AMERICAN INNS of COURT

NOVEMBER 2013
GUS J. SOLOMON INN OF COURT

Lawyers and Social Media

(Personal and Professional Uses of Social Media and Listservs)

Tuesday, November 19, 2013
121 SW Salmon Street
World Trade Center Plaza Conference Room
Portland, Oregon

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OREGON RULES OF PROFESSIONAL CONDUCT

(as amended effective January 1, 2013)

RULE 1.0 TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposes the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Electronic communication" includes but is not limited to messages sent to newsgroups, listservs and bulletin boards; messages sent via electronic mail; and real time interactive communications such as conversations in internet chat groups and conference areas and video conferencing.

(d) "Firm" or "law firm" denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

(e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(f) “Information relating to the representation of a client” denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

(h) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances.
(i) "Matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of a government agency.
(j) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
(k)"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
(l) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
(m) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
(n) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.
(o) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.
(p) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.
(q) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostatting, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(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).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
(2) to prevent reasonably certain death or substantial bodily harm;
(3) to secure legal advice about the lawyer's compliance with these Rules;
(4) 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 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;
(5) to comply with other law, court order, or as permitted by these Rules; or
(6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve information relating to the representation of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.
(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:
(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
(b) communicate ex parte on the merits of a cause with such a person during the proceeding unless authorized to do so by law or court order;
(c) communicate with a juror or prospective juror after discharge of the jury if:
(1) the communication is prohibited by law or court order;
(2) the juror has made known to the lawyer a desire not to communicate; or
(3) the communication involves misrepresentation, coercion, duress or harassment;
(d) engage in conduct intended to disrupt a tribunal; or
(e) fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;

(b) the lawyer is authorized by law or by court order to do so; or

(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter; and

(5) a lawyer may pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service, including fees calculated as a percentage of legal fees received by the lawyer from a referral.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation, except as authorized by law; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.

RULE 7.1 COMMUNICATION CONCERNING A LAWYER'S SERVICES

(a) A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer's firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication:

(1) contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the communication considered as a whole not materially misleading;

(2) is intended or is reasonably likely to create a false or misleading expectation about results the lawyer or the lawyer's firm can achieve;

(3) except upon request of a client or potential client, compares the quality of the lawyer's or the lawyer's firm's services with the quality of the services of other lawyers or law firms;

(4) states or implies that the lawyer or the lawyer's firm specializes in, concentrates a practice in, limits a practice to, is experienced in, is presently handling or is qualified to handle matters or areas of law if the statement or implication is false or misleading;

(5) states or implies that the lawyer or the lawyer's firm is in a position to improperly influence any court or other public body or office;

(6) contains any endorsement or testimonial, unless the communication clearly and conspicuously states that any result that the endorsed lawyer or law firm may achieve on behalf of one client in one matter does not necessarily indicate that similar results can be obtained for other clients;

(7) states or implies that one or more persons depicted in the communication are lawyers who practice with the lawyer or the lawyer's firm if they are not;

(8) states or implies that one or more persons depicted in the communication are current clients or former clients of the lawyer or the lawyer's firm if they are not, unless the communication clearly and conspicuously discloses that the persons are actors or actresses;

(9) states or implies that one or more current or former clients of the lawyer or the lawyer's firm have made statements about the lawyer or the lawyer's firm, unless the making of such statements can be factually substantiated;

(10) contains any dramatization or recreation of events, such as an automobile accident, a courtroom speech or a negotiation session, unless the communication clearly and conspicuously discloses that a dramatization or recreation is being presented;

(11) is false or misleading in any manner not otherwise described above; or

(12) violates any other Rule of Professional Conduct or any statute or regulation applicable to solicitation, publicity or advertising by lawyers.

(b) An unsolicited communication about a lawyer or the lawyer's firm in which services are being offered must be clearly and conspicuously identified as an advertisement unless it is apparent from the context that it is an advertisement.

(c) An unsolicited communication about a lawyer or the lawyer's firm in which services are being offered must clearly identify the name and post office box or street address of the office of the lawyer or law firm whose services are being offered.

(d) A lawyer may pay others for disseminating or assisting in the dissemination of communications about the lawyer or the lawyer's firm only to the extent permitted by Rule 7.2.
(e) A lawyer may not engage in joint or group advertising involving more than one lawyer or law firm unless the advertising complies with Rules 7.1, 7.2, and 7.3 as to all involved lawyers or law firms. Notwithstanding this rule, a bona fide lawyer referral service need not identify the names and addresses of participating lawyers.

RULE 8.4 MISCONDUCT
(a) It is professional misconduct for a lawyer to:
(1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;
(4) engage in conduct that is prejudicial to the administration of justice; or
(5) state or imply an ability to influence improperly a government agency or official or to achieve results by mans that violate these Rules or other law, or
(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

REVISED OREGON CODE OF JUDICIAL CONDUCT

(1996 Revision and subsequent amendments through Supreme Court Order No. 11-030)

Judicial Rule 1: Maintaining the Integrity of the Judicial System

JR 1-101(A) A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.

(B) A judge shall not commit a criminal act.

(C) A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament or fitness to serve as a judge.

(D) A judge shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

(E) A judge shall not allow family, social or other relationship to influence judicial conduct or judgment.

(F) A judge shall not use the position to advance the private interests of the judge or any person, nor shall a judge convey or permit anyone to convey the impression that anyone has a special influence with the judge, but a judge may provide a character or ability reference for a person about whom the judge has personal knowledge.

(G) A judge shall not testify as a character witness except pursuant to subpoena.

(H) A judge shall not hold membership in any organization that the judge knows is a discriminatory organization. For purposes of this rule, "discriminatory organization" means an organization that, as a policy or practice and contrary to applicable federal or state law, treats persons less favorably in granting membership privileges, allowing participation or providing services on the basis of sex, race, national origin, religion, sexual orientation, marital status, disability or age.

Judicial Rule 2: Impartial and Diligent Performance of Judicial Duties

JR 2-101 A judge's performance of judicial duties shall take precedence over all other activities, and a judge shall not neglect the business of the court.

JR 2-102(A) A judge shall provide to every person who has a legal interest in a proceeding, and to that person's lawyer, the right to be heard according to law.

(B) A judge shall not communicate or permit or cause another to communicate with a lawyer or party about any matter in an adversary proceeding outside the course of the

proceeding, except with the consent of the parties or as expressly authorized by law or permitted by this rule.

(C) A judge may communicate ex parte when circumstances require for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits, provided that:
(1) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication; and

(2) the judge makes provision by delegation or otherwise promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(D) Except as provided in subsection (E) of this rule, a judge shall promptly disclose to the parties any communication not otherwise prohibited by this rule that will or reasonably may influence the outcome of any adversary proceeding. The disclosure shall identify the person with whom the communication occurred and the substance of the communication, and the judge shall give the parties a reasonable opportunity to respond to the information disclosed.

(E) Subsection (D) of this rule does not limit, or require disclosure to a party of, any discussions about legal or administrative matters or other matters in the record related to a case that occur between a judge and any of the following: another judge of the same level; employees of the court; employees of the judicial branch of government.

JR 2-103 A judge shall not, while a proceeding is pending in any court within the judge's jurisdiction, make any public comment that might reasonably be expected to affect the outcome or impair the fairness of the proceeding. The judge shall require similar abstention on the part of court personnel who are subject to the judge's direction or control. This rule shall not prohibit a judge from making public statements in the course of official duties, from explaining for public information the procedures of the courts, from establishing a defense to a criminal charge or civil claim against the judge or from otherwise responding to allegations concerning the judge's conduct in the proceeding.

JR 2-104(A) A judge possessing knowledge that another judge or a lawyer has committed a violation of the rules of judicial or professional conduct or law that raises a substantial question as to that individual's honesty, trustworthiness or fitness as a judge or lawyer shall inform the Commission on Judicial Fitness and Disability or the Oregon State Bar Disciplinary Counsel.

(B) A judge possessing knowledge or evidence concerning another judge or lawyer shall reveal that knowledge or evidence on request by a tribunal or other authority empowered to investigate or act upon the conduct.

(C) This rule does not apply to judges who obtain such knowledge or evidence while participating in a loss prevention program of the Professional Liability Fund, such as the Oregon Attorney Assistance Program.

JR 2-105 A judge shall make any appointment only on the basis of merit.

JR 2-106(A) A judge shall disqualify himself or herself in a proceeding in which the

judge's impartiality reasonably may be questioned, including but not limited to instances when

(1) the judge has a bias or prejudice concerning a party or has personal knowledge of disputed evidentiary facts concerning the proceeding;
(2) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously was associated served during the association as a lawyer in the matter, or the judge or the lawyer has been a material witness in the matter;

(3) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse, parent or child, wherever residing, or any other person residing in the judge's household has a financial interest in the subject matter in controversy, is a party to the proceeding or has any other interest that could be substantially affected by the outcome of the proceeding;

(4) the judge, the judge's spouse, parent or child wherever residing, or any other person residing in the judge's household

(a) is a party to the proceeding, or an officer, director, partner or trustee of a party;
(b) is acting as a lawyer in the proceeding;
(c) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or
(d) is, to the judge's knowledge, likely to be a material witness in the proceeding.

(B) A judge shall be responsible for knowing about the judge's financial interests, including such interests relating to service as a fiduciary, and shall make reasonable efforts to be informed about the financial interests of the judge's spouse, domestic partner, parents and children, wherever residing.

(C) For purposes of this rule

(1) "fiduciary" includes relationships such as personal representative, trustee, conservator and guardian;

(2) "financial interest" means a more than de minimis ownership of a legal or equitable interest or a relationship as director, advisor or other active participant in the affairs of a party, except that

(a) ownership in a mutual or common investment fund that owns securities is not a "financial interest" unless the judge participates in the management of the fund;
(b) holding an office in an educational, religious, charitable, fraternal or civic organization is not a "financial interest" in property of the organization;
(c) the proprietary interest of a policyholder in a mutual insurance company, a depositor in mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest; and
(d) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(D) A judge who is disqualified under this rule may, rather than withdraw from the proceeding, disclose on the record the basis of the disqualification. If, after such

disclosure, the parties all agree in writing or on the record that the judge's relationship is immaterial or that the judge's financial interest is insubstantial, the judge may participate in the proceeding. Any writing, signed by or on behalf of all parties, shall be incorporated in the record of the proceeding.
JR 2-107 A judge shall be faithful to the law and shall decide matters on the basis of the facts and applicable law.

JR 2-108 A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

JR 2-109 A judge shall maintain order and decorum in proceedings before the judge.

JR 2-110(A) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, court personnel and members of the public.

(B) A judge shall not act in a way that the judge knows, or reasonably should know, would be perceived by a reasonable person as biased or prejudiced toward any of the litigants, jurors, witnesses, lawyers or members of the public.

(C) A judge shall require lawyers and court personnel who are subject to the judge's direction or control to act in accord with the principles embodied in paragraphs (A) and (B) of this rule.

(D) Paragraphs (B) and (C) of this rule do not preclude consideration or advocacy of any issue relevant to the proceeding.

Judicial Rule 3: Extra-Judicial Activities; Minimizing the Risk of Conflict with Judicial Obligations

JR 3-101 A judge shall not serve as an officer, director, trustee or advisor of a private or public corporation or of an educational, religious, charitable, fraternal, political or civic organization if the corporation or organization regularly engages in proceedings that would ordinarily come before the judge or in adversary proceedings in any court in Oregon.

JR 3-102(A) A judge shall not personally solicit funds for any private or public entity or for any educational, religious, charitable, fraternal, political, or civic organization, or use or permit the use of the prestige of the judicial office, including a reference to the judge's official position, for that purpose. Except as provided in JR 3-101, a judge may serve as an officer, director, or trustee of such an organization.

(B) Notwithstanding subsection (A), a judge may:

(1) Assist a private or public entity devoted to improvement of the law, legal education, the legal system, or the administration of justice in raising, managing, or investing funds;

(2) Personally solicit funds from or make recommendations to private and public granting agencies with respect to private or public entities devoted to the improvement of the law, legal education, the legal system, or the administration of justice;

(3) Permit the judge's name and position to be identified in stationery or other materials listing officers, directors, trustees, or committee members of a private or public entity devoted to the improvement of the law, legal education, the legal system, or the administration of justice;
(4) Appear at, participate in, or permit the judge's name or title to be used in connection with, fundraising events for private or public entities devoted to the improvement of the law, legal education, the legal system, or the administration of justice.

(5) Assist a not-for-profit private or public educational, religious, charitable, fraternal, or civic organization in raising, managing, or investing funds. Such assistance may not include making a direct request for financial support for the entity as part of the judge's involvement or permitting the judge's title to be used in connection with such a request.

(C) "Personally solicit funds," as used in this rule, means: A direct request for financial support in person, by letter, by telephone, or by any other means of communication but does not include receiving and handling funds or goods donated or offered in exchange for goods or services sold to raise funds.

(D) "Assist . . . in raising, managing, or investing funds," as used in this rule, means: any fundraising activity other than personally soliciting funds.

JR 3-103 A judge shall not directly or indirectly accept gifts, bequests, favors or loans from anyone, except that a judge may accept

(A) gifts incident to a public testimonial to the judge, publications supplied by publishers or organizations on a complimentary basis for official use or invitations to the judge to attend law-related functions or activities related to the improvement of law, legal education, the legal system, or the administration of justice;

(B) ordinary social hospitality; gifts, bequests, favors or loans from relatives; gifts from friends for wedding, birthday or other personal occasions; loans from lending institutions in the regular course of business on terms generally available to persons who are not judges; or scholarships, fellowships or grants awarded on terms applied to other applicants;

(C) any other gift, bequest, favor or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge.

JR 3-104 Nonpublic information acquired by a judge in a judicial capacity shall not be used or disclosed for any purpose not related to judicial duties.

JR 3-105(A) A judge other than a judge described in JR 5-102 shall not serve as a fiduciary as defined in JR 2-106(C) except for the benefit of a member of the judge's family. "Member of the judge's family" includes a spouse, domestic partner or their children, siblings or their children, child, grandchild, parent or grandparent, aunt or uncle, or first cousin wherever residing.

(B) Nothing in subsection (A) of this section allows a judge to serve as a fiduciary when service is otherwise prohibited by law.

JR 3-106 A judge shall not act as a private arbitrator or private mediator for remuneration or anything of value, except as otherwise provided in JR 5-102.

JR 3-107 A judge shall not engage in the private practice of law, except as otherwise provided in JR 5-102.

Judicial Rule 5: Application of Judicial Rules

JR 5-101 Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions is a judge for the purposes of this Code. All judges shall comply with this Code except as provided otherwise in this rule.

JR 5-102 A person who serves as a judge, other than as a judge duly elected or appointed by the Governor to a position on an appellate court, the tax court or a district or circuit court,

(A) is not required to comply with JR 3-105 (judge as fiduciary), JR 3-106 (judge as arbitrator or mediator) and JR 3-107 (judge engaging in practice of law), but must comply with all other provisions of this Code while serving; a county judge is also not required to comply with the other provisions of JR 3 (extra-judicial activities) or with JR 4 (political activity);

(B) shall not, except with the express consent of the parties and lawyers, accept a judicial assignment involving a lawyer or law firm that the person is then opposing, as a lawyer or a party, in any legal proceeding.

JR 5-103 A senior judge under ORS 1.300 is subject to JR 5-102 when serving by appointment of the Supreme Court.

Enrolled

House Bill 2654

Sponsored by Representative DOHERTY, Senators KNOPP, STARR; Senators BURDICK, EDWARDS, ROSENBAUM, STEINER HAYWARD (Presession filed.)

CHAPTER .....

AN ACT

Relating to compelled access to social media accounts.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this 2013 Act is added to and made a part of ORS chapter 659A.

SECTION 2. (1) It is an unlawful employment practice for an employer to:

(a) Require or request an employee or an applicant for employment to disclose or to provide access through the employee's or applicant's user name and password, password or other means of authentication that provides access to a personal social media account;

(b) Compel an employee or applicant for employment to add the employer or an employment agency to the employee's or applicant's list of contacts associated with a social media website;

(c) Except as provided in subsection (4)(b) of this section, compel an employee or applicant for employment to access a personal social media account in the presence of the employer and in a manner that enables the employer to view the contents of the personal social media account that are visible only when the personal social media account is accessed by the account holder's user name and password, password or other means of authentication;

(d) Take, or threaten to take, any action to discharge, discipline or otherwise penalize an employee for the employee's refusal to disclose, or to provide access through, the employee's user name and password, password or other means of authentication that is associated with a personal social media account, to add the employer to the employee's list of contacts associated with a social media website or to access a personal social media account as described in paragraph (c) of this subsection; or

(e) Fail or refuse to hire an applicant for employment because the applicant refused to disclose, or to provide access through, the applicant's user name and password, password or other means of authentication that is associated with a personal social media account, to add the employer to the applicant's list of contacts associated with a social media website or to access a personal social media account as described in paragraph (c) of this subsection.

(2) An employer may require an employee to disclose any user name and password, password or other means for accessing an account provided by, or on behalf of, the employer or to be used on behalf of the employer.

(3) An employer may not be held liable for the failure to request or require an employee or applicant to disclose the information specified in subsection (1)(a) of this section.

(4) Nothing in this section prevents an employer from:

(a) Conducting an investigation, without requiring an employee to provide a user name and password, password or other means of authentication that provides access to a personal social media account of the employee, for the purpose of ensuring compliance with applicable laws, regulatory requirements or prohibitions against work-related employee misconduct based on receipt by the employer of specific information about activity of the employee on a personal online account or service.

(b) Conducting an investigation permitted under this subsection that requires an employee, without providing a user name and password, password or other means of authentication that provides access to a personal social media account of the employee, to share content that has been reported to the employer that is necessary for the employer to make a factual determination about the matter.

(c) Complying with state and federal laws, rules and regulations and the rules of self-regulatory organizations.

(5) Nothing in this section prohibits an employer from accessing information available to the public about the employee or applicant that is accessible through an online account.

(6) If an employer inadvertently receives the user name and password, password or other means of authentication that provides access to a personal social media account of an employee through the use of an electronic device or program that monitors usage of the employer's network or employer-provided devices, the employer is not liable for having the information but may not use the information to access the personal social media account of the employee.

(7) As used in this section, "social media" means an electronic medium that allows users to create, share and view user-generated content, including, but not limited to, uploading or downloading videos, still photographs, blogs, video blogs, podcasts, instant messages, electronic mail or Internet website profiles or locations.

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Ramona J. Line, Chief Clerk of House

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Tina Kotek, Speaker of House

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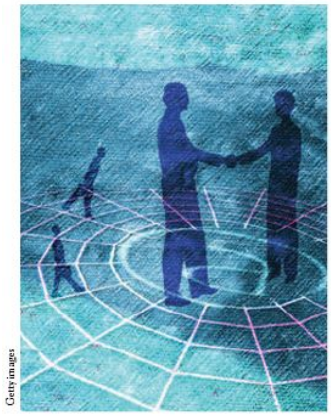
Bar Counsel

Social Media for Lawyers

A Word of Caution

By Helen Hierschbiel



So far, I have not jumped on the social media bandwagon. While I do read blogs on occasion, I do not post comments, I do not tweet, I do not have a Facebook, MySpace, LinkedIn or other comparable account, and I only rarely text anyone, preferring instead to call in response to any text message I receive. I can't say that I am proud of my ignorance of and detachment from these technological innovations. But when someone suggested several months ago that I write an article about the ethical traps involved in the use of social media, my eyes glazed over in incomprehension, and I ignored him.

Apparently, I am in the minority. In a 2009 survey conducted by Leader Networks for LexisNexis Martindale-Hubbell, approximately three-quarters of lawyers reported that they are members of a social network such as MySpace, Facebook or LinkedIn. Over a third of lawyers surveyed read and comment on articles, blogs and other online content. Of those engaged in these online social networking activities, three-quarters do so on at least a weekly basis. Lawyers surveyed cited two main reasons for their participation: to more easily exchange information and experience between peers, and to increase visibility among peers. While lawyers are still on the fence about the real value of social media, they do believe that online networking will change the business and practice of law over the next five years.[1]

Recently, while in search of a bar counsel column topic more suited to my temperament and expertise, I ran across several lawyer blogs and other online forums that were all a'twitter (pun intended) over a *New York Times* article regarding lawyer missteps when engaging in online discourse.[2] The article began with the story of a Florida lawyer who posted on JAABlog several unsavory comments about a judge, including that she was an "evil, unfair witch."[3] The article went on to highlight several other accounts of lawyers whose use of social media also got them into serious trouble.

So it seems that a column about how social media and the rules of professional conduct can collide might be timely and helpful after all. This column does not purport to explain how to use social media to market or otherwise improve your law practice. Instead, it is intended to remind lawyers as they are frantically blogging, tweeting and posting, to slow down, take a breath before they hit

ENTER, and remember that their words will be eternal, public, and could form the basis for disciplinary sanction against them.

Revealing Client Confidences

Perhaps the most obvious danger for lawyers who blog, chat or twitter about their law practices is the unwitting disclosure of client confidences. Oregon RPC 1.6 prohibits lawyers from revealing information relating to the representation of a client unless the client consents, the disclosure is impliedly authorized to carry out the representation, or disclosure is otherwise permitted under RPC 1.6(b). The collegiality and apparent anonymity of listserves, blogs and other online forums can lull lawyers into a dangerously false sense of security when it comes to protecting client confidences. An Illinois lawyer is currently facing disciplinary charges for posting comments to her blog that referred to one jurist as "Judge Clueless" and otherwise failed to protect the identities of her clients and confidential details of the case.[4] Lest you think that only Illinois lawyers would do such a thing, a lawyer in Oregon stipulated to a 90-day suspension for posting a message on a listserve in which she disclosed a former client's confidential personal and medical information and otherwise portrayed the former client in an unflattering light. *In re Qullinan*, 20 DB Rptr 288 (2006).

Restricted Communications

Another risk for lawyers who participate in online social networks is communicating with persons about subject matters that are off-limits. For example, Oregon RPC 3.5 prohibits lawyers from engaging in *ex parte* communications with judges on the merits of a pending proceeding. Recently in North Carolina, a judge was reprimanded for communicating *ex parte* with a lawyer regarding a pending trial in which the lawyer was representing one of the parties. The communications in that case took place on their Facebook pages.[5]

Lawyers are also prohibited from communicating with a person who they know is represented on the subject of the representation. Oregon RPC 4.2. Addressing contact with represented parties through the Internet, OSB Formal Op No 2005-164 says that visiting a public website is fine, but interacting with that website can be problematic. If the lawyer knows that the person with whom she is communicating online is represented, then the communication would be prohibited by RPC 4.2.

Due Diligence

Lawyers should not only be cautious about what they themselves are contributing online, but should also be aware of their clients' Internet activities. In his September 2009 *BullsEye* expert witness e-newsletter article, "When What Happens Online Ends Up in Court,"[6] Robert J. Ambrogi tells of a doctor who decided to blog, under the pseudonym "Flea," about his own medical malpractice trial. Throughout the trial, he posted his impressions of the plaintiffs' lawyer, the preparations for his testimony, and his thoughts about the jurors. On cross-examination of the doctor, plaintiffs' lawyer asked whether he was "Flea." Given some of the choice comments the doctor had posted, it's not surprising that a settlement was reached the next day.

The flipside of lawyers needing to be careful about what they and their clients post on the Internet, is needing to be cognizant of the abundance of information available online about others. In fact, some might argue that competent representation these days requires investigation of any Internet presence or personae for parties and witnesses. That is an open question that has yet to be addressed by any court of which I am aware.

Hiding the Ball

While investigating witnesses and adverse parties, is it all right to use deception? This was the question posed to the Philadelphia Bar Association in Opinion 2009-02 (March 2009). The inquirer sought to access a witness's MySpace and Facebook pages by asking a third person, someone whom the witness would not know or recognize, to go to the website and seek to "friend" the witness in order to obtain access to the witness's personal pages. The third person would provide truthful information, but would not reveal her affiliation with the lawyer or the purpose for which she sought access to the witness's personal pages. The Philadelphia opinion determined that such conduct clearly would be deceptive and therefore not allowed under its rules of professional conduct. If lawyers want access to personal social network sites, they need to ask for access directly.

The answer to the inquirer's question could be different in Oregon, depending on the exact purpose of the lawyer's efforts to access the information. Oregon RPC 8.4(a) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and from doing so through the acts of others. However, RPC 8.4(b) says that notwithstanding RPC 8.4(a), it is not misconduct

> for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights… Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

OSB Formal Op No 2005-173 makes clear that covert activity is not allowed under RPC 8.4(b) when there are no "violations of civil law, criminal law, or constitutional rights" to investigate, and that lawyers may not participate directly in the covert activity.

In any event, lawyers should take care not to engage in deception online themselves. An Oregon lawyer learned this lesson the hard way when he created an Internet bulletin board account in the name of a high school teacher and posted a message purportedly written by the teacher, implying that the teacher had engaged in sexual relations with his students. Although the lawyer

intended the ruse to be a practical joke, the lawyer ultimately was reprimanded for violating former DR 1-102(A)(3)(now RPC 8.4(a)(3)). *See In re Carpenter*, 337 Or 226 (2004).

Conclusion

The rules of professional conduct do not apply any differently in the social media context; however, they do still apply. And the informality and ease of use of social media can lull lawyers into acting without thinking, without flexing their judgment muscles, and without considering whether their comments might run afoul of their professional obligations. So, when partaking in the benefits of social media, lawyers should be mindful of the lesson learned by our most recent United States Supreme Court Justice Sonia Sotomayer: Internet postings are public, easy to access and eternal.

Endnotes

1. See 2009 Networks for Counsel Study, a complete copy of which can be found online at www.leadernetworks.com/documents/Networks_for_Counsel_2009.pdf.

2. Schwartz, "A Legal Battle: Online Attitude vs. Rules of the bar," *New York Times*, Sept. 13, 2009.

3. The lawyer ultimately stipulated to being reprimanded and fined for his comments*Fla. Bar v. Conway*, 996 So2d 213 (2008).

4. *In the Matter of Peshek*, Ill. Atty.Reg. and Disc. Comm., No. 09 CH 89 (Aug. 25, 2009).

5. *In re: Terry*, N.C. Judicial Stds Comm., Inq. No. 08-234 (Apr. 1, 2009).

6. See www.ims-expertservices.com/newsletters/sept/when-what-happens-online-ends-up-in-court-091509.asp

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Twit or Tweet

A Trial Lawyer's Guide to Using Social Media Information During Trial

By Colin K. Kelly
and Aliyya Z. Haque

Attitudes and beliefs espoused in social media platforms can help lawyers make decisions about whom to strike during jury selection, and can even help tailor and shape arguments during trial.

"Jury duty 2morrow. I may get 2 hang someone... can't wait..."

"Guinness for lunch break. Jury duty ok today."

These are real Facebook postings from a juror in a federal tax evasion case. *See United States v. Ganias*, 2011 WL 4738684, at *2 (D. Conn. Oct. 5, 2011). What would you do if you saw these Facebook posts from a juror in one of your cases during voir dire or worse, during a trial? Would you alert the judge? If a case has progressed well for your client would you wait to see how the verdict comes out? One of the worst-kept secrets for anyone who has picked a jury in the past several years is that social media use is soaring: 67 percent of online American adults use at least one social media site, people produce 750 tweets every second, and they launch three million new blogs each month. Joanna Brenner, *Pew Internet: Social Networking (full detail)* (Pew Research Ctr. Feb. 14, 2013). The question is no longer *whether* attorneys should conduct online research, including reviewing publicly available social media profile data, on potential jurors or whether attorneys should monitor juror social media posts during trial but *how* to do both ethically and effectively.

Several state and local bar associations have developed ethical guidelines for lawyers wishing to access social media information about potential jurors both during jury selection and throughout trial. Likewise, many courts have crafted their own special jury instructions to guard against juror misuse of and influence from social media throughout trial. This article will review how courts have historically dealt with social media use by lawyers and jurors and will help even the most non-social media-savvy trial lawyer understand both the ethical pitfalls and the tactical advantages of using social media information during voir dire and trial.

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Voir Dire or Voir Google? Effectively Using Social Media During Jury Selection

One commentator recently referred to voir dire as "voir Google" because of the prevalence of social media research in the jury selection process. *See* John G. Browning, *As Voir Dire Becomes Voir Google, Where are the Ethical Lines Drawn?* The Jury Expert (May 31, 2013). A Texas district attorney recently issued iPads to all county prosecutors so that they could more easily research social media postings by potential jurors during voir dire. *See* Debra Cassens Weiss, *Prosecutors in One Texas County Will Use Courtroom iPads to Search Potential Jurors on Facebook*, A.B.A. J. (Jan. 18, 2011). Less than a decade ago, however, many courts took the view that scouring the Internet for information on potential jurors was an invasion of privacy. In 2006, U.S. District Court Judge David Coar made headlines when he banned Internet inquiries into prospective jurors in a highly publicized government corruption trial. *See United States v. Sorich*, 427 F. Supp. 2d 820 (N.D. Ill. 2006), *aff'd*, 523 F.3d 702 (7th Cir. 2008); Jamila A. Johnson, *Voir Dire: To Google or Not to Google*, Am. Bar Ass'n (2008). Today, even limited bans on Internet research of jurors by a court would be the exception rather than the rule. Many trial lawyers would argue that conducting Internet research during jury selection—including reviewing social media information posted by potential jurors—is now a fundamental component of effective client representation and advocacy.

To date, at least one court has affirmatively upheld conducting Internet research during voir dire. In *Carino v. Muenzen*, a New Jersey court granted a new trial after the trial judge prohibited the plaintiff's attorney from using his laptop during the venire empanelling. *Carino v.* Muenzen, 2010 N.J. Super. Unpub. Lexis 2154, at *27 (N.J. Sup. Ct. App. Div. Aug. 30, 2010). The appellate court found that the playing field was fair because the opposing parties had equal access to the Internet, despite the fact that only one attorney had the foresight to bring his computer to court.

Several prominent bar associations have issued ethics opinions favoring permitting social media research during jury selection. The New York City Bar Association, for example, issued a formal opinion in 2012 that supports permitting attorneys to access social media websites for juror research "as long as no communication occurs between the lawyer and the juror as a result of the research." New York City Bar Ass'n, Formal Op. No. 2012-02. The opinion contains some important caveats that are good best practices for a lawyer who wants to use social media research during jury selection ethically, such as avoiding "accidental" or inadvertent communications with a juror and not using "deception" to obtain information or to gain access to a juror's website. Regarding the first condition, an accidental communication may occur if, for instance, an attorney clicked "follow" on a potential juror's Twitter feed without intending to do so. In effect, lawyers should expect that courts will not require mens rea to find that they have impermissibly communicated with jurors.

Similarly, the Philadelphia Bar Association has issued guidance that an attorney cannot use third parties to "friend" witnesses or jurors that the lawyer could not "friend" or contact. *See* Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2009-02, (Mar. 2009). The ethics committee found that asking a third party to "friend" or to contact an individual related to a trial would violate numerous rules of professional conduct, including Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants), Model Rule 8.4 (Misconduct), and Model Rule 4.1 (Truthfulness in Statements to Others).

Likewise, the New York State Bar Association has found that an attorney permissibly may access information on a social networking page if that information is accessible to the public. New York State Bar Ass'n, Ethics Op. No. 843, (Sept. 10, 2010). Similarly, the New York County Lawyers' Association found that it is

> proper and ethical... for a lawyer to undertake a pretrial search of a prospective juror's social networking site[s], provided 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 jurors tweets or otherwise contact them.

New York County Lawyers' Ass'n, Formal Op. No. 743, (May 18, 2011).

Interestingly, one state bar association has gone farther and issued guidance that the state ethics rules prohibiting "deceitful conduct" did not prohibit a lawyer from "advis[ing] clients and others about or supervis[ing] lawful covert activity in the investigation of violations of civil or criminal law," provided that the lawyer's conduct complied with other ethical obligations. *See* Or. State Bar Ass'n, Formal Op. No. 2013-189. To the best of our knowledge, no other state ethics opinions have gone this far. *See, e.g.*, San Diego County Bar Ass'n, Legal Ethics Op. No. 2011-2 (May 24, 2011).

Today, even limited bans on Internet research of jurors by a court would be the exception rather than the rule.

The general consensus throughout all of these ethics opinions is that undertaking social networking research during voir dire is appropriate and ethical as long as the individual being researched is not contacted in any way, even inadvertently, and no deceit is involved. Below are some additional specific tips for completing social media research during jury selection.

Practical Tips on Using Social Media During Voir Dire

Social networking sites can be a powerful force in voir dire, and some companies are creating computer programs to streamline the research process. For instance, an application called JuryPad, designed for the iPad, allows users to input and to store detailed information on individual jurors, to take a street level tour past a juror's house and neighborhood, to create custom seating charts, and to predict jurors' votes. Some attorneys may prefer programs such as JuryPad to a legal pad if they already use the Internet for juror research. Several other apps are being developed or are already on the market as well.

Even without a fancy application, any lawyer can use a search engine to find fairly extensive public information about pro-

spective jurors before and during voir dire. Facebook, Twitter, LinkedIn, and personal blogs often provide a particularly candid look into a prospective juror's leanings, predispositions, and potential bias. Below are some quick highlights of what to look for in your social media research.

Likes: Examine the music, television shows, and movies that an individual "likes" on Facebook. For instance, some prosecutors disfavor individuals who are fans of crime investigation shows such as "CSI" because the shows present an unrealistic portrait of true crime investigations and fail to take into account the high cost of investigations. *See* Ana Campoy & Ashby Jones, *Searching for Details Online, Lawyers Facebook the Jury, Wall St. J.* (Feb. 22, 2011). Additionally, look for information that might suggest unreasonableness or instability. For example, one attorney struck a potential juror whose Facebook page revealed frequent attempts to contact extraterrestrials.

Dislikes: Particularly opinionated individuals may go on social media tirades about particular issues. Even if a potential juror rants about an unrelated issue, it may be a sign that he or she will not be impartial or fully consider all evidence.

Friends and Followers: Who does a potential juror follow on Twitter, and who are his or her Facebook friends? If an individual follows several news sources on Twitter, it may indicate that he or she will feel tempted to check the Internet for extra-courtroom evidence or information. Also be sure to check whether an individual is Facebook friends with any parties involved in a case.

Education and Employment: Current and previous jobs and schooling information may be relevant in some cases. If, for instance, a jury was empanelled for a toxic tort lawsuit, an individual who worked for an environmental nonprofit organization may not be a preferred juror for a defendant.

Social Media Activity Level: Individuals who are especially active on Facebook or Twitter may be more prone to social media misconduct during trial.

Political Affiliations: In some types of cases, it may be valuable to know if an individual strongly identifies with one political party or set of beliefs.

Personal Blogs or Websites: Ask potential jurors if they maintain any blogs or personal websites. These sites may be more difficult to locate than Facebook or Twitter accounts, which makes asking directly prudent.

Finding Information: "Browse Anonymously"

Twenty-five percent of all Facebook users do not use any privacy settings, which is why social media searches often bear fruit. *Social Media Statistics and Facts 2012*, GO-Globe.com (Oct. 30, 2012). Yet, an attorney must not create a communication of any kind with a juror when looking at the juror's social networking trail. The New York City Bar Association addressed precisely what constitutes an "*ex parte* communication" under Model Rule 3.5 by outlining the bright-line rule that if a juror or witness receives any kind of notice that a lawyer has viewed his or her page, the lawyer has violated Model Rule 3.5 even if the communication was inadvertent. New York City Bar Ass'n, Formal Op. No. 2012-02. The next sections of this article will explain how to search in Facebook, Twitter, and LinkedIn without running afoul of Model Rule 3.5.

Facebook

There are several ways to search Facebook for information about a person. If you have a Facebook account, the simplest way to search is to sign into your account and enter a person's name in the search bar. Unless the individual has an uncommon name, a search will return multiple results of individuals with the name that you searched. Often, the accounts listed will reveal additional details about an individual such as a profile picture or information about where he or she lives or works, depending on his or her privacy settings. If you cannot locate an individual's account, that person either does not have a Facebook account, or he or she has set his or her privacy settings so that the general public cannot locate or search it. Alternatively, you can run a search in Google by entering the individual's name with the word "Facebook."

Once you have located and clicked on a profile, you will see that individual's "public profile." That is, a viewer will see the information and pictures that the account holder has set as "public." Often, a viewer can see very little because an account holder has hidden almost all information, but almost equally often, account holders have all of their pictures and information viewable by the public.

When you view a Facebook page, the account holder of that page will not be notified that someone has visited his or her page, and thus no ethical problems arise. However, it is crucial that a viewer not interact with the account holder's page in any way that would generate a communication with the holder. The viewer must not "friend" the user, "like" anything on the user's page, comment on anything on the user's page, send a message to the user, or do anything at all other than simply view the user's profile. In other words, browse anonymously and ensure that you do not leave a contact trail. Also, note that Facebook is known to change and reset its privacy settings frequently so you will need to keep abreast of these changes. In the future, due to Facebook-initiated changes, it could become possible that viewing a person's Facebook page could send him or her an inadvertent communication, so stay mindful of that possibility.

Twitter

Twitter can be a powerful tool in selecting and monitoring juries because it is a totally unfiltered social networking platform where users can follow their favorite celebrities, news media outlets, interests, and topics of concerns. If you have a Twitter account—also known as a Twitter "handle"—you can log into your account and search for an individual's name using the search bar tool. Alternatively, you can use Google to run a search with an individual's name in addition to the word "Twitter." If an individual has a Twitter handle, you should be able to locate it by using either of these two methods.

There are only two privacy settings on Twitter: private and public. Users can either protect all of their tweets or make all of them public. In most instances, Twitter becomes a useful tool only when an individual's tweets are unprotected. Then, you should scan all the tweets to look for any tweets or re-tweets that might indicate partiality or some other reason why

an individual should not serve on your jury. It is essential that neither an attorney nor anyone working with the attorney "follow" or "request to follow" a potential juror's Twitter handle. Regardless of whether someone's handle is public or private, "following" him or her generates an improper communication. So again, you can ethically look, but you cannot "follow."

LinkedIn

LinkedIn is a social networking site used primarily for professional purposes. It can be helpful in discovering individuals' past and current employment and education information. However, LinkedIn is a riskier tool to use when researching potential jurors than Facebook or Twitter because of the higher risk of inadvertently contacting a potential juror. Before researching someone when you log into a LinkedIn account, it is essential to change your privacy settings so that the account that you use is "anonymous." This setting can be found under the "Privacy Controls" column on the "Privacy and Settings" page. The safest setting is "Completely Anonymous." When you fail to choose this setting, any other users whose profiles you view will be notified that you viewed their profile. This notification—even if totally innocent and inadvertent—could run afoul of Model Rule 3.5, or at least in those states that have adopted it. Many jury consultants have already established "completely anonymous" paid LinkedIn accounts precisely for juror research.

Reality Drama vs. Restraint: The Inherent Conflict Between Social Media Use and Jury Service

Now that you have a detailed roadmap on how to conduct social media research ethically to select a fair and impartial jury, the next quagmire is whether you should monitor a jury's social media use during trial. Each year there are more and more news stories about jurors being bounced from trial or receiving public reprimands or both for improperly using, or rather abusing, social media despite the fact that most courts have developed very specific instructions prohibiting or limiting juror access to social media during trial. Steve Eder, *Jurors' Tweets Upend Trials,* Wall St. J. (Mar. 5, 2012). Why? Perhaps it is because the philosophies underlying social media use and jury service are so profoundly contradictory. Social networking sites openly *encourage* users to share and to comment on real-time events. Twitter allows users to share thoughts instantaneously in 140 characters or less, and Facebook enables users to stream their likes, dislikes, location, and life dramas instantaneously to whomever they choose. This social media reality clashes directly with the ideal expectation and the oath that jurors must serve as blindfolded *tabula rasas*-immune from any information not admitted by a trial judge. Social media outlets pride themselves on providing filter-free communication platforms. Conversely, lawyers and judges pride themselves on maintaining evidence and procedural controls that tightly filter the flow of information to and between jurors during trial. It is not surprising that some social media-enveloped jurors simply cannot resist the temptation to comment or to share various trial events and deliberations on Twitter or Facebook or any other social media outlet of choice. Although some jurors might choose to ignore court instructions, increasingly they do so at their peril under the eyes of a watchful court, the news media, and the lawyers trying a case.

Jury Misconduct and Social Media: Have Courts' Attitudes Changed?

Until relatively recently, few reported court decisions have dealt with alleged juror misconduct involving social media usage during trial. In 2009, two criminal defendants appealed a fraud conviction on the grounds that a juror had posted running commentary using Facebook, Twitter, and personal websites and blogs throughout the trial. *United States v. Fumo*, 103 A.F.T.R.2d 2009-2727, 2009 WL 1688482, at *58 (E.D. Pa. June 17, 2009). The juror's Facebook page was configured to be accessible to the public at the time, and the media discovered a status posted during the jury deliberations stating, "Stay tuned for the big announcement on Monday everyone!" In total, the juror posted seven trial-related Facebook statuses and one tweet saying, "This is it... no looking back now!" *Id.* at *61. On the appeal, the court affirmed the conviction, noting that all the comments online "were nothing more than harmless ramblings having no prejudicial effect." *Id.* at *64.

The quotes at the beginning of this article come from the Facebook status postings of a juror during a criminal trial in Connecticut. *United States v. Ganias*, 2011 WL 4738684, at *2–3. In this case the trial judge became aware of the juror's social media usage during trial and after questioning allowed the juror to continue serving because the juror claimed to have been "joking around" and was "absolutely... an impartial and fair juror." *Id.* at *3. The conviction was upheld by the court hearing the appeal on several grounds, including that the juror's statements during questioning were "presumptively honest." *Id.* (citing *United States v. Cox*, 324 F.3d 77, 86 (2d Cir. 2003)).

Even without a fancy application, any lawyer can use a search engine to find fairly extensive public information about prospective jurors before and during voir dire.

Conversely, a recent Arkansas capital murder conviction was overturned due to social media misuse by a juror during a trial. In *Dimas-Martinez v. State*, 385 S.W.3d 238 (Ark. 2011), the juror at the heart of the appeal tweeted repeatedly during trial and deliberations, and even after receiving a reprimand from the bench when the first tweet was discovered. In a final tweet during jury deliberations, the juror stated, "Its over [*sic*]" almost an hour before the jury returned with a verdict. *Id.* at 246. The tweets and Facebook posts, in conjunction with another juror's periodic sleeping during trial, were grounds for vacating the conviction. *Id.* at 247.

In California, a gang-related beating conviction has been in limbo for over two years as the defendant has challenged his conviction on the grounds that a juror allegedly posted commentary on Facebook during the trial. *See People v. Christian,*

Sacramento County Superior Court, No. 08F09791; *Appellate Court Denies Juror's Petition on Facebook Postings*, Sacramento Bee (May 31, 2012). An ongoing battle between the juror and the defendant on whether Facebook must turn over records of the juror's account recently ended with a ruling against the juror. *See Juror No. One v. Superior Court,* 142 Cal. Rptr. 3d 151 (Cal. Ct. App. 2012), *reh'g denied,* (June 21, 2012), *review denied,* (Aug. 22, 2012).

It could become possible that viewing a person's Facebook page could send him or her an inadvertent communication, so stay mindful of that possibility.

In some rare instances, courts will punish jurors for violating jury instructions prohibiting social media postings during trial. Last year, a Florida juror was held in contempt and sentenced to three days in jail after "friending" a defendant in a personal injury case on Facebook and then posting, "Score... I got dismissed!!" after being discharged from the jury. Robert Eckhart, *Juror Jailed Over Facebook Friend Request*, Sarasota Herald-Tribune (Feb. 16, 2012). In another case, a Texas juror was convicted on four charges of contempt of court and sentenced to two days of community service after "friending" a female defendant and posting case information on Facebook. Sarah Kessler, *Juror Pleads Guilty After "Friending" Defendant*, USA Today (Sept. 9, 2011). The juror's lawyer remarked that the mistake was "a reflection of the times." *Id.* As far back as 2011, a New York juror was held in contempt of court and fined $1000 after texting a friend details about deliberations in a case. Christina Carrega, *Judge to Texter: ur so bu$ted*, New York Post (June 16, 2011). That friend happened to be a district attorney and immediately alerted the judge of the communication.

Clearly, many trial judges have become less and less tolerant of social media abuses. But judges cannot monitor every juror in their cases—especially if the jurors designate the postings as private. In a recent survey of federal judges, 79 percent of the responding judges stated that they have no way of knowing whether jurors follow their instructions to avoid posting about a trial on social networking sites. *See* Meghan Dunn, *Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management*, (Fed. Jud. Ctr. Nov. 22, 2011). Attorneys—as officers of the court—should be diligent in patrolling various social media outlets throughout trial to be sure that jurors follow a court's instructions. At least one major bar association places a "must report" duty on lawyers who discover juror misconduct but the association has not established a specific duty to actively monitor juror compliance with a court's instructions. *Id.*

Practical Tips to Encourage Juror Social Media Compliance

Once a jury is empanelled, you will want to take two important actions: (1) petition the court to give detailed jury instructions regarding social media use, and (2) monitor jurors' social media use throughout trial and deliberations.

Jury Instructions

In 2011, the Federal Judicial Center conducted a national survey of federal district court judges and found that 94 percent currently instruct jurors on social media use during trial. Meghan Dunn, *Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management,* (Fed. Jud. Ctr. Nov. 22, 2011). Still, only about half of those judges instruct jurors at multiple points during the trial. Attorneys should request that social media instructions be read before trial begins, before deliberations begin, and also periodically throughout trial. The temptation to post about a trial is usually great so frequently reminding jurors that they cannot do this will prompt them to exercise restraint. Additionally, only one-third of judges who address social media explain the personal consequences of violating the jury instructions. While the model jury instructions currently do not include an explanation that misconduct could result in being held in contempt of court, reminding jurors that this could happen may strongly induce the jurors to refrain from misconduct. The full version of the most recent model jury instructions on jury social media use, designed to prevent case research and commentary, published by the federal judiciary Committee on Court Administration and Case Management can be found at .

Monitoring Social Media During Trial and Deliberations

Because most judges have no way to determine whether jurors use social media during trial, attorneys should consider periodically monitoring the jurors to ensure that nothing unfairly influences a jury. As trial and deliberations proceed, continuously observe all jurors' social networking sites, including the blogs that you uncovered during voir dire. If you discover juror misconduct, regardless of which side it could favor, you should immediately report the finding to the court. At least in New York, not reporting finding social-media related juror misconduct violates the professional ethics rules and other states may adopt that rule as well.

Conclusion

The explosion of social media has already made a significant impact in the courtroom, particularly in the jury box. A cursory search of a prospective juror's public Facebook page or public Twitter feed during voir dire can reveal immense amounts of helpful information that previously was very difficult to elicit. Attitudes and beliefs espoused in social media platforms can help lawyers make decisions about who to strike during jury selection and can even help tailor and shape arguments during trial. Likewise, lawyers should have a system in place after a jury is empanelled to monitor juror social media postings to ensure that jurors do not violate their oaths or instructions. This article is merely a starting point for lawyers looking for practical tips on how to use social media information ethically during trial. Undoubtedly, more and more state and local bar associations will follow this path and issue further ethical guidance on these issues in the future. FD

FORMAL OPINION NO. 2007-180

Internet Advertising:
Payment of Referral Fees

Facts:

Lawyer wants to participate in a nationwide Internet-based lawyer referral service and has received solicitations from companies offering this service. Customers who use the referral service are not charged. Some providers will charge Lawyer through various mechanisms.

The referral service will not be involved in the lawyer-client relationship. A referred consumer is under no obligation to work with a lawyer to whom the consumer is referred. The referral service will inform consumers that participating lawyers are active members in good standing with the Oregon State Bar who carry malpractice insurance. Consumers may also be informed that participating lawyers may have paid a fee to be listed in the directory. Furthermore, consumers will be informed that lawyers have written their own directory information and that a consumer should question, investigate, and evaluate the lawyer's qualifications before he or she hires a lawyer.

Questions:

1. May Lawyer participate in an Internet-based referral service?

2. May Lawyer ethically pay a fee to be listed in a directory of lawyers?

3. May Lawyer ethically pay a fee based on lawyer's being retained by a referred client?

Conclusions:

1. Yes, qualified.

2. Yes, qualified.

3. No.

Discussion:

Internet-based advertising is governed by the same rules as other advertising. The questions presented here raise issues relating to both advertising and recommending a lawyer's services. Advertising and recommendation are distinguished as follows: "When services are

advertised, the nonlawyer does not physically assist in linking up lawyer and client once the advertising material has been disseminated. When a lawyer's services are recommended, the nonlawyer intermediary is relied upon to forge the actual attorney and client link." *Former* OSB Formal Ethics Op No 1991-112 (discussing *former* DR 2-101 and *former* DR 2-103).[1]

Lawyers are permitted to communicate information about their services as long as the communication does not misrepresent a material fact and is not otherwise misleading. Oregon RPC 7.1(a)(1)–(2). Internet-based communication is available to consumers outside the states where Lawyer is licensed. Therefore, Lawyer must ensure that nothing in the advertisement implies that Lawyer may represent consumers beyond the scope of Lawyer's licenses. A lawyer who allows his or her name to be included in a directory must ensure that the organizers of the directory do not promote the lawyer by any means that involve false or misleading communications about the lawyer or his or her firm. RPC 7.2(b). For instance, if the directory lists only one type of practitioner, it may not include any statement that the lawyer is a specialist or limits his or her practice to that area unless that is in fact the case. RPC 7.1(a)(4). If the advertising creates an impression that Lawyer is the only practitioner in a specific geographic area who offers services for a particular practice area, when that is not the case, that representation would be misleading and therefore prohibited. Lawyer is responsible for content that Lawyer did not create to the extent that Lawyer knows about that content. Lawyer therefore cannot participate in advertising, including the home page of the advertising site and pages that are directly linked or closely related to the home page and that are created by the advertising company, if the content on those pages violates the Oregon RPCs. Lawyer is not responsible for the content of other lawyers' pages.

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[1] *See also Bates v. State Bar of Arizona,* 433 US 350, 97 S Ct 2691, 53 L Ed2d 810 (1977) (upholding a state's right to prohibit false and misleading advertising); *Ohralik v. Ohio State Bar Asso.,* 436 US 447, 98 S Ct 1912, 56 L Ed2d 444 (1978) (upholding a state's right to discipline lawyer personally soliciting a client under circumstances creating undue pressure on prospective client).

Oregon RPC 7.1(d) permits a lawyer to pay others to disseminate information about the lawyer's services, subject to the limitations of RPC 7.2. That latter rule, in turn, allows a lawyer to pay the cost of advertisements and to hire others to assist with or advise about marketing the lawyer's services. RPC 7.2(a). RPC 7.2(a) provides:

> (a) A lawyer may pay the cost of advertisements permitted by these rules and may hire employees or independent contractors to assist as consultants or advisors in marketing a lawyer's or law firm's services. A lawyer shall not otherwise compensate or give anything of value to a person or organization to promote, recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except as permitted by paragraph (c) or Rule 1.17.

At the same time, Oregon RPC 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer (except in limited circumstances that are not relevant to the questions presented here). RPC 5.4(a) provides:

> A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
>
> (1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.
>
> (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.
>
> (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
>
> (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

This rule "prohibits a lawyer from giving a non-lawyer a share of a legal fee in exchange for services related to the obtaining or performance of legal work." *In re Griffith,* 304 Or 575, 611, 748 P2d 86 (1987) (interpreting *former* DR 3-102, which is now RPC 5.4(a)). In the context of advertising, Oregon RPC 5.4 thus precludes a lawyer from paying someone, or a related third party, who advertises or otherwise disseminates information about the lawyer's services based on the number of referrals, retained clients, or revenue generated from the advertisements. By contrast, paying a fixed annual or other set periodic fee not related to any particular work derived from a directory listing

violates neither RPC 5.4(a) nor RPC 7.2(a). A charge to Lawyer based on the number of hits or clicks on Lawyer's advertising, and that is not based on actual referrals or retained clients, would also be permissible.

Oregon RPC 7.2(c) permits a lawyer or law firm to be recommended by a referral service or other similar plan, service, or organization as long as (1) the operation of the plan does not result in the lawyer or the lawyer's firm violating the rules relating to professional independence[2] or unauthorized practice of law;[3] (2) the client is the recipient of the legal services; (3) the plan does not impose any restriction on the lawyer's exercise of professional judgment; and (4) the plan does not engage in direct contact with prospective clients that would be improper if done by the lawyer.[4] If a third-party provider were to collect specific information from a consumer, analyze that information to determine what type of lawyer or which specific lawyer is needed, and refer the consumer based on that analysis, it would constitute the unauthorized practice of law and is prohibited. OSB Formal Ethics Op No 2005-168.

A lawyer cannot control where people choose to access the Internet, just as a lawyer does not know where a client will use a traditional telephone directory. Solicitation of clients and payment for referrals in personal injury or wrongful death cases is prohibited by ORS 9.500 and 9.505. Lawyers are also prohibited from soliciting "business at factories, mills, hospitals or other places . . . for the purpose of obtaining business on account of personal injuries to any person or for the purpose of bringing damage suits on account of personal injuries." ORS 9.510. This statute must be read in conjunction with constitutional limitations on the restriction of free speech and does not bar all Internet-based advertising on these issues. OSB Formal Ethics Op No 2005-127.

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[2] Oregon RPC 5.4.

[3] Oregon RPC 5.5, ORS 9.160, and ORS 9.500–9.520.

[4] Oregon RPC 7.3.

Substantive law may also limit Lawyer's ability to pay a referral fee.[5] Here, the referral fee would be paid to a private third party rather than a "public service referral program," and it thus appears that the U.S. Bankruptcy Code's general prohibition against fee-sharing applies.

Approved by Board of Governors, November 2007.

[5] See, e.g., 11 USC §503(b)(4), which governs the allowance of attorney fees in bankruptcy cases; §504(a) and (b), which prohibit a lawyer from agreeing to the sharing of compensation or reimbursement with another person; and §504(c), which creates an exception to the §504(a) and (b) restrictions for fee-sharing "with a bona fide public service attorney referral program that operates in accordance with non-Federal law regulating attorney referral services and with rules of professional responsibility applicable to attorney acceptance of referrals."