
 Council on Licensure, Enforcement and Regulation  
2011 Annual Educational Conference



**LinkedIn to  
Facebook: Social  
Networking and  
Regulatory Practice**

**Pittsburgh** Pennsylvania

Presenters: **James A. Wilson**  
Attorney at Law  
Durham, North Carolina

*Promoting Regulatory Excellence*

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CLEAR 2011 Annual Conference  September 8-10 Pittsburgh, Pennsylvania

**Look What We're Up Against**

- *“CLEAR has been working diligently to incorporate Social Media elements into this year's conference . . . Be sure to check out CLEAR on Facebook, Twitter and LinkedIn to get all of the up-to-the-moment information about what is scheduled this year and to connect with other attendees!”*

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**Look What We're Up Against**

- *“Since the 2011 CLEAR Annual Conference Facebook page is a new addition this year, take this opportunity to explore the page and all it has to offer.”*

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### Look What We're Up Against

- “As an added bonus, anyone who visits the Facebook page and posts a comment on the Wall or in one of the Discussions by September 1<sup>st</sup> will be entered into a special prize drawing at the Opening Reception!”

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### Social Media



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### Social Media

- Web-based or mobile technologies
- Interactive communications
- User-generated content
- Accessible
- Scalable

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Popular Social Networks



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Popular Social Networks



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Popular Social Networks



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Popular Social Networks



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Popular Social Networks



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Popular Social Networks



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**HOSTAGE TAKER UPDATES  
FACEBOOK IN MIDST OF STANDOFF**

- Valdez was apparently being served a warrant for a drug offense, took someone hostage and barricaded himself in a motel room.

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**HOSTAGE TAKER UPDATES  
FACEBOOK IN MIDST OF STANDOFF**

- *I'm currently in a stand off wit these shady --- from [OPD, Ogden police], kinda ugly but ready for whatever, I love u guyz and if I don't make it out of here alive that I'm in a better place and u were all great friends....*

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**HOSTAGE TAKER UPDATES  
FACEBOOK IN MIDST OF STANDOFF**

- *They shut our phones down but were okay, everyones comments mean alot. But how this ends is on the cops now. And my HOSTAGE as they call her is perfectly fine and holding it down wit me....*
- He then adds pictures of himself and the hostage.

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### HOSTAGE TAKER UPDATES FACEBOOK IN MIDST OF STANDOFF

- SWAT came in an hour later, where Valdez reportedly shot himself. Police have stated no officer had fired their weapon. Other posts on the Facebook suggest the police are currently digging through the Facebook page and investigating who may have been helping Valdez during the crisis.

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### facebook gets weird - part 2



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### Prevalence of Social Media Use

- 75% of US 18 to 24
- 57% of US 25 to 34
- 50% of US adults

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**Privacy**

- Public
- “Friends”

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**US Supreme Court**

- “Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior.” City of Ontario v. Quon, 560 U.S. \_\_\_\_ (2010), slip op. at 11

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**Journal of General Internal Medicine Survey**

- 93.5% of Medical Students
- 79.4% of Resident Physicians
- 41.6% of Practicing Physicians

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**Journal of General Internal Medicine Survey**

- 15.5% of Practicing Physicians reported having visited the profile of a patient or patient's family member
- 34.5% of Practicing Physicians have received friend requests from patients or their family members

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**Journal of General Internal Medicine Survey**

- "A majority did not think it ethically acceptable to interact with patients within OSNs for either social (68.3%) or patient-care (68.0%) reasons. Almost half of respondents (48.7%) were pessimistic about the potential for OSNs to improve patient-doctor communication, and a majority (79%) expressed concerns about maintaining patient confidentiality."

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**JAMA Survey**

- Medical school administrators asked about unprofessional content postings by students - 60% aware of such
- Katherine C. Chretien, MD, S. Ryan Geysen, MD, MA, Jean-Paul Chretien, MD, PhD, Terry Kind, MD, MPH, *Online Posting of Unprofessional Content by Medical Students, JAMA Vol. 302, No. 12, 1309 (2009)*

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**JAMA Survey**

- 38% sexually suggestive
- Inappropriate photographs
- Requesting inappropriate friendships with patients

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**JAMA Survey**

- Profanity (52%)
- Discriminatory language (40%)
- Depicted intoxication (40%)
- Violating patient confidentiality (13%)
- Critical of school

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**Categories of Use in Cases**

- Violation of law or ethics in itself
- Evidence of violation of other laws or ethical rules

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### Attorney Disciplined for Blog Posts

- Attorney Peshek's misconduct in Illinois consisted of publishing a blog with information related to her legal work . . . . The public blog contained confidential information about her clients and derogatory comments about judges. The blog had information sufficient to identify those clients and judges using public sources.

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### ER Physician Disciplined for Facebook Post

- Emergency room physician posted “a few of her clinical experiences in the Hospital’s Emergency Department” on her Facebook Account.
- She “did not use patient names and had no intention to reveal any confidential patient information.”

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### ER Physician Disciplined for Facebook Post

- “However, the nature of one person’s injury was such that the patient was identified by unauthorized third parties.”

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### ER Nurses Post Patient Pictures on Facebook

- “William Wells arrived at the emergency room . . . mortally wounded.”
- “Instead of focusing on treating him . . . they snapped pictures of the dying man and posted them on Facebook.”
- “People may think they’re protected so that what they post can only be seen by a friend or family member, but life has proved otherwise.

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### “Lying Down Game”



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### AMA Policy

- No posting of identifiable patient information
- Guard your own privacy through settings
- Maintain appropriate boundaries, perhaps separating personal and professional content
- Watch each other’s backs

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### How Do You Get It

- On your own
- Through others
- From the site
- From the member

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### Facebook's Response to Subpoenas

- Get it from the user, not Facebook
- Stored Communication Act, 18 U.S.C § § 2702 and 2703
- Subpoenas must come from the federal court in the Northern District of California or a California state court
- Subpoenas must be personally served

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### Facebook's Response to Subpoenas

- Subpoenas must not be "Overly Broad, Unduly Burdensome or Vague"
- Subpoenas must not seek privileged or proprietary information
- Facebook will not testify as custodian or expert
- Facebook expects to be paid for its time

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### Stored Communications Act

- 18 U.S.C. § § 2701-2712
- 1986 law
- Cover
  - Electronic communication services
  - Remote computer services
- Social media not contemplated - “ill-suited to address modern forms of communication”

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### Consider a Preservation Order

- Users may deactivate or delete accounts
- Deleted accounts may nevertheless be recoverable
- Service’s privacy policy may provide details

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### Obtaining from Licensee

- Ask about social media use and user names in discovery
- Include information about blogs and Twitter
- Smart users will limit privacy
- Facebook lets users download their own information

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*Romano v. Steelcase Inc.*

- Defendant in a personal injury case moved “for an Order granting said Defendant access to Plaintiff’s current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information”
- 30 Misc. 3d 426, 427, 907 N.Y.S.2d 650, 651, 2010 N.Y. Slip Op. 20388, 2010 WL 3703242 (N.Y. Sup. Ct. 2010)

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*Muniz v. United Parcel Serv., Inc.*

- “UPS contends that Jaffe’s electronic postings about the case will reveal relevant evidence of his time spent on this case, his market rates, and his skill in handling the instant litigation -- and that this information is necessary because Jaffe failed to provide such evidence in support of Plaintiff’s fee request.”

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*Muniz v. United Parcel Serv., Inc.*

- “In an attempt to demonstrate that its discovery demand would yield relevant information, UPS submitted some postings from Jaffe’s Facebook page, as well as three postings from one of the listservs at issue, that of the California Employment Lawyers Association (“CELA”).”

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### Obtaining on Your Own

- Ethics rules/opinions for attorneys
  - Available to public
  - Available to members
  - Available to friends

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### Attorney Professional Responsibility

- May you advise a client to delete social media that might be evidence?

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### Attorney Professional Responsibility

- Model Rule 3.4 - “A lawyer shall not . . . Unlawfully alter, destroy or conceal a document or other material having potential evidentiary value [or counsel a client to do so.]”

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**Attorney Professional Responsibility**

- May you obtain publicly-available social media?

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**Attorney Professional Responsibility**

- What if the information is available only to “friends?”
  - May attorney ask to “friend” licensee?
  - May attorney ask another to do so?
  - What if true purpose is not revealed?
  - What if deception is used?
  - Does it matter if the licensee is represented?

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**Model Rule 8.4 (a)**

- May not violate the Rules of Professional Conduct “through the acts of another”

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**Model Rule 8.4 (c)**

- May not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”

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**Model Rule 4.1 (a)**

- May not knowingly “make a false statement of material fact or law to a third person”

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**Model Rule 4.2**

- “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

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**Model Rule 4.3**

- “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”

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**Attorney Professional Responsibility**

- If a lawyer discovers he already knows a “friend,” may the lawyer use information accessible only to friends?
- If an investigator has already “friended” the licensee and gathered information, may the lawyer use it?

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