal Technology Resource Center)
 - "SaaS is accessed via a web browser (like Internet Explorer or FireFox) over the Internet. Data is stored in the vendor's data center rather than on the firm's computers. Upgrades and updates, both major and minor, are rolled out continuously. And perhaps most importantly, SaaS is usually sold on a subscription model, meaning that users pay a monthly fee rather than purchasing a license up front."


Cloud Computing, Cont.



• Applicable Rules

- Rule 1.1 – Competence
 - Comprehension of technology used and implications of its use
- Rule 1.4 – Communication
 - Explanation to clients of the use of remote data storage services
- Rule 1.6 – Confidentiality of Information
 - Security of client data
- Rules 1.15 & 1.16 – File Retention, Security, Storage, & Return
 - Security and retrieval of client data

Cloud Computing, Cont.




• Possible Risks/Factors to Consider

- Unauthorized access to or destruction of data
 - Severity of loss in the event data is compromised
- Lack of direct control over data
- Ability to retrieve client data
 - Potential for indefinite retention of data by third party

• Advantages

- Increased access to stored information (including client file) by both attorney and client
- Attendant theoretical increase in productivity and decrease in delays

Cloud Computing, Cont.



• Attorney obligations and reasonable precautions – What to know:

- Know your data storage service vendor and vendor's history
- Read and understand the vendor's user and/or license agreement terms
 - Confidentiality agreement? Subpoenaed information?
 - Google Docs (service for creating/sharing text documents, spreadsheets, and slide presentations) policy and binding agreement
- Inquire about and understand level and type of security employed by vendor
- Location(s) of data storage servers
 - Foreign? Domestic? Geographic redundancy?
- Access to and ownership of data
- Termination or discontinuation of use
- Data availability and backup procedures

Cloud Computing, Cont.



• Ethics Opinions:

- New York State Bar Association, Op. 842 (09/10/10)
 - An attorney's use of cloud computing backup system is permissible provided the attorney takes reasonable care to ensure the system is secure and that client confidentiality will be preserved.
 - Reasonable care may include consideration of the following: ensuring vendor has enforceable obligation to preserve confidentiality/security and will notify of attempt to subpoena contents; investigation of vendor's security measures, policies, recoverability methods, and other procedures; and vendor's use of available security technology.
- http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&CONTENTID=42697&TEMPLATE=/CM/ContentDisplay.cfm

Cloud Computing, Cont.



• Ethics Opinions, Cont.:

- North Carolina, Proposed Formal Ethics Opinion 7
 - "[A] law firm may use SaaS if reasonable care is taken effectively to minimize the risks to the confidentiality and to the security of client information and client files. However, the law firm is not required to guarantee that the system will be invulnerable to unauthorized access."
 - The proposed opinion also contains a list of "best practices" from which information contained within this presentation is derived.
 - <http://www.scibd.com/doc/30397343/NC-FEO-2010-7>
- Pennsylvania Bar Association, Opinion 2011-200 (2011)
 - In-depth look at the ethical issues surrounding cloud-computing.
- Pennsylvania Bar Association, Opinion 2010-06 (01/10/11)
 - A lawyer may use cloud computing to access and store data and may use smartphones synchronized through the cloud to remotely access the data if the lawyer takes appropriate measures to protect client confidentiality.

Cloud Computing, Cont.



• Ethics Opinions, Cont.:

- California State Bar, Formal Opinion No. 2010-179
 - "Whether an attorney violates his or her duties of confidentiality and competence when using technology to transmit or store confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications."
 - <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=wmqECiHp7h4%3D&tabid=837>

Cloud Computing, Cont.



• Ethics Opinions, Cont.:

- State Bar of Arizona, Opinion 09-04 (12/09)
 - Electronic storage of files is permissible provided attorneys "take competent and reasonable steps to assure that the client's confidences are not disclosed to third parties through theft or inadvertence." See St. Bar of Ariz., Op. 05-04.
 - While an attorney is not able to ensure the utilized system will be invulnerable to unauthorized access, an attorney's duties to protect a client's confidential information requires that the attorney must use his or her best professional judgment when deciding whether to employ such a system and, as technology evolves, must periodically review security measures put in place by the vendor to ensure such measures continue to protect client information.
 - <http://www.myazbar.org/ethics/opinionview.cfm?id=704>

Cloud Computing, Cont.



• Ethics Opinions, Cont.:

- New Jersey, Advisory Opinion 701 (04/24/06)
 - Use of technology permissible provided attorney ensures that third parties with access to or control over client information are similarly subject to confidentiality requirements and that the attorney either directly employ or ensure the vendor employs reasonable care in preventing disclosure of client information.
 - http://lawlibrary.rutgers.edu/ethics/acpe/acp701_1.html
- State Bar of Nevada, Formal Opinion 33 (02/09/06)
 - Duty to protect client confidentiality is not absolute. However, an attorney "must act competently and reasonably to safeguard confidential client information and communications from inadvertent and unauthorized disclosure. This may be accomplished while storing client information electronically with a third party to the same extent and subject to the same standards as with storing confidential paper files in a third party warehouse."
 - While informed consent from client is preferred, it is not necessary.
 - http://ftp.documation.com/references/ABA10a/PDIs/3_12.pdf


Cloud Computing, Cont.



• Ethics Opinions, Cont.:

- Alabama State Bar, Opinion 2010-02
 - An attorney must ensure that the electronic storage of client files and information is secure and that reasonable measures are employed to protect the confidentiality, security, and integrity of the information. "The lawyer must ensure that the process is at least as secure as that required for traditional paper files."
 - <http://www.alabar.org/ogc/PDF/2010-02.pdf>
- State Bar Association of North Dakota, Opinion No. 99-03 (06/21/99)
 - Permissible to use electronic online data serve to store files as long as confidential client information is properly protected, perhaps via password-protected storage.
 - <http://www.sband.org/data/ethics/99-03.pdf>

Metadata




- **Defined as:**
 - Data within data
 - Innocuous v. Damaging – Examples
 - Creator; date of creation; date of access; "comments"; etc.
- **Applicable Rules:**
 - Rule 1.1 – Competence
 - Awareness of existence of embedded data, actions taken to minimize risk
 - Rule 1.6 – Confidentiality of Information
 - Inadvertent disclosure of client information to unintended recipients
 - Rule 4.4(b) – Respect for Rights of Third Persons
 - Duty of recipient to notify of inadvertent receipt

Metadata, Cont.



- **Lawyers Professional Responsibility Board Opinion 22:**
 - A lawyer has a duty under the Minnesota Rules of Professional Conduct (MRPC) not to knowingly reveal information relating to the representation of a client, except as otherwise provided by the Rules, and a duty to act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure. See Rules 1.1, 1.6, MRPC. The lawyer's duties with respect to such information extends to and includes metadata in electronic documents. Accordingly, a lawyer is ethically required to act competently to avoid improper disclosure of confidential and privileged information in metadata in electronic documents.
 - If a lawyer receives a document which the lawyer knows or reasonably should know inadvertently contains confidential or privileged metadata, the lawyer shall promptly notify the document's sender as required by Rule 4.4(b), MRPC.
 - <http://lprb.mncourts.gov/rules/LPRBOpinions/Opinion%2022.pdf>

Metadata, Cont.



- **Considerations:**
 - Whether the metadata contained within an electronic document is potentially damaging
 - Reasonable precautions to take to minimize disclosure
 - Document "scrubbing" software, format of document, electronic document's recipient, etc.

Metadata, Cont.



- **American Bar Association, Formal Opinion 06-442**
 - "The Model Rules of Professional Conduct do not contain any specific prohibition against a lawyer's reviewing an using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party. A lawyer who is concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata, or who wishes to take some action to reduce or remove the potentially harmful consequences of its dissemination, may be able to limit the likelihood of its transmission by "scrubbing" metadata from documents or by sending a different version of the document without the embedded information."

Metadata, Cont.



- **Questions left unaddressed:**
 - Whether or not there exists an ethical duty for an attorney who receives an electronic document to "mine" for metadata
 - Whether removal of metadata from documents used or to be used in litigation is impermissible and/or illegal
 - Whether "inadvertence" is assumed or based upon content of information disclosed
- **Concerns?**
 - Advantage to larger firms?
 - Public policy of capitalizing on an attorney's lack of technological knowledge or lack of software superior to that of the recipient

Metadata, Cont.




- **Other Resources:**
 - ABA Formal Opinion 06-442
 - http://www.pdfjournal.com/files/06_442.pdf
 - "Opinionated" – Martin Cole, Bench & Bar (November 2009)
 - <http://prb.mncourts.gov/articles/Articles/Opinionated.pdf>
 - "Why You Should Care About Metadata" – Megan Engelhardt, Minnesota Lawyer (October 11, 2010)
 - <http://prb.mncourts.gov/articles/Articles/Why%20you%20should%20care%20about%20metadata.pdf>

Social Media




- **"Definition":**
 - Facebook, Twitter, MySpace, Blogs, Listservs, LinkedIn, etc.
- **Applicable Rules:**
 - Rule 1.1 – Competence
 - Obligation to convey risk of social media use
 - Rule 1.6 – Confidentiality of Information
 - Disclosure of information relating to the representation of a client through social media
 - In re Peshek, 798 N.W.2d 879 (Wis. 2011)
 - Reciprocal 60-day suspension imposed upon attorney who placed on her blog confidential information relating to the representation of clients and derogatory comments about judges and included content sufficient to identify those clients and judges. Attorney further failed to correct a false statement of fact concerning her client's use of narcotics.
 - OLPR Admonition

Social Media, Cont.



- **Applicable Rules, Cont.:**
 - Rule 1.7 – Conflict of Interest: Current Clients
 - Do "friendships" create conflicts, real or imagined?
 - Perceptions by others – Loss of confidence of client or public
 - Rule 3.6 – Trial Publicity (Extrajudicial statements)
 - Anything posted on the internet or on other public forums could potentially be subject to Rule 3.6
 - Definition of when a lawyer knows or reasonably should know a statement made will be "disseminated by means of public communication" may be expanded due to the ever-increasing accessibility of information online.
 - In re Scannell, No. A14-1930, 2015 WL 1546250 (Minn. Apr. 1, 2015).
 - Rules 4.1 & 8.4(c) – Truthful Statements
 - Use of deception when "contacting" others impermissible
 - Use of third parties to contact – your obligations run through any third party used
 - Even if no actual deception is used, "friending" a party or another for the purpose of obtaining information not publicly shared may be disciplinable.

Social Media, Cont.



- **Applicable Rules, Cont.:**
 - Rule 4.2 – Communication with Represented Parties
 - Social media "communication"
 - Do "friend requests" constitute contact?
 - See, e.g., People v. Ferrino, 851 N.Y.S.2d 339 (N.Y.C. Crim. Ct. 2008) (court found that defendant violated order for protection's "no-contact" provision by sending MySpace "friend requests" to victims—despite the fact that victims could simply deny the requests—because "friend requests" constituted contact).

Social Media, Cont.



• Applicable Rules, Cont.:

- Rule 4.2 – Communication with Represented Parties
 - "Friend requests" to agents of opposing party who is represented by counsel
 - Comment to Rule 4.2 provides, in part, that the prohibition on contacting an opposing party represented by counsel extends to "a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."
 - OLPB Admonition – 4.2 & 8.4(c) violation found when attorney instructed paralegal (under her own name) to send "friend request" to opposing party who was represented by counsel

Social Media, Cont.



• Applicable Rules, Cont.:

- Rule 3.5 – Impartiality and Decorum of Tribunal
 - Researching jurors – Initial research & continual monitoring
 - "[I]n light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members...a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial. To facilitate this search, the trial courts are directed to ensure the parties have an opportunity to make a timely search prior to the jury being empanelled and shall provide the means to do so, if counsel indicates that such means are not reasonably otherwise available." *Johnson v. McCullough*, 306 S.W.3d 551, 558-59 (Mo. 2010).

Social Media, Cont.



• Applicable Rules, Cont.:

- Rule 3.5 – Impartiality and Decorum of Tribunal
 - "Contacting" jurors – Facebook, Twitter, Websites, etc.
 - Direct communication expressly prohibited by Rule 3.5
 - This would include "friend requests" and any type of contact by which the subject would be made aware of your actions
 - Example: Twitter informs subject that you are "following" their feed
 - Passive "contact" would, under most circumstances, be permissible
 - Viewing juror's website, monitoring publicly-accessible portions of jurors' social media accounts, researching online presence, etc.

Social Media, Cont.



• Applicable Rules, Cont.:

- Rule 8.2(a) – Judges and Legal Officials
 - "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, or of a candidate for election or appointment to judicial or legal office."
 - Blowing off steam can be a disciplinable offense (Peshek & Conway)

• Attorney Conduct

- *In re Peshek*, 798 N.W.2d 879 (Wis. 2011) (above)
- *Florida Bar v. Conway*, No. SC08-326, 2008 WL 4748577, 996 So.2d 213 (Fla. 2008)
 - Florida attorney publicly reprimanded for blog postings containing derogatory comments about a judge he believed unfairly gave criminal defense attorneys only one week to prepare for trial.
- Attorney's alleged bereavement

Social Media, Cont.



- What attorney was supposed to be doing...



Social Media, Cont.



- What attorney was really doing...




Social Media, Cont.




- **Judicial Conduct**
 - ABA Formal Op. 462 (Feb. 21, 2013)
 - North Carolina Judge – Public Reprimand
 - Reprimanded for becoming a Facebook “friend” of an attorney appearing before him and exchanging various comments about the case during its pendency. Judge also “googled” one of the parties and later commented on the content of that party’s website.
 - <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>
- **Juror Conduct**
 - *Sluss v. Commw. of Ky.*, 381 S.W.3d 215 (Ky, 2012)
 - *U.S. v. Fumo*, No. 06-319, 2009 WL 1688482 (E.D. Pa. June 17, 2009)
 - *Dimas-Martinez v. State*, 385 S.W.3d 238 (Ark. 2011)

Social Media, Cont.



- **Potential Pitfalls of Social Media Use**
 - Damaging information revealed by attorneys, clients, family, friends, witnesses, etc.
 - Particularly in context of family law and personal injury/workers’ compensation matters
 - *E.F.O.C. v. Original Honeybaked Ham Co. of Georgia, Inc.*, No. 11-CV-02560-MSK-MEH, 2012 WL 5430974 (D. Colo. Nov. 7, 2012) [order on motion to compel]
 - Inherent informality of online communications
 - “Mistakes”
 - Information may be unreliable (including identity of persons placing or receiving information online)

Social Media, Cont.



- “Reply-All”
 - Rule 4.2, MRPC
- Altering Emails
 - *In re Block*, 739 N.W.2d 917 (Minn. 2007)
- Texts as part of file?
- Informality of emails and texts lends itself to immediate (and perhaps regretted) communications
 - Rules 4.4 and 8.4, MRPC

Social Media, Cont.



• Ethics Opinions:

- New York City Bar Association, Formal Opinion 2010-02
 - An attorney, acting him/herself or through the actions of another, "may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence."
 - <http://www.abcnv.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites>
- New York State Bar Association, Opinion 843 (09/10/10)
 - "A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation 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 [the Rules of Professional Conduct]."
 - <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208>

Social Media, Cont.



• Ethics Opinions, Cont.:

- Oregon State Bar Association, Formal Opinion No. 2005-164
 - Attorney may view the website of an opposing party who is represented by counsel as this action is not dissimilar from reading a magazine article or book written by that person. "A lawyer who reads information posted for general public consumption...is not communicating with the represented owner of the [website]." "[A website] can be 'public' even if an access fee or a subscription fee is charged."
 - If an attorney "does not invade the adverse party's privilege and communicates only with a non-managerial employee who is merely a fact witness, no violation [of the Rules] would exist."
 - http://www.osbar.org/_docs/ethics/2005-164.pdf

Social Media, Cont.



• Ethics Opinions, Cont.:

- Pennsylvania Bar Association, Formal Opinion 2014-300
 - Comprehensive analysis of ethical implications of attorneys' use of social media in the practice of law and attorneys' advice to clients using social media.
 - http://www.danieljsiegel.com/Formal_2014-300.pdf
- Missouri Bar Association, Informal Advisory Opinion 2009-0003
 - Attorney may not send "friend request" to opposing party who is represented by counsel.
 - <http://members.mobar.org/pdfs/precedent/aug11/informal-opinions.pdf>

Social Media, Cont.



• Ethics Opinions, Cont.:

- San Diego County Bar Association, Opinion 2011-2
 - A "friend request" sent to a person deemed to be represented by counsel is an indirect ex parte contact and concerns the subject of the representation "[I]f the communication to the represented party is motivated by the quest for information about the subject of the representation...."
 - <http://www.sdcba.org/index.cfm?pg=LEC2011-2>
- Philadelphia Bar Association, Opinion 2009-02
 - An attorney may not ask a third person to seek to become a friend of a witness on Facebook in an effort to gain access to the information posted for the purposes of impeaching the credibility of the witness at trial. Communication with a witness through a third party on Facebook is inherently deceptive.
 - http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WbServerResources/CMSResources/Opinion_2009-2.pdf

Social Media, Cont.



• Ethics Opinions, Cont.:

- Tenn. Jud. Ethics Comm., Op. 12-01 (Oct. 23, 2012)
 - Permitting judicial use of social media, but reminding judges to keep in mind issues relating to maintaining "public confidence in the independence, integrity, and impartiality of the judiciary." Also discussing potential for disqualification if the judge's social media use creates a reasonable belief that they harbor a personal bias in a case or have made a public statement regarding their anticipated course of action.
 - "In short, judges must decide whether the benefit and utility of participating in social media justify the attendant risks."
 - http://www.tncourts.gov/sites/default/files/docs/advisory_opinion_12-01.pdf

Social Media, Cont.



• Ethics Opinions, Cont.:

- New York County Lawyers' Association, Formal Opinion 743
 - "It is proper and ethical under [Rule 3.5] for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to "friend" jurors, subscribe to their Twitter accounts, send tweets to jurors or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror, but must not "friend," email, send tweets to jurors or otherwise communicate in any way with the juror, or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentations or engage in deceit, directly or indirectly, in reviewing juror social networking sites. In the event the lawyer learns of juror misconduct, including deliberations that violate the court's instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must promptly comply with Rule 3.5(d) and bring such misconduct to the attention of the court before engaging in any further significant activity in the case."

Social Media, Cont.



• Ethics Opinions, Cont.:

- New York County Lawyers' Association, Formal Opinion 743
- "[P]assive monitoring of jurors, such as viewing a publicly available blog or Facebook page, may be permissible."
- "If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."
- http://www.nycla.org/siteFiles/News/News159_0.pdf

Information



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- 651-296-3952
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