

*Presenting a live 90-minute webinar with interactive Q&A*

# Ethical Risks of Attorney Social Media Activity: Navigating the Dangers of LinkedIn, Twitter, Facebook, Blogs

Avoiding Inadvertent Attorney Advertising and Client Relationships, Disclosure of Privileged Information, and Damage to Reputation

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WEDNESDAY, OCTOBER 6, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Amber Bevacqua-Lynott, Senior Counsel, **Buchalter**, Portland, Ore. and San Diego

David J. Elkanich, Shareholder, **Buchalter**, Portland, Ore.

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# Ethical Risks of Attorney Social Media Activity: Navigating the Dangers of LinkedIn, Twitter, Facebook & Blogs

David J. Elkanich & Amber Bevacqua-Lynott  
Buchalter Professional Responsibility Group

October 6, 2021

1:00 – 2:30 PM Eastern

10:00 – 11:30 AM Pacific

**Buchalter**

LOS ANGELES  
NAPA VALLEY  
ORANGE COUNTY  
PORTLAND  
SACRAMENTO  
SAN DIEGO  
SAN FRANCISCO  
SCOTTSDALE  
SEATTLE  
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# Topics/Agenda

- Ethical risks of attorney online activity
- Duty of Confidentiality
- Attorney advertising
- Client solicitation
- Unauthorized communications
- Positional conflict
- Evidence preservation and spoliation
- Recent developments in social media and state legal ethics rules and court opinions
- Best practices for minimizing legal ethics pitfalls when marketing legal services
- Q & A

**BEING A LAWYER  
IS EASY.  
IT'S LIKE RIDING A BIKE.  
EXCEPT THE BIKE IS ON FIRE.  
YOU ARE ON FIRE.  
EVERYTHING IS ON FIRE.**

# Why do people think of lawyers like this guy?

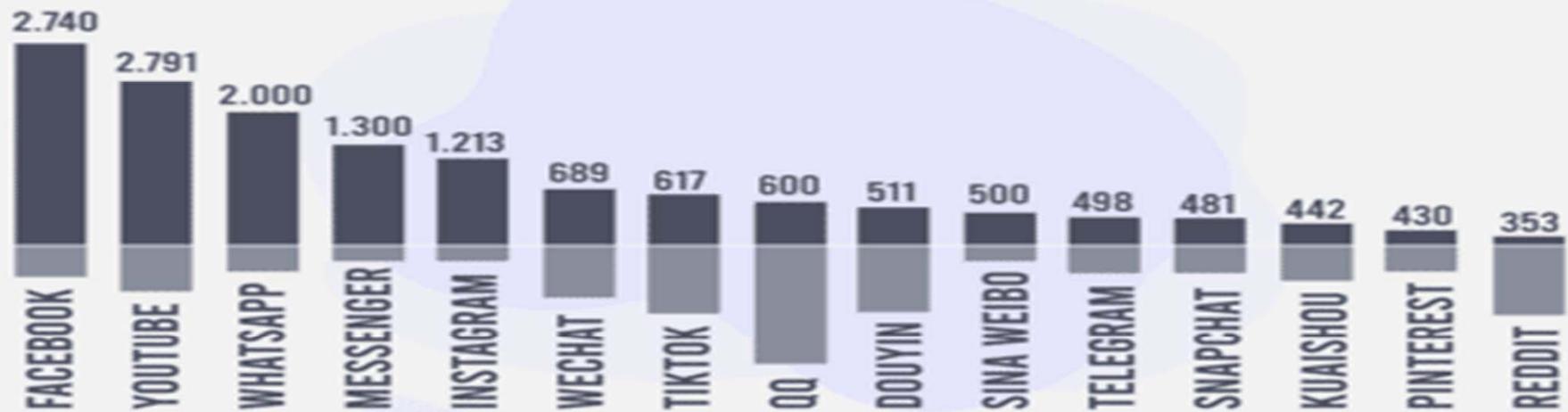


# Why do we care about social media?



# World communicates through social media

THE TOP 15 SOCIAL NETWORKING SITES AND APPS BY ACTIVE USERS (MILLION)



DreamGROW

SOURCE: STATISTA.COM

# Lawyers use of social media platforms

**96%**

OF RESPONDENTS USE SOCIAL MEDIA

**70%**

SAY THEIR USE OF SOCIAL MEDIA IS PART OF  
AN OVERALL MARKETING STRATEGY

**84%**

ARE ON LINKEDIN — STILL NO. 1 AMONG LAWYERS —  
BUT FACEBOOK AND TWITTER ARE CLOSING IN

**31%**

SAY FACEBOOK IS MOST EFFECTIVE AT BRINGING IN  
BUSINESS (OVER LINKEDIN AT 27%)

**7%**

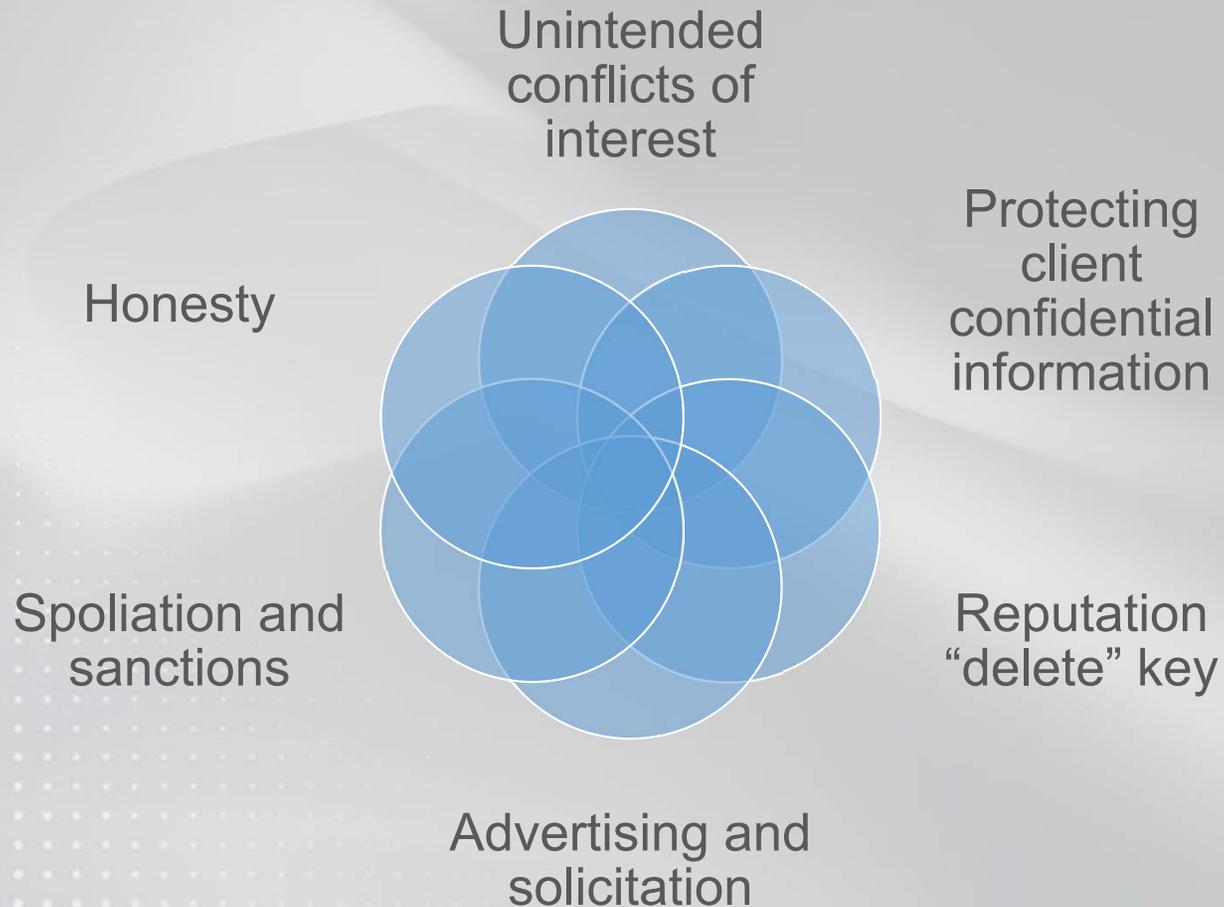
SAY SOCIAL MEDIA IS "VERY" RESPONSIBLE  
FOR GETTING THEM NEW CLIENTS

**42%**

SAY SOCIAL MEDIA IS "SOMEWHAT" RESPONSIBLE  
FOR GETTING THEM NEW CLIENTS

Source: Sprout Social & ABA  
Tech Report 2018—Marketing

# Ethical issues raised by social media



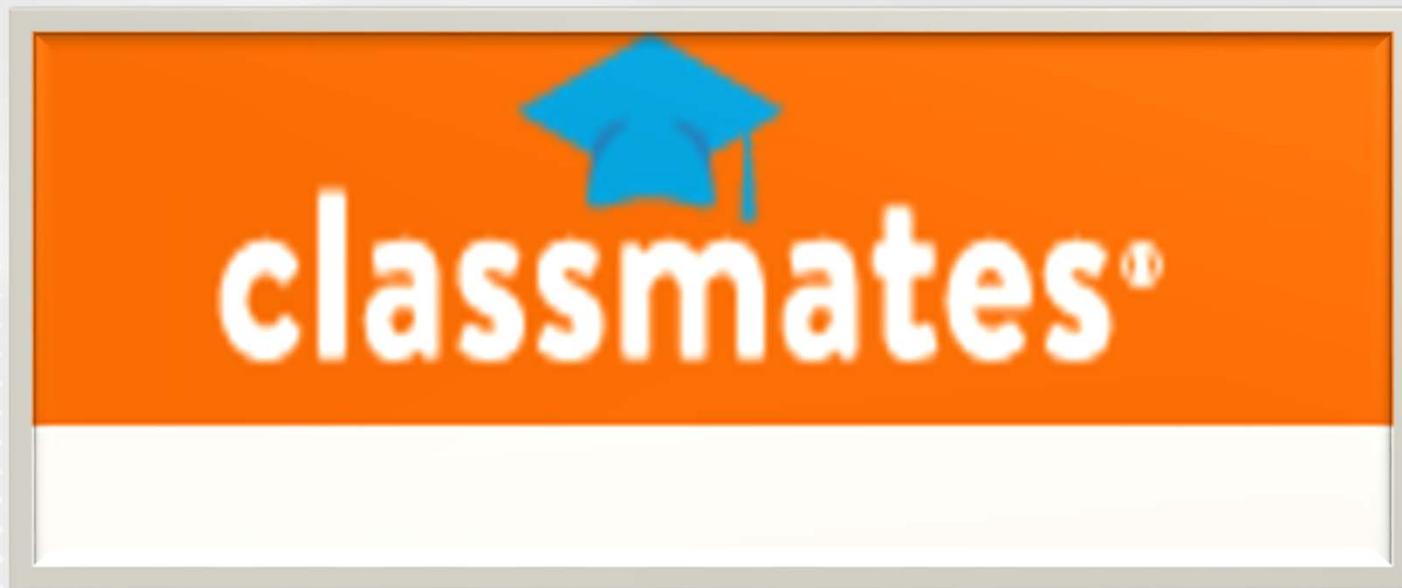
# Social media is everywhere

- Networking & advertising
  - Practice helper
  - Reputation builder
  - Discovery tool
- 
- 21st century water cooler



# Ethical Issues and Social Media

# No. 1: Be aware of online activity



Lawyer:

"Hey all! How is it going. I am married to an incredibly beautiful woman, AND I get to hang out with high school chicks all day (and some evenings too). I have even been lucky with a few. It just doesn't get better than this."

## Washington RPC 8.4(c)

Court:

“[I]t is necessary to identify the nexus between the lawyer's conduct and the lawyer's fitness to practice law to establish that the lawyer's conduct is of the type of conduct for which this court may call the lawyer to answer.”

## Employee fired from Taco Bell for licking shells

<http://www.cbsnews.com/news/employee-fired-from-taco-bell-for-licking-shells/>



A photo of an unnamed employee licking Taco Bell shells caused disgust on social media. / FACEBOOK

Taco Bell has fired the employee who caused a social media storm after appearing in an online photo licking a stack of taco shells, CBS Los Angeles reports.

The picture, originally posted by user "Jj O'Brien Nolan" on the fast food chain's Facebook feed Sunday, was taken by the employee's co-worker at a Taco Bell in Ridgecrest. The co-worker was also terminated.

Obviously

A permanent  
disability claimant

facebook



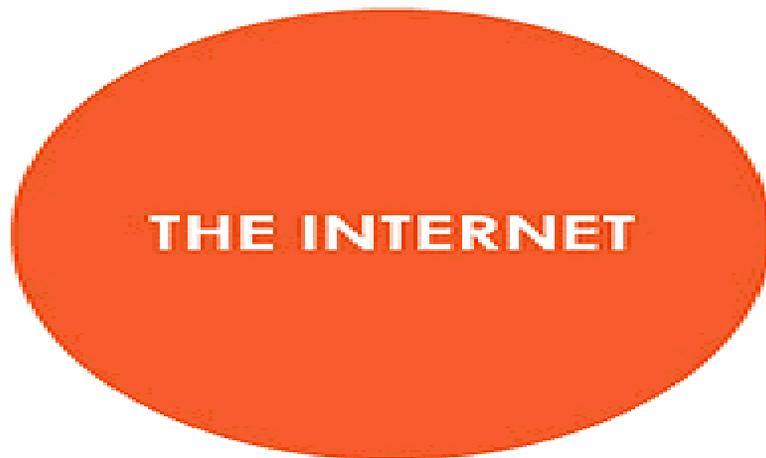
**Riding the Wave**

Yesterday at 2:00 pm

Whoa! Check me out! Wakeboarding is so awesome - I'm for sure doing it again this next weekend.



# The internet and privacy



**A HELPFUL VENN DIAGRAM**

## No 2: honesty remains an essential ingredient



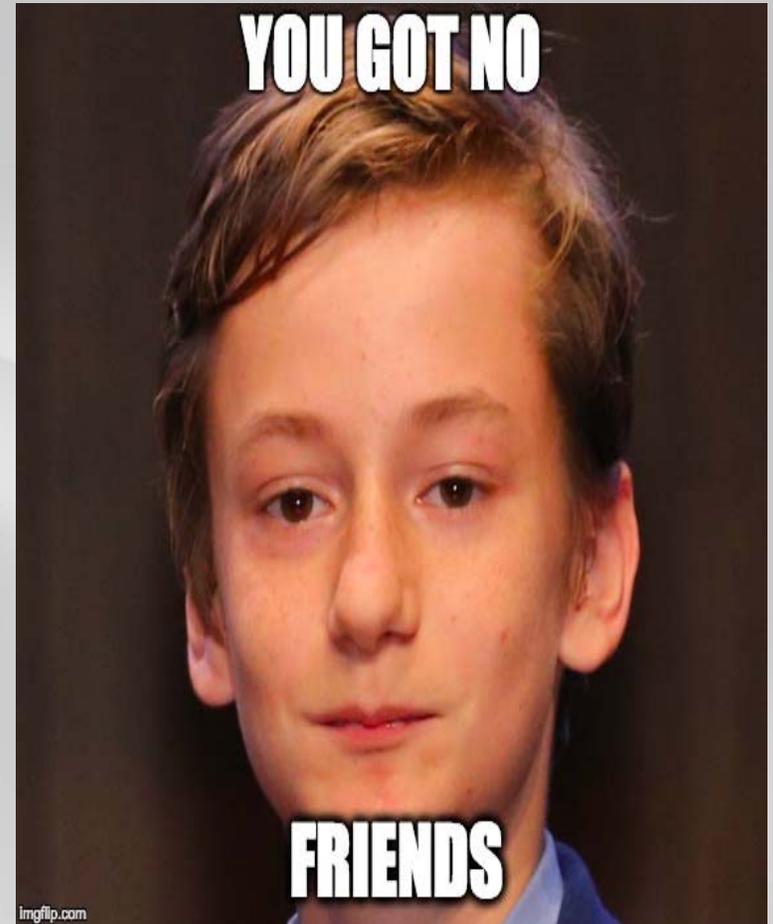
- A Galveston, Texas lawyer requested a continuance due to a reported death in the family. The trial judge checked the lawyer's Facebook page and ...

discovered that the lawyer had spent the week drinking and partying.

# Friending for information – where is the line?

- Lawyer wishes to investigate an opposing party, a witness, or a juror, by accessing the person's social networking website. While viewing the publicly available information on the website, Lawyer learns that there is additional information that the person has kept from public view through privacy settings and that is available by submitting a request through the person's website.

What can Lawyer do?



Review publicly available info? Yes.

Use username or alias?

- Generally no

Request access to non-public info?

- If represented, no under RPC 4.2
- If not represented, yes but be mindful of RPC 4.3...

# Requesting social media through discovery

- Normal discovery procedures should apply
- But courts – wary of fishing expeditions especially due to the non-public and personal nature of social media
  - “Might” have useful information – not likely enough
  - Need some evidence showing relevant information can be found on the account

# Spoliation is always spoliation

*Lester v. Allied Concrete Co.*

- Discovery request for FB
- P Lawyer advised client to “clean up” the FB page because “we do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace.”



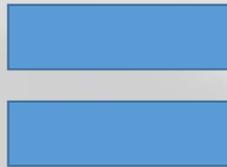
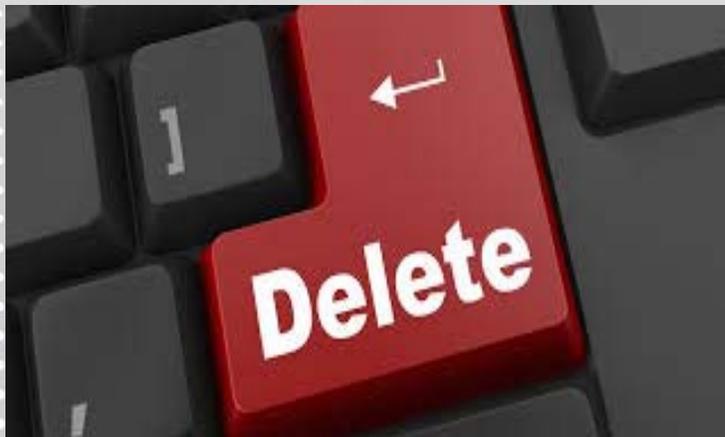
# Competence a must

- Lawyers must be competent in social media
- RPC 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- ABA Cmt [8]: Lawyer must “maintain” competence by keeping abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education.

# Competence in social media

- What technology do you need?
- Understand and mitigate risks of technology?
- How do you obtain and maintain competence?





# So, what can lawyers advise?

- New York 745 (2013), Lawyer may advise clients:
  - What they should/shouldn't post on social media
  - What existing posting they may or may not remove
  - Particular implications of social media posts as it may be used against them in litigation
- Philadelphia Bar Association Op. 2014-5 (2014):
  - May change privacy settings
  - May delete content, so long as content is properly preserved prior to deletion
  - Must make reasonable efforts to obtain content if lawyer knows it exists but wasn't produced by client

- NYSBA Commercial & Federal Litig. Section Guideline No. 4.A  
Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject to a duty to preserve.
- Pre-litigation? See Florida Advisory Opinion 14-1 (2015)
- RPC 3.4(a) A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

# But what about negative social media posts?



[Michelle Anderson](#)

★★★★★ reviewed 4 months ago

Straight up liar. Says he is fair and considerate, yet he suckered me and my family into paying double what he said he was going to charge! In addition to the unfair business practices, he was overly arrogant and racist towards my husband. If you are looking for an attorney to represent your family, this is not the guy to hire, you have been warned.



**Response from the owner** - 3 months ago

You have either made a mistake or are being dishonest. I have never heard of you. I have never charged anyone "double" what I quoted, nor have I been racist toward anyone. If you have a problem with an attorney you should contact the California State Bar Ethics Hotline at (1-800-2-ETHICS).

[Edit](#) - [Delete](#)

# Duty of confidentiality

- RPC 1.6(a): A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)



- RPC 1.6(b) provides that you may reveal a client's confidence or secret to the extent the lawyer reasonably believes necessary:

—To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or a civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client. See RPC 1.6(b)(5).

- *So, what does this mean?*

- There are also ethics opinions warning about responding to social media:
  - Los Angeles County Bar Association Op. 525 (2012)
  - Professional Ethics Committee for the State Bar of Texas Op 662 (2016)
  - San Francisco Opinion 2014-1 (01/2014)
  - NYSBA Opinion 1032 (10/30/2014)
  - Pennsylvania Bar Opinion 2014-30
- And cases too:
  - In re Skinner*, 295 Ga. 217, 758 S.E.2d 788 (2014) and *In re Tsamis* (Ill. 2014) (reprimands for disclosing confidential client information in response to negative online reviews)
- And the ABA, formal opinion 496 (2021)

# *In re Conry*, 368 Or 349 (2021)

(argued at trial and on appeal by David Elkanich)

- Issue: What is a “controversy” in RPC 1.6(b)(5)?
- ABA cmt [10] RPC 1.6:
  - The lawyer’s right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

- So what are our options?
  - Breathe and self-evaluate.
  - Contact the social media provider.
  - Resolve any disputes between you and the client.
  - Engage in litigation?
  - Consider a responsive post? Think about the limits of *In re Conry*.
- Bar suggests: “The post is inaccurate. I represented this client zealously and effectively. My ethical duty to protect this client’s confidences prevents me from responding in more detail. Please see my website for accurate information about my practice.”

## No. 3: be vigilant with client confidentiality

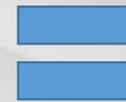
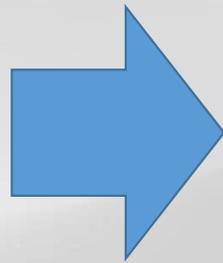
- Judge was “a total a—hole”
- Another judge was “Judge Clueless”
- Failed to inform the judge of her client’s false statements; the lawyer described her conversation with the client:
  - “Huh? You want to go back and tell the judge that you lied to him, you lied to the pre-sentence investigator, you lied to me? And you expect what to happen if you do this? I’ll tell you what would happen; the sentence just pronounced would be immediately vacated and you’d go to prison, that’s what would happen.”

- #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.

# ABA finally comes around, sorta...

- ABA Formal Opinion 480 (March 2018):
  - Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.*
- Rule 1.6 provides no exception for information that is "generally known" or "contained in a public record."
- Client identity could be protected too. Be careful with hypotheticals.

# Confidentiality applies online



# No “generally known” exception to RPC 1.6

- ABA Formal Opinion 480 (March 2018):

*—Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.*

- Rule 1.6 provides no exception for information that is "generally known" or "contained in a public record."
- Client identity could be protected too. Be careful with hypotheticals.
- How far to take this? Cf. RPC 1.9(c)(1)

## No. 4: watch out for conflicts online

- Unintended attorney-client relationships!
- Think of clients like Velcro
- Run (and update)



## No. 5: Yes, you may advertise but...

- Social media posts may constitute:
  - attorney advertising
  - legal practice – or malpractice (incomplete info?)
- “A lawyer’s social media profile that is used only for personal purposes (i.e., to maintain contact with friends and family) is not subject to attorney advertising and solicitation rules. However, a social media profile that a lawyer primarily uses for the purpose of her and her law firm’s business is subject to such rules”
- NYSBA Guideline 1.A

- California Ethics Op. No. 2016-196:
- “Blogging by an attorney may be a communication subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising if the blog expresses the attorney’s availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly through its description of the type and character of legal services offered by the attorney, detailed descriptions of case results, or both.”

# Online risks:

- Legal “advice” v. general information
- Risk of practice where not licensed – UPL issues
- Client-defined based upon reasonable and subjective view of the would-be client (not the lawyer)
- Disclaimers

# Consider risks in claiming own profile

- Search yourself – have you claimed yourself yet?
  - LinkedIn
  - Avvo
  - Other websites
- But beware consequences – see WA Op 2014-02 -
  - “A lawyer who claims, adopts, or endorses information on a website listing becomes responsible to ensure that the information in the listing conforms to the Rules for Professional Conduct.”

# WSBA Ethics Op. No. 2014-02

- Before claiming profile, take reasonable steps to ascertain the extent to which the website will make representations about your practice
- Ratings and endorsements – OK, but:
  - “If Lawyer chooses to participate in the website, then Lawyer must periodically monitor her profile to reasonably ensure that inaccurate client ratings or peer endorsements are deleted or disclaimed in a reasonably prompt manner, if it is reasonably feasible to do so.”
- “A lawyer who claims, adopts, or endorses information on a website listing becomes responsible to ensure that the information in the listing conforms to the Rules for Professional Conduct. If Lawyer claims her profile and inadvertently provides inaccurate information, then Lawyer must make a prompt correction. Lawyer must also update her information if it changes, in order to ensure that only accurate information is provided.”

# What is false and misleading under RPC 7.1

- RPC 7.1:
  - A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.
- Examples:
  - “Never lost a jury trial”
  - “Harvard trained”
  - “Amber Lynott and Associates” or “Elkanich Legal Team”
  - “We have collected millions of dollars for clients just like you!”

## Also, think about:

- Be wary of “Experts” and “Specialists”
- Use accurate practice areas / groups
- Proper titles and geographic licenses
- A “suspended” lawyer ...

# Client solicitation getting easier?

- More streamlined advertising rules under ABA
- Many states are removing prohibition on in-person solicitation
  - See Oregon RPC 7.3 and Washington RPC 7.3
- Does the prohibition on in-person solicitation include:
  - Livestreams?
  - FaceBook groups?
  - Chat rooms?
  - Listserve?

# No. 5: social media and juries

## Carino v. Muenzen, 2010 WL 3448071 (NJ 2010):

- THE COURT: Are you Googling these [potential jurors]?

\*\*\*

- [PLAINTIFF'S COUNSEL]: I'm getting information on jurors-we've done it all the time, everyone does it. It's not unusual. It's not. There's no rule, no case or any suggestion in any case that says-

\*\*\*

- THE COURT: No, no, here is the rule. The rule is it's my courtroom and I control it.

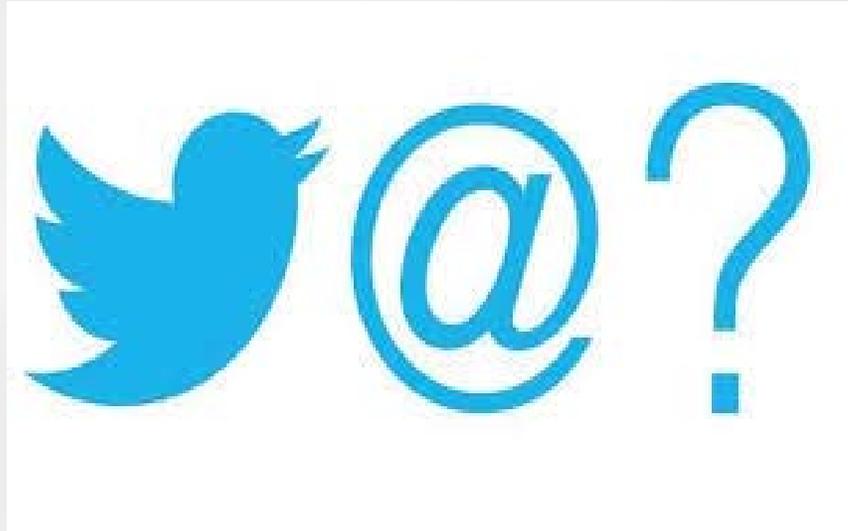
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- THE COURT: I believe in a fair and even playing field. I believe that everyone should have an equal opportunity. Now, with that said there was no advance indication that you would be using it. The only reason you're doing that is because we happen to have a [Wi-Fi] connection in this courtroom at this point which allows you to have wireless internet access.

\*\*\*

- THE COURT: And that is fine provided there was a notice. There is no notice. Therefore, you have an inherent advantage regarding the jury selection process, which I don't particularly feel is appropriate. So, therefore, my ruling is close the laptop for the jury selection process. You want to-I can't control what goes on outside of this courtroom, but I can control what goes on inside the courtroom.

- Do you ask jurors if they have a handle?



# Oracle v. Google, No. 3:10-cv-03561-WHA (2016)

- » “Trial judges have such respect for juries — reverential respect would not be too strong to say — that it must pain them to contemplate that, in addition to the sacrifice jurors make for our country, they must suffer trial lawyers and jury consultants scouring over their Facebook and other profiles to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information.”
- » The Court called upon the parties to voluntarily consent to a ban against all Internet research on the venire or our jury until the trial is over.
- » If don’t agree, each side shall inform the venire of the specific extent to which it (including jury consultants, clients, and other agents) will use Internet searches to investigate and to monitor jurors \* \* \* and the extent to which they will perform ongoing searches while the trial is underway.
- » Venire will be given opportunity to adjust privacy settings.

# ABA Ethics Op 466

1. Viewing a juror's information that is available without making an access request so that the juror is unaware that the information has been viewed. For example, viewing a juror's Facebook page that is open to the public.

Answer: Generally "yes"

2. Viewing a juror's information by requesting access to the juror's social media. For example, sending a "friend" request to a juror so that you can view the juror's Facebook page if the juror has placed privacy restrictions at the "Friends" level.

Answer: Generally "no"

3. Viewing a juror's information where the juror will or may learn the identity of the viewer. For example, viewing a juror's LinkedIn profile, if the juror has a premium LinkedIn account.

Answer: Generally, "yes, qualified."

- Practical limits?

- No timely jury list
- Not enough information
- Not enough time
- Not enough recourses
- No jury questionnaires

- Consider the following:

- How long and complex is the case?
- Can you learn information about the jurors that could assist in presentation of the case?
- Should you be monitoring jurors' online activities?
- Watch the activities of jury consultants – see RPC 5.3

- Do:

- Remember the RPCs: you are always a lawyer
- Be comfortable with the technology you use
- Claim your firm's presence before someone else
- Correct false impressions and disclaim if necessary
- Create, adopt and enforce a firm policy for internal and external, official and unofficial online activities
- Watch your privacy settings

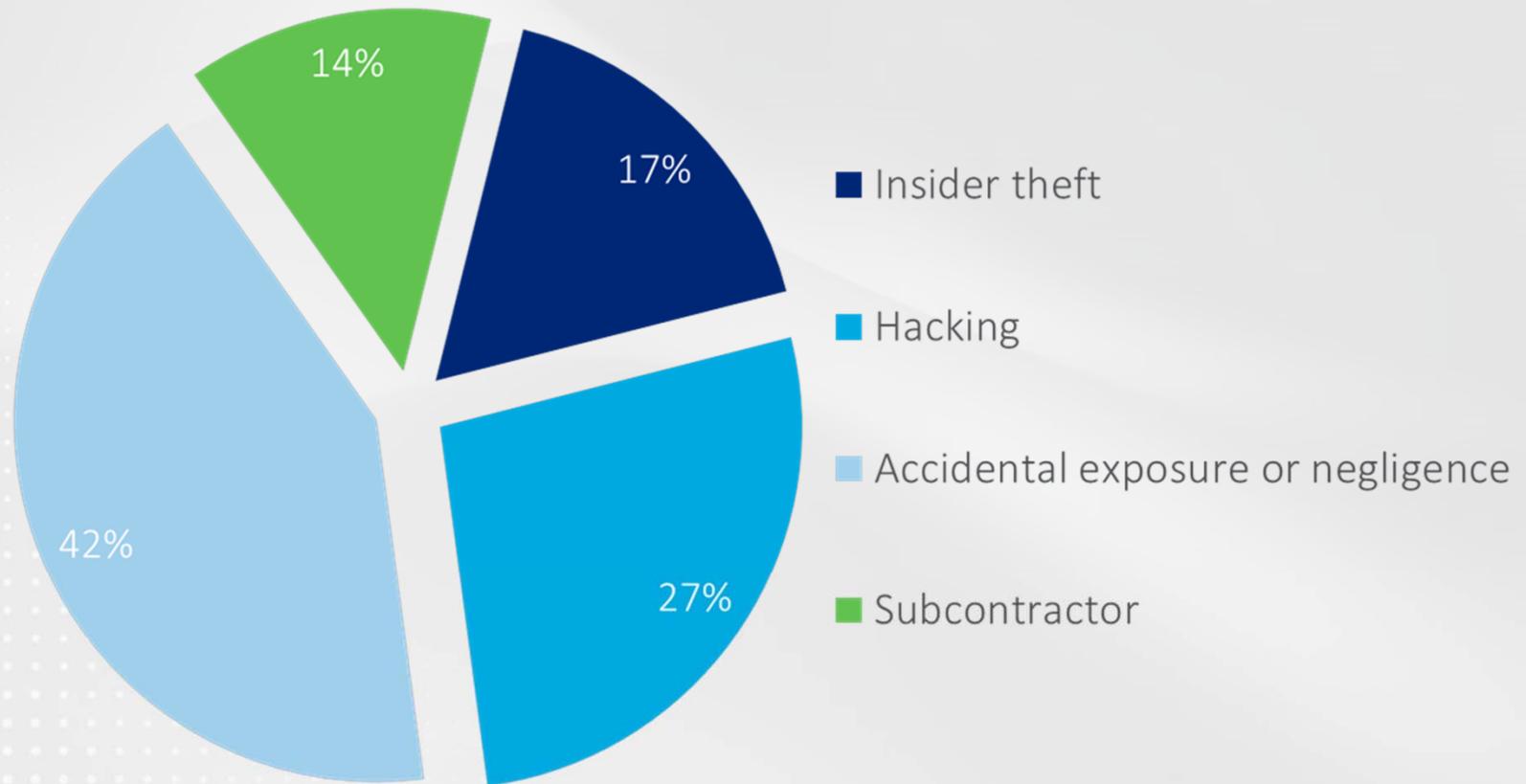
- DO NOT:

- Reveal client information without consent
- Post anything you would be embarrassed about later.
- Engage in conduct which, if engaged in offline, would violate the rules.
- Friend everyone who asks.

# Personal marketing – using social media

- Building your brand has always required a deft balance of the personal social activity with the demonstration of professional competence and network credibility
- The rules are the same
- Be smart about it
- Don't give legal advice
- Respect client confidentiality
- Success is achieved the same way
- Be where the perspective clients and referral sources are
- Be smart about what you do and know what you don't
- Be credible

# Something to consider re cyber security



# 10 Ways to minimize risk

- Use secure networks, where possible
- Use encrypting technology
- Inactivity timer
- Location services
- Remote wipe (and wipe on attempts)
- URLs and QRs
- Update your device
- Don't jailbreak or root
- Terms of Service – malicious apps
- Virtual assistants

# Buchalter Professional Responsibility Group



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- Fee Disputes, Mediations, Arbitrations
- Litigation Issues, such as Withdrawal, Sanctions & Disqualification
- Disciplinary (Bar) Defense
- Judicial Ethics
- Judicial Conduct Commission
- Licensing, Admissions, and Reciprocity
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