







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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Attorney Has First Amendment Right to Blog About Criminal Case Without Client Consent

- Blogged about cases he defended
- Used clients' names without consent
- "would have been protected speech had the news media or others disseminated it."

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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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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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“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

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

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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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Making the Most of the Media:
The Regulator's Relationship with Social and
Traditional Media

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