BRAVE NEW WORLD: 
ETHICAL GUIDANCE FOR THE ELECTRONIC AGE

Tri-State Regional Special Education Law Conference
November 6-7, 2014

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Materials adapted from CLE materials originally prepared by Carol Greta, Administrative Law Judge, Iowa Department of Inspections and Appeals, with ALJ Greta’s generous permission.

“Modern Communications Technology”

MODERN COMMUNICATIONS TECHNOLOGY AND THE DUTY OF CONFIDENTIALITY
Published: April 13, 1995   Approved: July 21, 1995

We start with a 1995 opinion from the North Carolina State Bar because it serves as a good reminder that “modern” is a relative term. Bearing the title “Modern Communications Technology and the Duty of Confidentiality”, the opinion stated as follows:

1. When a lawyer uses “a cellular or cordless telephone or any other unsecure method of communication, a lawyer must take steps to minimize the risk that confidential information may be disclosed.”
   a. Citing Rule 4 of the North Carolina Rules of Professional Conduct (to protect and preserve the confidences of a client)¹, that state Bar reasoned that while protecting and preserving a client’s confidences extends to the use of communications technology, this obligation “does not require that a lawyer use only infallibly secure methods of communication.” Returning to more comfortable territory, the Bar analogized that because lawyers are not required to use paper shredders to dispose of waste paper so long as the responsible lawyer ascertains that procedures are in place which “effectively minimize the risks that confidential information might be disclosed,” similarly, “a lawyer must take steps to minimize the risks

¹ Under the federal Model Rules of Professional Conduct, this would be rule 1.6.
that confidential information may be disclosed in a communication via a cellular or cordless telephone.”

b. First, the lawyer must use reasonable care to select a mode of communication that, in light of the exigencies of the existing circumstances, will best maintain any confidential information that might be conveyed in the communication.

c. Second, if the lawyer knows or has reason to believe that the communication is over a telecommunication device that is susceptible to interception, the lawyer must advise the other parties to the communication of the risks of interception and the potential for confidentiality to be lost.

2. When using electronic mail or any other technological means of communication that is not secure to communicate confidential client information, a lawyer must take the same precautions as set forth in #1 above.

OBSERVATION: Most, if not all of us, whether practicing attorneys or administrative law judges, employ some written advisory in our e-mail communications. Examples:

Generic example 1:

This e-mail and any attachments to it is confidential and may be attorney-client privileged. It is intended only for the use of the individual or entity identified in the message. If the receiver of this message is not the intended recipient, you are hereby notified that reading, distribution, use, or copying of this message is strictly prohibited. If you have received this message in error, please immediately notify the sender by replying to the address noted above and delete the message.

Generic example 2:

This e-mail (including attachments) is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521, is confidential and is legally privileged. This message and its attachments may also be privileged and attorney work product. They are intended for the individual or entity named above. If you are not the intended recipient, please do not read, copy, use or disclose this communication to others; also please notify the sender by replying to this message, and then
delete it from your system. Any unauthorized review, use, disclosure of distribution is prohibited.

Public entity/employee example:

Notice to Recipient: This message and any response to it may constitute a public record, and therefore, may be available upon request in accordance with Iowa Public Records Law, Iowa Code Chapter 22.

Belt and suspenders example:

CONFIDENTIALITY NOTICE: This email, and any attachments hereto, contains information which may be CONFIDENTIAL and/or ATTORNEY CLIENT PRIVILEGED. The information is intended to be for the use of the individual or entity named above. If you are not the intended recipient, please note that any unauthorized disclosure, copying, distribution or use of the information is prohibited. If you have received this electronic transmission in error, please returned the e-mail to the sender and delete it from your computer. NOT TAX ADVICE: To ensure compliance with requirements imposed by the Internal Revenue Service, we inform you that any U.S. federal tax advise contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal revenue Code or (2) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

A. Electronic Mail

1. ABA Formal Op. 11-460 (August 4, 2011) DUTY WHEN LAWYER RECEIVES COPIES OF A THIRD PARTY’S E-MAIL COMMUNICATIONS WITH COUNSEL; DISCLOSURE

Issue: When an employer’s lawyer receives copies of an employee’s private communications with counsel which the employer found in the employee’s business email or workplace computer or similar device, what is the employer’s lawyer’s ethical obligation? EXAMPLE: After an special education teacher files a lawsuit against her employer school district, the district copies the contents of the teacher’s workplace computer for
possible use in defending the lawsuit, and provides copies to its outside counsel. Upon review, the district's counsel sees that some of the employee's e-mails bear the legend """"Attorney-Client Confidential Communication." Must the district's counsel notify the teacher's lawyer that the employer has accessed this correspondence?

Opinion:

- Neither Rule 4.4(b) nor any other Rule requires the employer's lawyer to notify opposing counsel of the receipt of the communications. [Rule 4.4 – Transactions With Persons Other Than Clients – states in paragraph (b), “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.] Rule 4.4(b) does not expressly address this situation, because e-mails between an employee and his or her counsel are not "inadvertently sent" by either of them.

- However, court decisions, civil procedure rules, or other law may impose such a notification duty, which a lawyer may then be subject to discipline for violating. If the law governing potential disclosure is unclear, Rule 1.6(b)(6) allows the employer's lawyer to disclose that the employer has retrieved the employee's attorney-client e-mail communications to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law. If no law can reasonably be read as establishing a notification obligation, however, then the decision whether to give notice must be made by the employer-client, and the employer's lawyer must explain the implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision.

- The question remains whether Rule 4.4(b) implicitly addresses this situation. In several cases, courts have found that Rule 4.4(b) or its underlying principle requires disclosure in analogous situations, such as when "confidential documents are sent intentionally and without permission." Chamberlain Group, Inc. v. Lear Corp., 270 F.R.D. 392, 398 (N.D. Ill. 2010). In Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 665 (N.J. 2010), the court found that the employer's lawyer in an employment litigation violated the state's version of Rule 4.4(b) [substantial the same as Rule 4.4(b)] by failing to notify the employee's counsel that the employer had downloaded and intended to use copies of pre-suit e-mail messages exchanged between the employee and her lawyers. The
Stengart court found that the employee “had an objectively reasonable expectation of privacy” in the e-mails based on the fact that the employee “could reasonably expect that e-mail communications with her lawyer through her personal account would remain private, and that sending and receiving them via a company laptop did not eliminate the attorney-client privilege that protected them.” 990 A.2d at 655. In contrast, other decisions arising in different factual situations have found that the attorney-client privilege did not protect client-lawyer communications downloaded by an employer from a computer used by its employees. These other decisions have not suggested that the employer's lawyer had a notification duty when the employer provided copies of the employee's attorney-client communications to the employer's lawyer. See, e.g., Long v. Marubeni Am. Corp., 2006 WL 2998671, at *4 (S.D.N.Y. Oct. 19, 2006); Kaufman v. SunGard Inv. Sys., No. 05-CV-1236, 2006 WL 1307882, at *3 (D.N.J. May 9, 2006); Scott v. Beth Israel Medical Center, Inc., 847 N.Y.S.2d 436, 444 (Sup. Ct. 2007).

• QUERY: What if the teacher sent the e-mails on her employer's k12.ne.us address? Does the teacher have reasonable expectation of privacy in e-mails sent from her work e-mail account? Does it matter if the teacher was warned in her employment handbook that the work e-mail account was only to be used for work purposes and must not be used for personal purposes? Would it be required to notify the teacher that the district could monitor her use of her work e-mail account? See next hypothetical.

• Since Rule 4.4(b) was added to the Model Rules, the pertinent ABA committee twice has declined to interpret it or other rules to require notice to opposing counsel other than in the situation that Rule 4.4(b) expressly addresses.

• QUERY: Could one argue that the lawyer is prohibited from reading or using the e-mails by Rule 4.4(a), which requires lawyers to refrain from using “methods of obtaining evidence that violate [a third person's] legal rights,” and which, according to the accompanying comment, forbids “unwarranted intrusions into privileged relationships, such as the client-lawyer relationship?” How about invoking Rule 8.4(c), which forbids “conduct involving dishonesty, fraud, deceit or misrepresentation,” and Rule 8.4(d), which forbids “conduct that is prejudicial to the administration of justice?”

• When the law governing potential disclosure is unclear, the lawyer need not risk violating a legal or ethical obligation. The fact that the employer-client has obtained copies of the employee's e-mails is
“information relating to the representation of [the] client” that must be kept confidential under Rule 1.6(a) unless there is an applicable exception to the confidentiality obligation or the client gives “informed consent” to disclosure. Rule 1.6(b)(6) permits a lawyer to “reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to comply with other law or a court order.” Rule 1.6(b)(6) allows the employer's lawyer to disclose that the employer has retrieved the employee's attorney-client e-mail communications to the extent he or she reasonably believes it is necessary to do so to comply with the relevant law, even if the legal obligation is not free from doubt. On the other hand, if no law can reasonably be read as establishing a reporting obligation, then the decision whether to give notice must be made by the employer-client. Even when there is no clear notification obligation, it often will be in the employer-client's best interest to give notice and obtain a judicial ruling as to the admissibility of the employee's attorney-client communications before attempting to use them and, if possible, before the employer's lawyer reviews them. This course minimizes the risk of disqualification or other sanction if the court ultimately concludes that the opposing party's communications with counsel are privileged and inadmissible. The employer's lawyer must explain these and other implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision. See Rules 1.0(e) (Terminology, "informed consent"), 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”), and 1.6(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 [the exceptions under Rule 1.6(b)]”).

2. ABA Formal Op. 11-459 (August 4, 2011) DUTY TO PROTECT THE CONFIDENTIALITY OF E-MAIL COMMUNICATIONS WITH ONE’S CLIENT

Issue: What is a lawyer’s obligation to warn a client when sending or receiving electronic communications where there is a significant risk that a third party may gain access? EXAMPLE: An employee has a computer assigned for her exclusive use in the course of her employment. The company's written internal policy provides that the company has a right of access to all employees' computers and e-mail files, including those relating to employees' personal matters. Notwithstanding this policy, employees sometimes make personal use of their computers, including for the purpose of
sending personal e-mail messages from their personal or office e-mail accounts. Recently, the employee retained a lawyer to give advice about a potential claim against her employer. When the retained lawyer knows or reasonably should know that the employee may use a workplace device or system to communicate with the lawyer, does the lawyer have an ethical duty to warn the employee about the risks this practice entails?

Opinion:

- A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, to which a third party may gain access.

- The risk may vary. Whenever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client’s situation, there is a significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.


Issue: Does a lawyer’s use of unencrypted e-mail over the Internet to transmit information regarding the representation of a client violate Rule 1.6? Is the lawyer required to consult with the client prior to transmitting any such information?

Opinion:

- The Rules of Professional Conduct do not directly address this subject. A lawyer’s fundamental duty to preserve client confidences is codified in Rule 1.6(a) of the Rules of Professional Conduct, which provides: “A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in subsections (a), (b), (c) and (d).”

- A lawyer must make every effort practicable to prevent disclosure of information relating to representation of a client. A lawyer who possesses confidential client information must take “reasonable steps” to secure the information against “inappropriate disclosure.” Confidential client information must be “stored, retrieved and
transmitted under systems and controls that are reasonably designed and managed to maintain confidentiality.” Restatement Of The Law Governing Lawyers, § 112, comment d (Proposed Final Draft No. 1. 1996).

- The use of e-mail in a manner consistent with these guidelines depends almost entirely upon the answer to a technical, non-legal question: “What is the likelihood of interception or inadvertent disclosure of the contents of an unencrypted e-mail message?” If interception or inadvertent disclosure of e-mail is likely to occur, then it is unreasonable and unethical to use Internet e-mail as a vehicle for communicating matters relating to representation of a client. In answer to the technical question, for the reasons set forth below, the committee is persuaded that, under ordinary circumstances, the risk of interception or inadvertent disclosure of the contents of an unencrypted e-mail transmission is minimal.

- Software programs are commercially available which permit e-mail messages to be “encrypted” and transmitted in code…. It cannot be disputed that “encrypting” e-mail would offer increased security and make it highly unlikely that an e-mail message could be read by anyone other than its intended recipient, even if it were to be intercepted by a “sniffer” or system administrator. But the logistics involved in setting up an encryption system with every potential e-mail correspondent would all but eliminate the advantages of speed, efficiency, reduced cost and ease of use which have made e-mail such an attractive business communications tool. Under typical circumstances, such a high degree of security is not warranted. We do not, for example, expect that land-line phone conversations or facsimile transmissions involving client confidences should be routinely coded or “scrambled”…. Parallel reasoning should apply to the use of e-mail. This committee concludes that, while it may be technically feasible to intercept e-mail communications, there is relatively little risk of unauthorized disclosure associated with the use of unencrypted e-mail.

- The committee believes it is also unreasonable and unnecessary to expect a lawyer to encrypt every e-mail message as a protection against those who may, intentionally or in violation of the law, chance to intercept that e-mail transmission. Therefore, in the committee's view a lawyer may, under ordinary circumstances, use unencrypted electronic mail for communicating matters relating to representation of a client without violating Rule 1.6 of the Rules of Professional Conduct. Accord, ABA Committee on Ethics and Prof. Responsibility. Opinion 99-413.
• But, for purposes of the Rules of Professional Conduct, the ultimate responsibility for evaluating which methods of communication should be used to maintain client confidentiality remains with the lawyer. Therefore, if circumstances exist which would place a lawyer on notice that there is a greater than ordinary risk of interception or unauthorized disclosure (such as an e-mail “mailbox” which is accessible to persons other than the intended recipient), regardless of the relative sophistication of the e-mail recipient, use of e-mail to transmit confidential information without the express authorization and consent of the client would be unwise and unethical. In a similar fashion, where the information sought to be communicated is of an extraordinarily sensitive or highly confidential nature, such that any unauthorized disclosure could cause serious injury to the interests of the client, the lawyer should choose a means of communication that provides a level of security proportional to the heightened need to avoid any threat of disclosure of the information. Because of this, the consent of the client should be obtained before transmitting any e-mail containing information of an extraordinarily sensitive or highly confidential nature, just as a wise and prudent lawyer would obtain the consent of the client before communicating significant, consequential, and extremely sensitive privileged matters through telephone lines, fax machines, or even regular mail.

B. Electronic Storage of Information

Cal. State Bar Committee on Professional Responsibility, Eth. Op. 2010-179, 2010 WL 5579444 (December 21, 1999) PROPRIETY OF USING TECHNOLOGY TO STORE CONFIDENTIAL CLIENT INFORMATION WHEN THE TECHNOLOGY MAY BE SUSCEPTIBLE TO UNAUTHORIZED ACCESS BY THIRD PARTIES

Issue: Does a lawyer violate the duties of confidentiality and competence owed to a client by using technology to store confidential client information when the technology may be susceptible to unauthorized access by third parties?

Opinion:
• Whether an attorney violates his or her duties of confidentiality and competence when using technology to store confidential client information will depend on the particular technology being used and the circumstances surrounding such use.

• Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether
reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications.

C. Cloud Computing


Opinion: Lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely. The lawyer should research the service provider to be used. Note: This opinion was affirmed by the Board of Governors with slight modification on July 26, 2013.

D. Metadata

Example: A school district’s counsel e-mails a draft settlement agreement to a parents’ attorney in word processing format. The parents’ attorney opens the document and reviews the metadata (track changes, comments, etc.). The metadata contains discussions of the district’s bargaining positions and strategy, as well as some very unflattering comments made by the building principal about the child’s father.


Issue: May a lawyer properly review and use information embedded in electronic documents (i.e., metadata) received from opposing counsel or an adverse party?

Opinion:
- Rule 4.4(b) does not apply because the documents were not inadvertently sent.

- Other law might prevent the receiving lawyer from retaining and using the materials, and that the lawyer might be subject to sanction for doing so, but this was “a matter of law beyond the scope of Rule 4.4(b). As Comment [2] to Rule 4.4(b) observes, “this Rule does not
address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.”

- Pursuant to their supervisory authority, courts may require lawyers in litigation to notify the opposing counsel when their clients provide an opposing party's attorney-client confidential communications that were retrieved from a computer or other device owned or possessed by the client. Alternatively, the civil procedure rules governing discovery in the litigation may require the employer to notify the employee that it has gained possession of the employee's attorney-client communications. Insofar as courts recognize a legal duty in this situation, as the court in *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 665 (N.J. 2010), *supra*, has done, a lawyer may be subject to discipline, not just litigation sanction, for knowingly violating it. However, the Model Rules do not independently impose an ethical duty to notify opposing counsel of the receipt of private, potentially privileged e-mail communications between the opposing party and his or her counsel.


Opinion:

- A lawyer has a duty under the Minnesota Rules of Professional Conduct (MRPC), not to knowingly reveal information relating to the representation of a client, except as otherwise provided by the Rules, and a duty to act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure. See Rules 1.1, 1.6, MRPC. The lawyer's duties with respect to such information extends to and includes metadata in electronic documents. Accordingly, a lawyer is ethically required to act competently to avoid improper disclosure of confidential and privileged information in metadata in electronic documents.

- If a lawyer receives a document which the lawyer knows or reasonably should know inadvertently contains confidential or privileged metadata, the lawyer shall promptly notify the document's sender as required by Rule 4.4(b), MRPC.

Opinion:
- A lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication.
- A lawyer who receives an electronic communication from another party or another party’s lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.


Issue: “This Formal Opinion provides ethical guidance to lawyers on the subject of metadata received from opposing counsel in electronic materials, including documents, spreadsheets and PowerPoint presentations under circumstances in which it is clear that the materials were not intended for the receiving lawyer.

Opinion:
- There is no specific Pennsylvania Rule of Professional Conduct determining the ethical obligations of a lawyer receiving inadvertently transmitted metadata from another lawyer, his client or other third person; and, there is no specific Pennsylvania Rule of Professional Conduct requiring the receiving lawyer to assess whether the opposing lawyer has violated any ethical obligation to the lawyer's client.
- Each attorney must “resolve [the issue] through the exercise of sensitive and moral judgment guided by the basic principles of the Rules” and determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer’s judgment and the particular factual situation.
- In reaching this conclusion, the Committee notes that Thus, the decision of how or whether a lawyer may use the information contained in the metadata will depend upon many factors, including:
  - The judgment of the lawyer;
  - The particular facts applicable to the situation;
  - The lawyer's view of his or her obligations to the client under Rule of Professional Conduct 1.3, and the relevant Comments to this Rule;
  - The nature of the information received;
  - How and from whom the information was received;
  - Attorney-client privilege and work product rules; and,
• Common sense, reciprocity and professional courtesy.

• Although the waiver of the attorney-client privilege with respect to privileged and confidential materials is a matter for judicial determination, the Committee believes that the inadvertent transmissions of such materials should not constitute a waiver of the privilege, except in the case of extreme carelessness or indifference.

**Electronic Social Media (Facebook, LinkedIn, Twitter, etc.)**

Example: A school district’s attorney reviews a family’s social media postings, including posts by the child’s mother in which she says she has no intention of EVER (and she means EVER) following through with the mediation agreement she signed.

1. **ABA Formal Op. 14-466 (April 24, 2014) LAWYER REVIEWING JURORS’ INTERNET PRESENCE**

   Issues: (1) Absent court order or relevant law, may a lawyer review a juror’s or potential juror’s Internet presence?
   2. May a lawyer directly or indirectly send an access request to a juror’s Facebook account?
   3. If a juror or potential juror becomes aware that a lawyer is reviewing his or her Internet presence, is the monitoring a communication from the lawyer in violation of Model Rule 3.5(b)? [Under 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. And Rule 8.4(a) prohibits doing through the acts of another what the lawyer is prohibited from doing directly.]
   4. In the course of such review, if a lawyer discovers evidence of juror or potential juror misconduct, what steps – if any – must the lawyer take?

   Opinion:

   1. Using a shared electronic social media (ESM) platform to passively view juror ESM is not prohibited communication with the juror. *(Contra, Formal Opinion 2012-2, Association of the Bar of the City of New York Committee on Professional Ethics, concluding that a network-generated notice to the juror that the lawyer has reviewed the juror’s social media was a communication from the lawyer to*
the juror albeit an indirect one. While the ABCNY Committee found that the communication would “constitute a prohibited communication if the attorney was aware that her actions” would send such a notice, the Committee took “no position on whether an inadvertent communication would be a violation of the Rules.” The ABA Committee disagreed with ABCNY, stating “[t]his is akin to a neighbor’s recognizing a lawyer’s car driving down the juror’s street and telling the juror that the lawyer had been seen driving down the street.” The ABA Committee then added, “Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.”

2. No.

3. See #1.

4. If a lawyer becomes aware of a juror’s conduct that is criminal or fraudulent, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. Applicable law might treat such juror activity as conduct that triggers a lawyer’s duty to take remedial action including, if necessary, reporting the juror’s conduct to the court under current Model Rule 3.3(b). See, e.g., U.S. v. Juror Number One, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt).

2. ABA Formal Op. 13-462 (February 21, 2013) JUDGE’S USE OF ELECTRONIC SOCIAL NETWORKING MEDIA

Opinion:

- A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety.

- Although judges are fullfledged members of their communities, nevertheless, they “should expect to be the subject of public scrutiny
that might be viewed as burdensome if applied to other citizens....”
Model Code Rule 1.2 cmt. 2.

- All of a judge's social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner “that promotes public confidence in the independence, integrity, and impartiality of the judiciary,” and must “avoid impropriety and the appearance of impropriety.” This requires that the judge be sensitive to the appearance of relationships with others. Model Code Rule 1.2. But see Dahlia Lithwick and Graham Vyse, “Tweet Justice,” Slate (April 30, 2010), (describing how state judge circumvents ethical rules prohibiting ex parte communications between judges and lawyers by asking lawyers to “de-friend” her from their ESM page when they're trying cases before her; judge also used her ESM account to monitor status updates by lawyers who appeared before her), article available at http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_justice.html.


Issue: May a judicial official participate in an ESM such as Facebook?

Opinion:
- In ABA Formal Opinion 462 (February 21, 2013), the ABA recognizes that “[s]ocial interactions of all kinds, including [electronic social media], “can be beneficial to judges to prevent them from being thought of as isolated or out of touch.”

- Although participating in social networking sites and other ESM clearly is fraught with peril for Judicial Officials because of the risks of inappropriate contact with litigants, attorneys, and other persons unknown to the Judicial Officials and the ease of posting comments and opinions, the Code does not prohibit such participation. Accordingly, the Committee unanimously determined that a Judicial Official may participate in ESM (such as Facebook), subject to the following conditions:
A Judicial Official must maintain dignity with respect to every comment, photograph and other information shared on a social networking site. Rule 1.2

A Judicial Official must not foster social networking interactions with individuals or organizations if such communications erode confidence in the independence of judicial decision making. Rule 1.2

A Judicial Official should not post any material that could be construed as advancing the interests of the judge or others. For example, a Judicial Official's profile page should not link to, endorse or “like” commercial or advocacy websites. Rule 1.3

A Judicial Official should not form relationships with persons or organizations that may convey an impression that these persons or organizations are in a position to influence the Judicial Official. Rule 2.4

A Judicial Official should not become a social networking “friend” of attorneys who may appear before the Judicial Official. Rule 1.2

A Judicial Official should not become a social networking “friend” of law enforcement officials, social workers or any other persons who regularly appear in court in an adversarial role, but may add court staff as “friends.” Rule 1.2

A Judicial Official should not make comments about any matters pending or impending before any court in accordance with Rule 2.10

A Judicial Official should not view parties’ or witnesses' pages on a social networking site and should not use such a site to obtain information regarding a matter before the judge. Rule 1.2

A Judicial Official should disqualify himself or herself from a proceeding when the Judicial Official's social networking relationship with a

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2 All rules cited are from the Model Code of Judicial Conduct. Rule 1.2 of the Code states that a judge “should act at all times in a manner that promotes public confidence in the ... impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

3 Rule 1.3 states that a “judge shall not use or attempt to use the prestige of judicial office to advance the personal or economic interests of the judge or others or allow others to do so.”

4 Rule 2.4(b) states that a “judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.” 2.4(c) states a “judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.”

5 Rule 2.10 sets forth several restrictions on judicial speech.
lawyer is likely to result in bias or prejudice concerning the lawyer for a party or the party. 2.11

(10) A Judicial Official may not give legal advice to others on a social networking site. Rule 3.10

(11) A Judicial Official should not engage in political activities on social networking sites. Some examples include, but are not limited to, the following: (a) a judicial official should not publicly endorse or oppose a candidate for public office, (b) a judicial official should not “like” a political organization’s Facebook page or create links to political organizations’ websites and (c) a judicial official should not post a comment on a proposed legislative measure or a controversial political topic. Rule 4.1

(12) A Judicial Official should be aware of the contents of his/her social networking profile page, be familiar with the site’s policies and privacy controls, and stay abreast of new features and changes. To the extent that those features raise further ethical issues, a Judicial Official should consult the Committee for guidance.

- The Committee concluded that, if the Judicial Official chooses to participate in ESM, the best course of action would be for the Judicial Official to terminate permanently the existing account and start anew. If this course of action cannot be accomplished, the Judicial Official should edit his/her profile page upon reactivation to ensure that it is in compliance with the conditions of this opinion in every respect. This includes, but is not limited to, removing inappropriate contacts, photos, links, comments, petitions, “friending,” and “Check In” postings. A Judicial Official should monitor closely new developments with respect to the ESM and keep abreast of applications instituted by the site managers. The Judicial Official also should monitor his/her participation with respect to maintaining appropriate dignity as well as insuring the precedence of the judicial office.

- The Committee noted, as a security concern as much as an ethical concern, that judges who choose to participate should be mindful of the significant security/privacy concerns that such participation entails. It has been reported that data collected using Facebook “likes” alone allows researchers to predict accurately certain

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6 Rule 2.11 requires disqualification “in any proceeding in which the judge’s impartiality might reasonably be questioned including, but not limited to, the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer or personal knowledge of the facts that are in dispute in the proceeding…”

7 Rule 3.10 states that a judge shall not practice law.

8 Rule 4.1 sets forth the limitations regarding political activities.
qualities and traits concerning users. In addition, accessing Facebook via a mobile device without certain security features enabled, may let other participants know a user's physical location at any given time.
Client-Lawyer Relationship
Rule 1.0 Terminology
(a) "Belief" or "believes" denotes that the person involved actually supposed 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 (e) 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.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(i) "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.

(j) "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.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "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.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. 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 1.4 Communication

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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 prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) 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;
(6) to comply with other law or a court order; or
(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.5 Impartiality And Decorum Of The Tribunal

A lawyer shall not: ...(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

Rule 4.4 Respect For Rights Of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably
should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Rule 8.4 Misconduct
It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; …