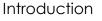


Technology, Social Media & Ethics

Office of Lawyers Professional Responsibility Siama C. Brand



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

• Defined as...

Cloud Computing

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)
- Certier) "Saa5 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, Saa5 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.



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- 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
 - terms Confidentiality agreement? Subpoenced 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.



- 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.
 - Sectore and inclusion called inclusion 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&CONT ENTID=42697&TEMPLATE=/CM/ContentDisplay.cfm

Cloud Computing, Cont.



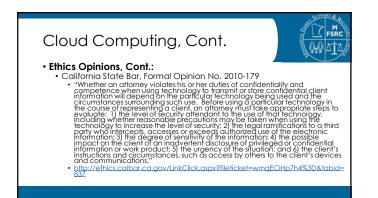
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• Ethics Opinions, Cont.:

- North Carolina, Proposed Formal Ethics Opinion 7 (A) Law firm may use Soa's 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.scribd.com/doc/30399343/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 the lawyer takes appropriate measures to protect client confidentiality.



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.:

- thics Opinions, Const.;
 New Jersey, Advisory Opinion 701 (04/24/06)
 Use of technology permisible provided attamery ensures that third parties with access four confidentiality requirements and that the attamery subject to confidentiality requirements and that the attamer eigenvectory ensure the vendor employs reasonable care in preventing disclosure of client information.
 http://lowibirany.rutgers.edu/ethics/acces/accp701_Lhtml
 State Bar of Nevada, Formal Opinion 33 (02/09/06)
 Dub to protect client confidentiality in a constraint of back the August and attamery and attamery.
- Duty to protect client confidential Up inton 35 (U2/07/06)
 Duty to protect client confidentially is not absolute. However, an attorney
 "must act competently and reasonably to safeguard confidential client
 information and communications from inadyverfent and unauthorized
 disclosure. This may be accomplished while storing client information
 electronically with a brid 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/PDfs/3_12.pdf

Cloud Computing, Cont.



• Ethics Opinions, Cont.:

- Alabama State Bar, Opinion 2010-02 Alabatria state Bar, Opinion 2010-02
 An attomey 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.clabacr.org/agc/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 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 an 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 coursents.
 If a lawyer receives a document which the lawyer knows or reasonably should know inadvertently contains confidential or privileged metadata, the lawyer shall promotly 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

merican 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

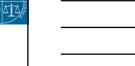
• Concerns?

- 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.pdfforlawyers.com/files/06_442.pdf
 "Opinionated" Martin Cole, Bench & Bar (November 2009)
- http://lprb.mncourts.aov/articles/Articles/Opinionated.pdf
- "Why You Should Care About Metadata" Megan Engelhardt, Minnesota Lawyer (October 11, 2010) http://lprb.mncourts.gov/articles/Articles/Why%20you%20should%20care% 20about%20metadata.pdf



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Social Media



- "Definition":
- Facebook, Twitter, MySpace, Blogs, Listservs, LinkedIn, etc. Applicable Rules:
 - Rule 1.1 Competence

 - 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
 Inre Peshek, 798 N.W.2d 879 (Wis, 2011)
 Reciprocal 64-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 ancroits.
 OLPR Admonition

Social Media, Cont.



- Applicable Rules, Cont.:
 Rule 1.7 Conflict of Interest: Current Clients
 Do "findships" 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 everincerasing accessibility of information online.
 Inter Scampill, No. A14130, 2015 WL 154250 (Minn. Apr. 1, 2015).
 Rules 4.1 & 8.4(c) Truthful Statements
 Use of tide parties to contact your obligions run through any third party used
 Even tino pctyal deception is used. "friendina" a part or another for the
- - Even if no actual deception is used, "friending" a party or another for the numose of obtaining information not publicly shared may be disciplinable

Social Media, Cont.

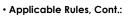


• Rule 4.2 - Communication with Represented Parties

- Social media "communication"
 Do "friend requests" constitute contact?
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- Rule 4.2 Communication with Represented Parties "Friend requests" to agents of opposing party who is represented by
- counsel 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 showyer concerning the matter or has authority to obligate the organization with respect to the matter or whose oct or ornisision in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."
 OLPR Admonition – 4.2 & 8.4(c) violation found when attorney instructed paralegal (under her own name) to send "friend request" to opposing party who wars represented by counsel
- party who was represented by counsel

Social Media, Cont.



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• Applicable Rules, Cont.:

- Rule 3.5 Impartiality and Decorum of Tribunal
- Kule 3.3 Importation y dria Decorotin of microrial
 Researching jurors Initial research & continual monitoring
 "[[I] 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 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 course indicates that such means are not reasonably otherwise available." <u>Johnson v. McCullaugh</u>, 306 S.W.3d 551, 558-59 (Mo. 2010).

Social Media, 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 "third 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.



- 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 furth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer, or public 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)

 - Florido Bar v. Conway, No. SC08-326, 2008 WL 4748577, 996 So.2d 213 (Flor. 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.



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• What attorney was really doing...





- ABA Formal Op. 462 (Feb. 21, 2013)
- North Carolina Judge Public Reprimand A 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. <u>http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf</u>

Juror Conduct

- <u>Sluss v. Commw. of Ky.</u>, 381 S.W.3d 215 (Ky. 2012)
 <u>U.S. v. Fumo</u>, No. 06-319, 2009 WL 1688482 (E.D. Pa. June 17, 2009)
 <u>Dimas-Martinez v. State</u>, 385 S.W.3d 238 (Ark. 2011)

Social Media, Cont.



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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.E.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





- 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.abcny.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites
 - 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 processed in the recebook or MySpace network used by another party in
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 aligation may processed in the recebook or MySpace network used by another party in
 access of the recebook or MySpace network used by another party in
 accessing the social network pages of the party will not violate the Rules of Professional
 conduct).
 "http://www.pysba.org/AM/Remote cm25cripasthome IEMPI ATE-/CM/C
 - Conduct]." http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/C ontentDisplay.cfm&CONTENTD=43208

Social Media, Cont.



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• 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 coursel 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.



 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.danielisiegel.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 coursel.
 http://members.mobar.org/pdfs/precedent/aug11/informal-opinions.pdf



• 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 attomey 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/W ebServerResources/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 01.pdf opinion 12-

Social Media, Cont.



• Ethics Opinions, Cont.:

Hics 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 finend juros: subscribe Jurine Twitter accounts, send tweets to phases of a trial, a lawyer may visit the publicity available Twitter, facebook or other social networking site of a juror, but must not "finend," mail, send tweets to juros or otherwise communication with the prospective juror and the lawyer does other social networking site of a juror, but must not, "finend," mail, 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 enoge in deceil, directly or information and the away may be the lawyer of the start of luror misconduct, including deliberations in malayed the the card's instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must not "the court before engaging in any further significant activity in the case."



• 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



- Advisory Opinion Service:
 - Confidential opinions will be given to licensed Minnesota attorneys and judges with questions about current and personal conduct.
 - 651-296-39521-800-657-3601
- OLPR/LPRB Website:

 - Articles, Rules, LPRB Opinions, Public Discipline Records, Complaint Forms, Online Advisory Opinion Request Form
 - <u>http://lprb.mncourts.gov</u>