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COLORADO MUNICIPAL LEAGUE  
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**The Ethics of Social Media:  
What you need to know**

*Timothy J. O'Neill, Assistant Regulation Counsel,  
Colorado Supreme Court  
Office of Attorney Regulation Counsel*

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Blogging:  
Do You Really Want Someone to Know That?



- **Remember, the Rules of Professional Conduct still apply!**

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BRAGGING:  
A PHYSICAL  
INTERPRETATION



www.poorjdr.com

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**CAUTION!**



- *Illinois Disciplinary Board v. Peshek*, Commission No. 09 CH 89: Complaint filed against Public Defender for blogging about her cases when blog was open to the public. Attorney lost her job as a result. Attorney was also suspended for a period of sixty (60) days.
- In blogging about her clients, Ms. Peshek referred to them either by their first name, a derivative of their first name, or their jail identification number. The blog was open to the public and contained confidential client information.

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## Think Before You Post!



- In 2015, the Colorado Supreme Court suspended an attorney for 18 months for, among other things, disclosing confidential information in responding to client complaints on the internet about his fees.
- James Underhill responded to complaints “with internet postings that publicly shamed the couple by disclosing highly sensitive and confidential information gleaned from attorney-client discussions.”

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## Is it really advertising?



- In November 2013, Virginia Supreme Court ruled RPCs apply to lawyer's blog. *Hunter v. Virginia State Bar*
- Lawyer's blog primarily discussed cases in which attorney obtained successful outcomes for clients. Blog was accessible via firm website. Posts were “potentially” misleading and needed disclaimer. Violated Rule 7.1 and 7.2, but not 1.6.
- California Ethics Opinion 2012-186 discusses when postings may be “advertising.”
- But read article in January 2015 issue of *The Docket*, “One Attorney's Professional Social Media Use.”
- See also, Bloomberg BNA article from May 2015, “Lawyers May Use Social Media to Seek New Clients, Reply to Requests for Counsel,” 31 LAW. MAN. PROF. CONDUCT 286.
- D.C. Ethics Opinion 370: Social Media I: Marketing and Personal Use. Even *personal* use may implicate the rules or create attorney/client relationship.

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## LinkedIn Profiles



- In March 2015, New York County Lawyers Association Professional Ethics Committee issued Formal Opinion 748 regarding LinkedIn. Attorneys must review their profiles periodically. See also D.C. Ethics Opinion 370. Social Media I: Marketing Personal Use (Nov. 2016).
- Even third-party “endorsements” and “recommendations” must be accurate.
- Rules 7.1 and 7.4.

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## Be Respectful!



- In December 2014, Kansas Supreme Court suspended attorney for six months for "intentionally bullying tactics" on Facebook
- Attorney sent a message to an unrepresented party. Attorney represented biological father that opposed biological mother's decision to place child for adoption. Attorney asked biological mother to "stand up and fight for your daughter" and "make things right." The baby "deserves to know her parents." Attorney self-reported his conduct. Violated rules 8.4(d) and 8.4(g)



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## Be Respectful!



- In June, 2015, Louisiana Supreme Court disbarred attorney for "social media blitz."
- Attorney urged readers using Twitter and an online petition against judges in two custody cases to contact the judges. Attorney claimed that the judges were unwilling to consider evidence.
- The posts contained "false, misleading and inflammatory statements," such as claiming the judge had refused to admit audio recordings, when in fact they were not offered.
- "Please...[call the judges] during the hours of 8:30 to 5:00 starting Monday, August 15 to ask why they won't follow the law and protect these children."

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## Be Honest!

- In October 2013, the North Carolina Grievance Committee censured and attorney for dishonest conduct under 8.4(c).
- Attorney used other attorneys names in Google AdWords. Attorney denied selecting the specific words and and claimed the inclusion was inadvertent. Attorney claimed that it was a "bulk-purchase of key words."
- Grievance Committee found it was the attorney's duty to "scrutinize all keywords prior to adding the keyword to [his] advertising campaign."



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## Judges might read your posts!



- *The Florida Bar v. Conway*: Attorney received public reprimand for derogatory comments about a judge on a blog. The comments included statements that the judge was "an evil, unfair witch." This case raised First Amendment issues.
- Texas prosecutor was denied a second continuance for a funeral after the judge checked her Facebook page and found posts indicating the attorney was partying, not grieving. (The judge also reported the lawyer to her supervisor in the DA's office.)
- In 2015, an Iowa judge delayed a civil trial after finding a Facebook post that the judge believed might unduly influence potential jurors.

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## Judges are not immune

- In 2014, the Arkansas Supreme Court removed a judge for improper comments on an internet forum.
- Judge Mike Maggio posted on a forum for LSU sports fans that disclosed confidential information about adoption proceedings of Charlize Theron.
- Posts including jokes about ethnic groups, gays, and bestiality.
- Judge posted that he wanted to be assigned cases involving attractive women.



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## Judges are not immune

- In 2015, a Minnesota senior judge and a Texas judge were reprimanded for Facebook posts about their trials:
  - Minnesota Sr. Judge Edward Bearse was remorseful and was not familiar with privacy setting on Facebook. He thought only his 80 friends could see the posts.
  - Texas Judge Michelle Slaughter was deliberate in publicly posting comments about pending matters.
  - At least one mistrial resulted from the judges' posts in each case.



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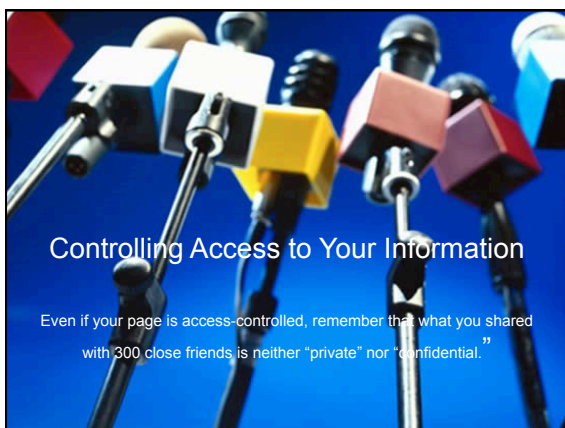
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## Controlling Access to Your Information

Even if your page is access-controlled, remember that what you shared with 300 close friends is neither "private" nor "confidential."

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## Padlock Your Email



- Use a secure email service.
- Use encryption program for attachments.
- Use a cloud storage service.

### Resources:

- Timothy J. Toohey, *Beyond Technophobia: Lawyer's Ethical and Legal Obligations to Monitor Evolving Technology and Security Risks*, 21 RICH. J. L. & TECH. 9 (2015).
- ABA Formal Opinion 477 (May 11, 2017), *Securing Communication of Protected Client Information*.
- Look at the article in the *OARC Update*, Winter 2015 Newsletter by Brett Corporan and James Carlson.

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## Email—So Easy to Misuse



- Attorney Steven Belcher, licensed in both Illinois and Missouri, was disciplined for transmitting non-public photograph taken from a client file with corresponding email commentary.
- Mr. Belcher was suspended for six months, all stayed, with a six-month period of probation.

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## Cloud Computing

- Generally permissible, but you need to take care.
- ABA has organized ethical opinions around the country on this issue:  
[http://www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/resources/charts\\_fyis/cloud-ethics-chart.html](http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html)
- Recent amendment to Rule 5.3 specifically addresses "using an internet-based service" to store client information. Attorney must make "reasonable efforts" to ensure that services are compatible with lawyer's professional obligations.
- Some questions to consider?
  - What happens if the service goes out of business?
  - How does this comply with my record keeping requirements? 1.15D, 1.16A
  - How and when can I access my information?
  - What security measures are in place?
  - What third-parties have access to my data? Data mining?
- Look at the article in the April, 2013 Issue of *Wyoming Lawyer*: "Skydiving in Cyberspace" by Wyoming Disciplinary Counsel Mark W. Gifford.

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Even when you think it's private. . . .



Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit was investigated for off-color humor accessible on his family's non-public internet page, including some sexually suggestive material.

The Judicial Council admonished Judge Kozinski for "his conduct exhibiting poor judgment with respect to this material," which "created a public controversy that can reasonably be seen as having resulted in embarrassment to the institution of the federal judiciary."

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## Who's Your Friend Now?



Be cautious about "friending" on social networking sites.

- A North Carolina judge received a public reprimand for communicating with an attorney who was a Facebook friend during trial. *Before the Judicial Standards Commission, Inquiry No. 08-234 Public Reprimand, B. Carlton Terry, Jr.*
- Florida Supreme Court Judicial Ethics Advisory Committee determined a judge may not add lawyers who may appear before the judge as a friend on social networking sites. *Florida Supreme Court Judicial Ethics Advisory Committee, Opinion No. 2009-20*
- South Carolina Advisory Committee on Standards of Judicial Conduct, Opinion No. 17-2009: A judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge's position as magistrate.
- D.C. Ethics Opinion 370. Social Media I: Marketing and Personal Use. Even personal use may implicate the rules.

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## Is your smartphone private?

- Reading client emails in public
- Lost/stolen phones
- Rule 1.6 (Confidentiality of Information)
- Remember that these obligations continue even after the representation ends. Rule 1.9(c)(2).



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## Texting: Should you just call?



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## Facebook Replies Not Enough



- Nebraska lawyer suspended for 90 days for failing to adequately answer client questions through Facebook
- Responses included:
  - "Relax"
  - "We are fine"
  - "I will explain later"
  - "I can't explain the whole process"

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## Questions to Ask

- Are you keeping records of communications?
- Are you communicating adequately?
- Is enough information being conveyed?



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## Prosecutors are not immune

- An Ohio prosecutor was fired for using Facebook to pretend to be the ex-girlfriend of a defendant on trial for murder.
- A federal prosecutor in New Orleans resigned after acknowledging making anonymous online comments about an individual who was the subject of a federal investigation, as well as judges and others involved with cases he handled.




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## INVESTIGATIONS

### For your clients/Of your clients

- RPCs 4.1, 4.2, 4.3, 8.4(c)
- Be careful what you advise a client to do
- The internet has a long memory

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## Social Media as Investigative Tool


Colorado Ethics Opinion adopted September, 2015



Formal Opinion 127 from the Colorado Bar Association Ethics Committee  
"Use of Social Media for Investigative Purposes"

- Guidance in accessing the public and restricted portions of a person's profiles or posts (e.g., represented and unrepresented parties, jurors, witnesses, judges)
- Explaining prohibitions against the use of deception to gain access to restricted portions. "No exception in the Rules permits a lawyer to employ deception or subterfuge to gain access to restricted information through social media." Cites to *In re Pautler*, 47 P.3d 1175 (Colo. 2002) (DDA posed as PD to convince murder suspect to turn himself in).

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## Philadelphia and New York Agree

Philadelphia Ethics Opinion 2009-02:  
Attorney cannot friend request, or ask a third person to become Facebook friends, with a witness to gain impeachment information. Such act is deceptive in nature. No pretexting!

This includes caseworkers, investigators or other third parties.  
See also 2014-300

New York Bar Assoc. Formal Opinion 2010-2:  
A lawyer can use information that is public or readily accessible as long as no deception is used to gain access. If it is public it is fair.

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### Proactive Use of Social Networks as Investigative Tools

- Investigating a potential client's social networking sites can inform your decision about whether to accept the case
- You also need to know what is out there so you can be prepared when the other side asks for it
  - See Magistrate Judge Kristin L. Mix's article in *The Colorado Lawyer*, June 2011, regarding the discoverability of social media in litigation



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### Spoliation — Beware!

- A lawyer in Virginia stipulated to a five-year suspension after advising his client – the plaintiff in a wrongful death suit – to “clean up” his Facebook photos in order to make him seem more like a grieving spouse. Client had posted a picture of himself holding a beer and wearing a t-shirt that read “I Love Hot Moms.”
- The client deleted sixteen photos, which were discovered by defense lawyers and the jurors were informed that there had been an attempt to delete the photos.
- The lawyer also lied to the court about the privilege log.
- The court ordered the lawyer and client to jointly pay \$722,000 to lawyers for the defense for legal fees.
- See ABA Ethics Tip February, 2015: *Privacy Settings and Postings on Social Media: Etched in Plastic or Carved in Stone?*
- See also *Preservation of Social Media Evidence in a Family Law Context*, Massaro and Statfield, *The Colorado Lawyer*, May, 2015

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### Things to Consider

- Other users can disseminate without asking permission of the poster. This may make information vulnerable, even if it was intended to be “private.”
- Posting may be voluntarily placing information into the “public sphere” and therefore make courts less willing to deem it private.
- When does the duty to preserve kick in? Caution your clients and take a prudent approach.



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## Check Ethics Opinions

- Pennsylvania Bar Association Formal Opinion 2014-300 is a comprehensive and thorough analysis of many of the issues
- California Formal Opinion 2012-186 addresses what circumstances postings on social media websites can be considered advertising.
- ABA Formal Opinion 477 (May 11, 2017) *Securing Communication of Protected Client Information*.
- The mediums are changing, but the analysis is often the same.



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## Supervising Staff

- Rules 5.1 and 5.3 address attorney responsibilities in advising others, including nonlawyer assistants
- Rule 5.3(b) "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer"
- ABA Formal Opinion 477 (May 11, 2017) *Securing Communication of Protected Client Information*. Does staff know how to use the technology and security features?

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## Training Support Staff

- Does your staff know the rules of to whom they can chat online? What information they can share?
- It is critical to train support staff in a manner that ensures they are aware of your obligations under the Rules of Professional Conduct.
- This includes issues of confidentiality. Caseworkers and other staff should be instructed not to post confidential information on Facebook or other social media sites.



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## Who is responsible?

- Rule 5.3(c) "a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved."
- Subpart (2) states the lawyer is responsible for the conduct if he or she knows of it and fails to take reasonable remedial action.



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## Remember!



It may be electronic and it may be easy,

**but the Rules still apply!**

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