ETHICS FOR LITIGATORS

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Justin O'Dell has been actively practicing law in Georgia since his admission to the bar in 2002. Mr. O'Dell has litigated bench and jury cases in the U.S. District Court, Northern District of Georgia, and in the various Superior, State, Probate and Juvenile Courts of Metro Atlanta, Georgia. He has also appeared before the Cherokee and Cobb County Board of Commissioners as well as the Marietta City Council on various client matters related to licensing and zoning.

Mr. O'Dell has a broad range of practice areas, including but not limited to business and civil litigation disputes, a variety of family law matters, probate litigation and property litigation. He has appeared in a variety of forums related to property title and use. Justin has also litigated consumer cases involving personal injury, wrongful foreclosure, wrongful eviction, breach of fiduciary duty and defective construction. He has also successfully represented residential and commercial property owners facing claims of eminent domain.

Finally, Mr. O'Dell has successfully handled each of the last three election disputes in Cobb County. He successfully argued and overturned the 2006 Kennesaw Mayor's election due to voter irregularities, successfully defended the challenge to the candidacy of a Marietta City Councilman and successfully set aside and obtained a new election regarding Sunday Sales of alcohol in Cobb County. The latter was due to failure to comply with State Legislation creating voter disenfranchisement within the municipalities and cities of Cobb County.

Justin O'Dell was raised on a small family farm in Southern Idaho. He attended Furman University, graduating in 1999 with a degree in Political Science. He attended law school at the University of Georgia and completed his Juris Doctorate, cum laude, in 2002. In addition to working on a farm, Mr. O'Dell worked as a summer seasonal wildland firefighter for the U.S. Department of Interior, Bureau of Land Management.

Since coming to Marietta, Georgia, Mr. O'Dell has become ingrained in the local community through civic and nonprofit service. He serves on various civic and non-profit boards and is one of the founding Board members and Board Chairman of Reconnecting Families, Inc. Mr. O'Dell is an active member of the Cobb Chamber of Commerce and completed the Leadership Cobb program in 2007. Justin is active within the faith community as a member and Deacon of First Baptist Church of Marietta.

Mr. O'Dell's work has been recognized in a variety of ways. In 2010, he was named one of the 20 Rising Stars Under 40 in Cobb County, Georgia. Also in 2010, Justin was recognized by the State Bar of Georgia with the Robert Benham Award for Community Service. In 2012, Georgia Power awarded him their annual Citizen Wherever We Serve Award. He has received recognition for outstanding service by the Marietta Kiwanis club and the Cobb Collaborative. In addition, his work for Reconnecting Families, Inc. was responsible for his firm receiving a Community Service Award from the Cobb Chamber of Commerce in 2008.

REPORTED CASES:

Vatacs Group, Inc. v. Homeside Lending, Inc., 281 Ga. 50, 635 S.E.2d 758 (2006).
In re Fennell, 300 Ga. App. 878 (2009).
Wills v. Arnett, 306 Ga. App. 503 (2010).

JURY RESULTS:

Buckner v. Complete Wrecker Service, Eviction Services, Inc., Morris, Schneider and Prior, State Court of Dekalb County, (2007). Plaintiff's verdict for wrongful eviction in excess of $200,000.00.
Burleigh v. Shackelford, State Court of Cobb County (2006). Defendant liable for only $65,451.17 against a Plaintiff's request of in excess of $800,000.00.
Weeks v. Huck, Superior Court of Cobb County (2011). Plaintiff's verdict establishing a property line and award of $20,000.00 attorney's fees.
Lincoln v. Beaumont Tax Service, Superior Court of Cobb County (2011). Plaintiff's verdict in excess of $150,000.00, plus award of punitive damages for breach of fiduciary duty and fraud and attorney's fees arising from negligent tax services.

NOTABLE NON-JURY RESULTS:

Mrs. M. v. Dr. J., Superior Court of Cobb County (2006). Award in favor of Wife of $8000.00 per month in total support, over $80,000.00 in attorney's fees and property settlement of approximately $500,000.00
Mr. D v. Ms. B, Superior Court of Cobb County (2007). Award of custody of infant to Father due to abandonment, alienation and erratic behavior of Mother.
In RE: Mrs. B, Probate Court of Gilmer County (2007). Successful defense and prosecution involving Guardianship and Conservatorship of incapacitated Mother.
Mr. B. v. Debt Collector, Settlement for bad faith and harassment in violation of Fair Debt Collection Practices Act.
Church v. Board of Elections, Superior Court of Cobb County (2008). Successfully obtained new election in race for Mayor of City of Kennesaw.
PMC v. CII Global, Superior Court of Cobb County (2008). Defense of individual partner and prosecution of claims against other partners. Successful enforcement of settlement of dissolution of partnership in favor of client.
Godwin v. Pearlberg, Superior Court of Cobb County (2009). Successful defense to a legal challenge to the eligibility of incumbent City Councilman for reelection before the County Board of Elections and appeal to the Superior Court.
Amirfazli v. Vatacs, et. al., Superior Court of Gwinnett County (2010). Bench verdict in favor of Defendant excess of $60,000.00 on Counterclaim of promissory note and in defense of suit on wrongful foreclosure.

Mrs. D. v. Mr. D., Superior Court of Cobb County (2010). Judges award of requested property division despite allegations of marital misconduct.
Cardoza v. Wells Fargo, et. al. Superior Court of Cobb County (2010). Successfully set aside foreclosure and returned home to homeowner. Confidential settlement.
Ms. D v. Mr. D, Superior Court of Cobb County (2011). Temporary award of substantial alimony, child support and attorney's fees against high asset executive due to marital misconduct. Temporary award led to substantial settlement terms.
Chemlink v. Christian, et. al, Superior Court of Cobb County (2011). Temporary restraining order, injunction and judgment against employee for violation of covenant not to compete, fraud, conversion of trade secrets and tortuous business practices.
Martin v. Board of Elections, Superior Court of Cobb County (2012). Successfully set aside 2012 election referendum regarding Sunday Sales due to failure to comply with legislation and disenfranchisement of City voters.
Mrs. F v. Mr. F, Superior Court of Cobb County (2012). Successful divorce defense of high asset executive with compensation, stock options and deferred compensation against claims of spouse for multimillion dollar property settlement and request for $25,000 per month in alimony.
Mr. & Mrs. B v. Ms. G, Superior Court of Cherokee County (2012). Successfully defended a Mother against grandparents attempting to take custody away due to allegations of drug use.

PRESENTATIONS& WRITING

Technology in the Law Office: Helping Small Firms Compete, Digital Strategies to Keep up with the Big Boys (October 29, 2010)

Election Challenges in Georgia (2011)

The Court System & You: A Primer for Clergy, Non-Profit Organizations and Churches (February 22, 2011, Cobb County Clergy)

Facebook Meets Voir Dire: The Good, The Bad & The Ugly of Mining the Internet During Litigation (May 17, 2011)

Leslie Dean O'Neal has been a practicing attorney in the greater Atlanta area since her admission to the Georgia Bar in 2008 and is currently admitted to practice before the Georgia Court of Appeals, the Georgia Supreme Court, and the United States District Court for the Northern District of Georgia. Ms. O'Neal has handled bench trials, jury trials, and oral arguments in the various Superior, State, and Probate Courts of Metro Atlanta, Georgia. Ms. O'Neal's legal practice focuses on general civil litigation including domestic law, contempt actions, landlord/tenant disputes, wills and estates, appellate issues, conservatorships, small business disputes, and tort actions. Mrs. O'Neal has been particularly successful on the appellate level, having successfully reversed two trial court judges in her first three years of legal practice.

Mrs. O'Neal received her J.D., cum laude, from the University of Mississippi School of Law in 2008. Mrs. O'Neal gained valuable experience during law-school through her participation in the National Family Law Appellate Competition and her clerkship with the Honorable Edwin H. Roberts, Jr. of the Mississippi Chancery Court. Mrs. O'Neal is a Phi Beta Kappa from Auburn University, graduating Magna Cum Laude with a Bachelor of Arts degree in History and a minor in Political Science.

O'Neal continues to be very active in her community and currently serves on the Advisory Board of the United Way in Cobb County and is the Co-Chairman of the Youth Services Committee of the Kiwanis Club of Cobb County where she coordinates the Read-a-Book project, which allows for businessmen and businesswomen in the community to visit local schools and read a book to a classroom of students. Mrs. O'Neal is an avid runner, having successfully completed two half-marathons and is currently training for her first full marathon. Mrs. O'Neal has been a member of Buckhead Church since April of 2011.

REPORTED CASES:

Venable v. Parker, 307 Ga.App. 880, 706 S.E.2d 211
In Re Hudson, 300 Ga.App. 340, 685 S.E.2d 323

JURY RESULTS:

Weeks v. Huck, Superior Court of Cobb County (2011). Plaintiff's verdict establishing a property line and award of $20,000.00 attorney's fees.
Lincoln v. Beaumont Tax Service, Superior Court of Cobb County (2011). Plaintiff's verdict in excess of $150,000.00, plus award of punitive damages for breach of fiduciary duty and fraud and attorney's fees arising from negligent tax services.

NOTABLE NON-JURY RESULTS:

Mrs. R. v. Mr. R., Superior Court of Cobb County (2012). Summary Judgment granted in favor of Father against Mother's Petition to Modify Child Support and award of over $28,000 in attorney's fees to Father.
Mr. T v. Mrs. T, Superior Court of Cobb County (2012). Award of sole legal custody to Father in modification against former stay at home mother and award of over $10,000 in attorney's fees to Father.
Ms. M. v. Mr. M (2012). Successfully reinstated visitation and parental rights to a Father falsely accused by a child of child molestation.
JJW v. ICE (2012). Summary Judgment granted in favor of owner of a business in a lawsuit for unpaid rent and damages.
Ms. P v. Mr. P. (2012). Negotiated agreement allowing Mother to have primary physical custody of minor child and relocate out of state over Father's objection.
Mr. C & Mrs. C v. IKUMC (2011). Summary Judgment granted in favor of Church against former congregation member who sought recovery of a previous $1,500,000 donation, with trial court's order affirmed on appeal with no opinion.
Ms. F v. Mr. G (2011). Obtained primary physical custody of 11 year old child to the Mother despite the child signing a legal election affidavit to live with the Father.
Mr. M v. Mrs. B (2010). Obtained $12,000 in attorney's fees award in favor of Mother and against Father for filing a frivolous petition to modify child support and abuse of discovery practices.
Mr. O v. Mrs. O (2010). Obtained $4,000 monthly alimony award for Wife accused of adultery.

I. APPLYING RULES OF PROFESSIONALISM IN ADVERSARIAL PROCEEDINGS

A. Ethics Cannons and Recent Changes to ABA Model Rules[1]

The ethics cannons of professional conduct were adopted by the ABA in 1908 and contained 32 cannons of ethics at the time. They were last amended in 1967 and now contain 47 total cannons of ethics. The complete cannons of ethics can be found on the ABA website or through the following link:

http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf

The cannons of ethics are statements of aspiration rather than specific rules, as set forth in the preamble:

> *In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.*
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> *No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not construed as a denial of the existence of others equally imperative, though not specifically mentioned.*

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[1] All of the material in this section was obtained from the American Bar Association Website, www.americanbar.org

Following the Cannons of Ethics, the ABA adopted and published the 1969 Model Rules of Professional Responsibility which were later revised and adopted in 1983 as the Model Rules of Professional Conduct. At present, the only state which has not adopted Rules of Professional Conduct based upon the ABA Model Rules is the state of California. In 1997, the American Bar Association formed the Ethics 2000 Commission to review the Model Rules of Professional Conduct. Of twelve proposed amendments to the model rules, three were ultimately adopted in 2002. None of the amendments were seismic in scope.

The Ethics 2000 Commission was followed in 2009 by the Ethics 20/20 Commission which was charged to review the Rules of Professional Conduct in light of advances in technology and global legal practice developments. On April 16, 2012, the Ethics 20/20 Commission released a formal statement that it would not propose any changes to ABA policy on nonlawyer ownership of law firms. The Ethics 20/20 Commission has proposed substantive rule changes for 2012 related to Ethics as follows:

i. Model Rule 1.6 (Duty of Confidentiality)

The Commission concluded that lawyers need to guard against: (1) inadvertent disclosures, (2) unauthorized disclosures, and (3) unauthorized access. An inadvertent disclosure is one in which confidential information is accidentally disclosed (e.g., a lawyer mistakenly sends an e-mail to the wrong recipient). An unauthorized disclosure is one in which confidential information is disclosed intentionally, but without authority (e.g., a member of the lawyer's office reveals confidential client information on a social

networking site). Unauthorized access occurs when a third party (i.e. "hacker") gains access to confidential information.

The Commission is proposing a new sentence to Comment [16] to Rule 1.6 that explicitly states that the disclosure of information, by itself, does not constitute a violation of the proposed Rule 1.6(c) if a lawyer took reasonable precautions to guard against it.

Further, the Commission has made a number of changes to Model Rule 1.6 to give lawyers more guidance regarding their authority to disclose confidential information in order to detect potential conflicts of interest. The revisions will include issues involving situations where lawyers move from one firm to another, when two law firms merge or when a lawyer, law firm or portion of a law firm is acquired by another lawyer or law firm. The Comments now specifically identify the protections that firms need to put in place when receiving this kind of information and several additional pieces of information that can be disclosed in order to ensure that a proper conflicts check is performed.

ii. Model Rule 1.18 Duties to Prospective Clients

The Commission has proposed revisions to the language in Comment [3] to Rule 1.18 (Duties to Prospective Clients) to make clear that prospective client relationships can arise either when the lawyer initiates the communication with a potential client or when the potential client initiates a communication with the lawyer. For example, a prospective client relationship can arise if the lawyer offers to represent a person by e-

mail or letter, the lawyer requests that the person share confidential information with the lawyer, and the person responds by sharing confidential information with that lawyer.

iii. Model Rules 7.1 and 7.2 Advertising and Communications Concerning Lawyer's Services

The Commission is proposing to change to Comment [3] to Rule 7.1 (Communications Concerning a Lawyer's Services) to change the phrase "prospective clients" to "the public" to reflect the Rule's intended scope. Rule 7.1 is clearly designed to cover all possible future clients, not just those people who are "prospective clients" as that term is defined in Rule 1.18. The Commission has also recommended adding language to Comment [5] to Rule 7.2 (Advertising) to say that lead generation services should "affirmatively state" that they are not recommending a lawyer.

iv. Rule 1.1 Competence

The Commission proposes changing Comment [6] to Rule 1.1 (Competence). That Comment addresses a lawyer's ethical duties when a portion of a client's legal work is outsourced to a lawyer in another firm. The Commission agrees that it may be reasonable to rely on the work performed by nonfirm lawyers without independently confirming that that work was performed competently.

B. Cross-Specialization and the Duty of Competency

Model Rule 1.1 provides that "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ABA MRPC 1.1. With regard to cross-specialization or a diverse, general practice of law, the comments to the model

rule indicate that ethical issues related to the duty of competency arise in three situations: i) representation in a wholly new area of practice; ii) representation in an unfamiliar area of practice in an emergency and iii) preparation and maintaining competence in various areas of practice.

i. Representation in a Wholly New Area of Practice

Comment 2 to Rule 1.1 makes clear that a lawyer need not have training or experience in an unfamiliar area in order to handle such legal problems. MRPC 1.1, Comment 2. However, the lawyer must be equipped with the ability to analyze precedent, evaluate evidence and anticipate legal problems that may arise. Id. Moreover, the lawyer is charged with knowing when it may be appropriate to associate another lawyer with greater training and/or experience.

Rule 1.1 carries a serious side effect. Since the lawyer is presumed competent in all areas of the law, the lawyer cannot use a lack of familiarity with a specific area of the law as a defense in a claim for malpractice or in an ethics proceeding. Failure to know or apply the law is the most common legal malpractice allegation at 11.3% of all malpractice claims. "Avoiding Malpractice, Are You at Risk?", Daniel Ellington, *ABA Law Practice* July/August 2010 Issue. Vol. 36, No. 4, pg. 29. Another 6.6% of claims relate to failure to know the proper deadline, 8.8% relate to conducting improper or inadequate discovery and 8.9% relate to improper or inadequate planning or preparation, all of which are functions of incompetent representation. Id.

Perhaps the most high profile example of this situation is Jose Baez, criminal defense lawyer for Casey Anthony in Florida. Prior to representing Anthony in her death

penalty case, Baez spent eight years trying to gain admission to the Florida State Bar, worked sparingly in the County Solicitor's Office and had never handled a death penalty case before. Although victorious for Anthony, he was sanctioned by the Court and faces ethics charges before the Florida State Bar tied to failure to comply with proper procedures and requirements during the case. "Jose Baez Bar Complaints Explained" *Orlando Sentinel*, October 18, 2011.

Similarly, an Indiana lawyer was suspended from the practice of law for 60 days related to the appeal of a lawsuit in the 7th Circuit Court of Appeals. In. Re: McCord, S.C. Ind. No. No. 84S00-9806-DI-313 (2000.). The lawyer was not admitted in the 7th Circuit Court of Appeals, yet proceeded to litigate his case there. The lawyer then missed various procedural deadlines and failed to adhere to the rules of procedure of the 7th Circuit Court. In the end, the client's case was dismissed. In imposing the suspension, the Supreme Court concluded that the lawyer's demonstrated failure to provide competence in the 7th Circuit was evidence of his overall fitness to represent clients in any forum. Id.

ii. Representation in an Unfamiliar Area in an Emergency

The comments to the Model Rules recognize a situation wherein a lawyer is called upon, likely without warning, for representation or to provide advice in an unfamiliar area on an immediate or emergency basis. MRPC 1.1. Comment 3. In litigation, a situation could arise wherein the client, while testifying under oath, reveals conduct that could give rise to criminal liability. A civil litigator, unfamiliar with criminal practice, may be forced to make a decision and advise the client regarding

continuing to testify, refusing to answer questions or taking the fifth amendment. In these situations, the comments clearly indicate that the advise or assistance should be limited to only that which is reasonably necessary under the circumstances.

iii. Preparation and Maintaining Competence in Various Areas of Practice

As even the most specialized of lawyers will likely find his or her practice venturing into new areas over time, the most substantial ethical issues are presented in the realm of gaining competence and experience and maintaining the same. In the first instance, lawyers must clearly understand that the fees charged to the client cannot include the necessary time and expense for the lawyer to gain competence. Model Rule 1.5 prohibits the lawyer from charging an unreasonable fee and requires that the fee be reasonable considering the "skill requisite to perform the legal service properly." This rule would not prohibit a lawyer from charging a client for the time necessary to review the relevant codes and case law related to a matter, insofar as any prudent lawyer would always do the same. The rule would, however, prohibit charging a client for the time and expense to attend a CLE presentation on an unfamiliar area of the law.

In addition to obtaining the necessary competency to handle a matter, it is equally important that the lawyer maintain the proper level of competency. The requirement extends beyond the annual minimum level of CLE hours required to maintain admission to the bar. The lawyer must also keep up with changes in the law and practice.

C. Schedules, Deadlines & Malpractice – Get Informed

Beyond the substantive failures related to competency set out above, failing to file pleadings or other documents on time (8.6%) and failing to calendar deadlines properly (6.7%) are the next highest allegations related to claims of malpractice. "Avoiding Malpractice, Are You at Risk?", Daniel Ellington, *ABA Law Practice* July/August 2010 Issue. Vol. 36, No. 4, pg. 29. These errors run the gamut from improperly calendaring a deadline to properly calendaring the deadline, but neglecting to react to it. Other examples involve files which are misfiled or mis-indexed or mathematical errors in establishing deadlines.

Every day lawyers fail to appear in Court or fail to meet deadlines established by statute or court order. Advances in technology and practice management software have made it easier than ever for lawyers to set up "tickler" and reminder systems to make appearances and deadlines. Unfortunately, the growth in volume in the Court system has caused judges to have less patience with no appearing parties. Whereas Judges in prior decades might have placed a courtesy call to a law office prior to taking draconian action in a case, the busy and backlogged calendars of the current judiciary make such conduct less and less likely.

Beyond law practice management and proper office protocols and procedures, the best and most effective way to avoid liability for procedural defaults and missed deadlines or court appearances is professionalism. An attorney who is known for insisting on a dismissal or default when a lawyer fails to appear in Court is very likely to face the same outcome from an adversary or a Judge in similar circumstances. However,

the attorney with the reputation of making phone calls to inquire as to counsel's absence is likely to get a reciprocal phone call from an attorney or Judge in the same situation. MRPC Rule 1.2 and the comments thereto make it clear that the lawyer's duty of zealous representation of a client is subject to the lawyer's duties to opposing counsel and the court as set forth in MRPC 3.3 and 3.4 and in the Canons of Ethics.

D. The Dangerous Grey Areas Near Misrepresentation/Deceipt/Dishonesty

Perhaps the most emergent grey area involving lawyer misrepresentation, deceipt or dishonesty involves the lawyer participating the evidence gathering process prior to the existence of the representation being generally known. The rise in technology and social media has given lawyers the ability to gather more and more information without leaving the office. Work that was once outsourced to licensed private investigators is now easily performed by lawyers. This activity creates the potential for conflict with several of the Model Rules of Professional Conduct. Model Rule 3.7 prohibits the lawyer from representing a client in a matter wherein the lawyer may be called as a witness. Model Rule 4.1 provides that "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person" and Model Rule 8.4 is an outright prohibition on conduct "involving dishonesty, fraud, deceit or misrepresentation."

For many years the key factor related to whether a lawyer engaged in some form of deceptive conduct in pursuit of a legitimate public interest, either through a government investigation or a civil legal action or was engaged in conduct so grave a character as to call into question the lawyer's fitness to practice law. "When the Truth

Can Wait" Eileen Libby, *ABAJournal*, February 1, 2008, *Citing* "Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct." David B. Isbell & Lucantonio N. Salvi *Georgetown Journal of Legal Ethics* (Summer 1995). However, in 2000, Oregon lawyer David Gatti was sanctioned by the Oregon State Bar under a rule mirroring the MRPC for posing as a chiropractor or medical doctor in a series of phone calls to a medical review company in order to gain information for use in a federal lawsuit. *In re Gatti*, 8 P.3d 966 (2000). Shortly thereafter in Colorado, a prosecutor was suspended for three months for posing as a public defender in order to get a murder-rapist to surrender to authorities. *In re Pautler*, 47 P.3d 1175 (2002) (Fans of the TV show *Law & Order* will recognize the fact pattern, however, on television Serena Southerland fared better and received only a public reprimand).

Social media also presents unique ethical issues related to misrepresentation. Most states and jurisdictions would conclude or have concluded that merely mining for publicly available information regarding adverse parties and witnesses is not an ethical violation. Ethical issues arise when the contact shifts from passive to interactive exchanges of information. Few bar associations have addressed the issue, but those that have liken the contact to a personal setting in a public forum. In other words, if the contact would be improper person to person, then it would be improper online.

The Oregon Bar Association (Oregon St. B. Ass'n Op. No. 2001-164 (Jan. 2001) analogized as follows "A website which allows the visitor to browse the site may be

freely accessed by the public, therefore it may be accessed by a lawyer. This is no different than driving by the a store and taking photos or entering the store and walking around. Similarly, a one-way communication (such as ordering products) is permissible." However, a lawyer who goes online and submits "chat" questions through the site or e-mails the store in the hopes of gaining information about the store violates the ethical prohibition on communications with client's represented by counsel and communications which are deceptive. By analogy, a lawyer could not enter the store in person and without disclosing the real reason for the visit and begin questioning the store owner and staff about the operation. *See also*, "Communication and the Internet: Facebook, E-Mail and Beyond", David Hricik, Professor of Law Mercer University School of Law.

"Friending" witnesses or the opposition also presents ethical issues for lawyers. Most bar associations have rules against communication with an individual known to be represented by counsel. As a result, an ethical violation would result in trying to "friend" the opposition. The jurisdictions split when the target is a witness, not represented by counsel. New York says an attorney may withhold information so long as the attorney does not make false statements of fact in attempting to contact another person. The New York City bar found that a lawyer may use her real name and profile to send a "friend request" to an unrepresented person to gain access to his/her social networking site to gather information. NYC Bar. Opinion 2010-2 (September 2010). The association found the situation analogous to a lawyer or investigator sidling up to a witness in a bar on Saturday night and striking up a conversation. "Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous", Steven Seidenberg, ABA Law Journal,

February 2011. In Pennsylvania, the Bar Association found the opposite. The guidance committee found that absent full disclosure of the purpose for the contact, the request was "deceitful" and in violation of the ethical rules. Philadephia Bar Association Opinion 2009-02 (March 2009).

E. Dealing with Abusive or Incompetent Opposing Counsel

Nothing frustrates litigation like abusive or incompetent opposing counsel. In both instances, maintaining professionalism and ethics can cause the lawyer to work twice as hard in order to achieve a just result. Although competence is specifically required by the Model Rules of Professional Conduct, politeness and decency are not. At best, simple courtesy is reflected only in the Canons of Ethics. Canon 17 states

> "Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the cause. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided."

Canon 18 continues in like form:

> "A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf."

Although incivility may not be specifically subject to sanction by a bar association, lawyers would do well to be reminded that it is not outside the reach of the

Court. A recent reminder came in a First District Court of Appeals case which took to task a young lawyer whose poison pen letters to his opponent backfired after he filed a motion for sanctions. In the end, the lawyer found himself on the wrong end of a thirty-one page "Statement of Decision" which required the lawyer's client to pay $100,000.00 in sanctions and $300,000.00 in attorney's fees based on the lawyer's behavior. Marriage of Davenport 194 Cal. App. 4th 1507 (2001). Although in the context of family law, the Judge's words are a good reminder to all litigators:

> "Beyond all that, there is evidence of Andrew Watters' treatment-more accurately, mistreatment- of his opposing counsel in his correspondence with them. Bad enough that such correspondence occurs in any litigation. It is utterly inconsistent with a fundamental aspect of proper family law practice. 'Family law cases are not supposed to be conducted as "adversarial" proceedings. Quite the contrary, the goal is to *reduce* acrimony and adversarial approaches common to general civil litigation and, instead, to foster *cooperation* between the parties and their counsel with a view toward settlement short of full-blown litigation. [See Fam. C. §§ 2100 (b), § 271 (a) (sanctions for uncooperative conduct in family law cases); see also Cal. Atty. Guidelines of Civility & Professionalism § 19- 'in family law proceedings an attorney should seek to reduce emotional tension and trauma and encourage the parties and attorneys to interact in a cooperative atmosphere, and keep the best interest of the children in mind']" *Davenport at page 29-30* [emphasis in original].
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> "We close this discussion with a reminder to counsel-all counsel, regardless of practice, regardless of age-that zealous advocacy does not equate with 'attack dog' or 'scorched earth'; nor does it mean lack of civility… (Citations omitted) …Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive." *id at page 33.*

Even Judges are not immune. When Judge Sam Sparks in Austin, Texas became fed up with incivility between to litigants, he issued the now famous order inviting them to a "kindergarten party" at the Courthouse featuring such lessons as:

- How to telephone and communicate with a lawyer

- How to enter into reasonable agreements about deposition dates
- How to limit depositions to reasonable subject matter
- Why it is neither cute nor clever to attempt to quash a subpoena for technical failures of service when notice is reasonably given; and
- An advanced seminar on not wasting the time of a busy federal judge and his staff because you are unable to practice law at the level of a first year law student.

Judge Sparks also reminded those involved that the U.S. Marshall would make beds available if necessary. Morris v. Coker, Case Nos. A-ll-MC-712-SS, A-ll-MC-713-SS, A-ll-MC-714-SS, A-ll-MC-7IS-SS, W.D. Tex., Aug. 26, 2011.

In the ultimate coup d'grace, Chief Judge Edith Jones of the U.S. Fifth Circuit Court of Appeals issued an e-mail letter indicating that she was not amused, "It has not escaped my attention, or that of my colleagues or, I am told, nationally known blog sites that you have issued several 'cute' orders in the past few weeks. The order attached below is the most recent. Frankly, this kind of rhetoric is not funny. In fact, it is so caustic, demeaning, and gratuitous that it casts more disrespect on the judiciary than on the now-besmirched reputation of the counsel. It suggests either that the judge is simply indulging himself at the expense of counsel or that he is fighting with counsel in what, as Judge Gee used to say, is surely not a fair contest. It suggests bias against counsel. No doubt, none of us has been consistently above reproach in our professional communications with counsel. We are all prone to human error. But no judge who writes an order should allow such rhetoric to overcome common sense. Ultimately, this kind of excess, as I noted, reflects badly on all of us. I urge you to think before you write."

Assuming the Court does not intervene to correct the behavior of abusive opposing counsel, the rules of ethics provide little help. A lawyer is bound to report a

violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." MRPC 8.3. Complaining to a bar association (or Judge) about another lawyer being abusive, rude or uncivil is often as effective as the child who comes crying to "Mommy" or "Daddy" about his brother or sister. The following tips are good, ethical practice pointers from "Staying Civil", Andrew C. Simpson, GPSOLO Magazine, October/November 2005.

- Instead of letting anger conquer you, redirect your efforts toward understanding what motivates your antagonist. Once you isolate this, you can tailor a solution that fits your personality. The most frequent motivation for injudicious behavior, by an attorney or a judge, is to control you (followed by distraction and hiding incompetence).
- Don't sink to their level, or you'll regret it later. This is particularly true if you understand that your opponent *wants* you to be angry. Under no circumstances let your anger show. How many times have we heard a parent admonish a child, "Ignore him, he's just trying to get a rise out of you"?
- But don't completely ignore such behavior. Although you do not want your opponent to know that the conduct bothers you, it is important to document the tactics in order to manage and gain eventual control over the offensive behavior.
- Offensive conduct during a deposition can be easily controlled by videotaping the proceedings. Few things will influence an out-of-control attorney more than the fear that the judge will see that behavior. The federal rules and most state rules allow a deposition to be taken by video but do not specify that the video must be made by a professional, such as a court reporter. As long as your notice of deposition specifies that it will be videotaped, you can set up your own video camera and record the proceedings.
- If you are in a state that allows recording of telephone conversations with one-party consent, there is no better way to control the situation than to record the phone calls. Even in a state where both parties must consent to recording, "automated attendant" telephone systems allow you to state in your outgoing message that "calls may be recorded and your continuation of the call constitutes your consent to recording."
- When you do find it necessary to report counsel's behavior, if you have properly documented the situation you can show a pattern of ongoing misconduct rather than a one-time conflict between two

advocates. Save the missives that opposing counsel faxes to you, along with any recordings from telephone conversations, *ad hominem* attacks in pleadings, deposition transcripts/videos, and relevant e-mails; also ensure that your filing system will allow you to easily retrieve the information.

- When dealing with a judge, your strategy for dealing with judicial incivility must differ. A judge can be intimidating without crossing the line into improper behavior. Know the court rules, know the judge's rules, and play by both. If you know the rules, you will know when it's safe to assert yourself.
- Judges use an imposing presence to intimidate lawyers into not objecting all the time. Again, this usually is not improper, but when it is, the attorney must make the record. If you are satisfied that your objection is valid (e.g., you know the court's rules), make your objection. Ask that the court note your continuing objection to the line of questioning, or the use of the particular document, or whatever happens to be the subject of your objection. Each time the judge shows frustration, calmly remind the court of your obligation to make a record to protect your client's rights, and of your renewed request for a continuing objection.
- If you encounter a judge whose behavior clearly crosses the line and, for example, throws a temper tantrum at a lawyer, the best thing for the client might be for the lawyer to apologize or silently grin and bear it. Occasional incivility from a judge may have to be tolerated; if it is a routine matter; however, you can raise it with the appropriate governing body for the judge.
- If the level of judicial hostility rises to the point that you believe it affects the fairness of your client's claim for justice, make a motion for recusal. If the judge's behavior toward your client gives rise to the appearance of impropriety or a lack of impartiality in the mind of a reasonable member of the public, you have good grounds for recusal. The motion to recuse should be brought only if you are reasonably confident that an appellate court, reviewing the record under the appropriate standard of review (usually abuse of discretion), will conclude that the judge's decision not to recuse was in error.

Unlike abusive counsel, the ethical rules provide substantial assistance and guidance in dealing with incompetent counsel. As noted herein, competence is required by the Model Rules of Professional Conduct. MRPC 1.1. Incompetent representation is thus a violation of the rules. Rule 8.3 mandates that a lawyer shall report any violation

that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Competence obviously relates to the lawyer's fitness and thus an issue of competence is required to be reported. The comments are also helpful. The Comments to the rule reiterate that "Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. . . An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense." MRPC 8.3 Comment 1.

Client confidences may be protected and maintained in dealing with incompetent counsel. The comments indicate that reporting is not required if the report would be a violation of Rule 1.6 (Confidentiality). MRPC 8.3 Comment 2. The duty is also not imposed upon a lawyer representing another lawyer in a proceeding related to that lawyer's fitness or conduct, MRPC 8.3 Comment 4 or where the lawyer knows the other lawyer to be receiving assistance through a lawyer assistance program. MRPC 8.3 Comment 5.

II. COMMUNICATING WITH REPRESENTED PARTIES

A. "CC", "Reply to All" and Other E-Mail Traps of Inadvertent Communication

The widespread use of e-mail by lawyers and clients has opened a Pandora's box of ethical issues and traps for the unwary. Whereas litigators opine that the "E" in e-mail stands for Evidence, bar associations are finding that it also stands for "Ethical

Violations." A lawyer in California recently learned the distinction in *Terraphase Engineering, Inc., et al. v. Arcadis, U.S., Inc.*, (N.D. Cal. 2010). In *Arcadis*, a group of employees were preparing to leaving their company (Arcardis) to form their own competing company. Prior to litigation, the employees' attorney attempted to send an e-mail to his clients, but due to "autocomplete" accidentally sent the e-mail to Arcadis. The e-mail found its way to in-house counsel who then forwarded the same to outside counsel. Neither notified the employees' counsel, but instead used the e-mail as a basis for the Counterclaim ultimately filed in the lawsuit. The employees' counsel realized that the information could not have been known but for the e-mail and questioned counsel for Arcadis who admitted receiving and reading the privileged information.

The employees' counsel filed a Motion which sought only to prohibit Arcadis from use of the privileged information. Arcadis fashioned many arguments, including a particularly inventive claim that the rules of professional conduct did not apply because there was no active litigation between the parties at the time the e-mail was sent. The Court ultimately went beyond the Plaintiff's request and disqualified Arcadis' outside counsel. In addition the in-house counsel who reviewed the e-mails, ordered Arcadis to dismiss its counterclaim without prejudice, to re-file the pleading with new counsel and awarded $40,000.00 in fees to the employees.

Not surprisingly, the use of e-mail was the subject of two of the 2011 ABA advisory opinions. Issued on August 4, 2011, Opinion 11-459 addressed the duty to protect confidentiality of e-mail communications with a client and 11-460 addressed the duty when a lawyer receives copies of e-mail communications with counsel.

i. Duty to Protect Confidentiality of E-mail Communications with Client

Opinion 11-459 states in summary:

> 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, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.

For most litigants, the most common issue involves the sending or receiving of e-mails through a company provided e-mail account or accessing e-mails through a company computer. Most mid to large sized companies are required to monitor and secure employee e-mails for regulatory, compliance or insurance related purposes. Most employees are deemed to consent to the monitoring and review as a condition of employment. In 1999, the ABA concluded that a lawyer does not violate the duty of confidentiality by merely sending a non-encrypted e-mail. ABA Op. 99-413 (1999) ("Protecting the Confidentiality of Unencrypted E-Mail"). The decision was based on the presumption that an e-mail account contained a reasonable expectation of privacy. That expectation is diminished, however, when the account is knowingly monitored by an employer. The opinion notes that the case law thus far indicates a wide disparity as to under what circumstances such e-mails will be considered privileged.

The ABA opinion provides that, until presented with information to the contrary, one should assume that all employer e-mails accounts are monitored. As a result, an ethical obligation arises given a significant risk that the communications will be read by the employer or another third party. The ABA recommends that the attorney warn the client, at a minimum, of the following:

> (1) The client has engaged in, or has indicated an intent to engage in, e-mail communications with counsel;
>
> (2) The client is employed in a position that would provide access to a workplace device or system;
>
> (3) Given the circumstances, the employer or a third party has the ability to access the e-mail communications; and
>
> (4) As far as the lawyer knows, the employer's internal policy and the jurisdiction's laws do not clearly protect the privacy of the employee's personal e-mail communications via a business device or system.

In addition, the ABA concludes that in these circumstances it may also be required that the lawyer specifically refrain from communicating with the client via an employer account and instruct the client to act likewise.

ii. Duty When A Lawyer Receives Copies Of E-mail Communications With Counsel

Opinion 11-460 is summarized by the ABA:

> When an employer's lawyer receives copies of an employee's private communications with counsel, which the employer located in the employee's business e-mail file or on the employee's workplace computer

> or other device, neither Rule 4.4(b) nor any other Rule requires the employer's lawyer to notify opposing counsel of the receipt of the communications. 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 likelihood of facing this ethical scenario is admittedly more rare, but as shown above, the consequences can be far more serious. This ethical opinion actually presents a degree of protection in situations covered by the issue presented above involving communications with an employee on an employer account.

Model Rule 4.4(b) provides: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." This rule provides controlling authority for the *Arcadis* situation described above. A mistyped, misaddressed or accidental e-mail is essentially no different than a document being addressed to the wrong recipient or included in discovery responses. The question addressed by the ABA involved the more troubling issue of e-mails which were retained by an employer and given to counsel or obtained legitimately through the e-discovery process. In analyzing the issue, the ABA concluded that Rule 4.4(b) cannot be read as applying to the situation. This conclusion is consistent with two prior opinions which

refused to extend Rule 4.4 to situations involving use of embedded "metadata" within documents (ABA Formal Op. 06-442 (2006)) and use of privileged materials obtained other than inadvertent transmition (i.e. an authorized third party). ABA Formal Op. 06-440 (2006).

Despite the lack of control by Rule 4.4(b), the ABA Opinion concludes that even absent a clear ethical mandate to *disclose* the existence of the e-mails (noting that the same may violate Rule 1.6 Confidentiality), the ethical rules as well as Court procedures and Rules of Evidence likely prohibit their *use.* 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" would most likely be violated by any attempt to use such e-mails. Further, to the extent that the e-mails would be inadmissible or improper in Court Rule 1.6(b)(6) allows the lawyer to follow the better practice of disclosing the e-mails without violation of the duty of confidentiality insofar as the rule 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."

B. Plaintiff Attorneys' Communications with Represented Insurance Adjusters

In May 1962, the American Bar Association held that a Plaintiff's attorney would be in violation of the Canons of Ethics by dealing with lay adjusters, without the specific consent and approval of the insurance company counsel. ABA Informal Decision 523. Most states, having modeled their Rules of Professional Conduct upon the ABA, agreed.

However, in 2005, the New York Bar reached the opposite conclusion. In NYSBA Opinion No. 785, the State Bar of New York Committee on Professional Ethics rationalized that since the insurance company and the adjuster are not the "client" or a "party" in the claim or proceeding. As such, the Committee held that "An attorney representing a plaintiff injured in an automobile accident may engage in direct settlement discussions with a non-lawyer insurance company claims adjuster over the objection of the attorney assigned by the insurance company to represent the defendant-policyholder with respect to the claim, provided that: (i) the insurer is not represented by separate counsel with respect to the matter, and (ii) the plaintiff's attorney does not deliberately elicit information protected from disclosure in the action. Id.

Not surprisingly, the New York Insurance Department and the Bar were asked to revisit the issue of the adjuster communicating directly with a claimant known to be represented by Counsel. The Office of General Counsel, OCG Op. 2/18/2005, reconfirmed that any such communication is a violation of N.Y. Ins. Law 2110(b)(4), the and the NY Rules of Professional Responsibility. Citing, OGC Op. 07/12/2001; OGC Op. 10/02/1996.

III. CLIENT HURDLES

A. Appropriate Client Communications

Communicating effectively and consistently with a client and in a professional and ethical manner is an important balance to maintain. Communication between the lawyer and the client is a crucial component to providing professional and competent legal representation, and nothing irritates a paying client more than when he or she is

unable to get in touch with their attorney, or even get a return phone call. The ABA Model Rules of Professional Conduct provide specific requirements regarding the frequency and type of communications that must take place between an attorney and the client. ABA Rule 1.4 provides that a lawyer shall:

1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent;
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; and,
6) explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Model Rules of Prof'l Conduct, R. 1.4 (a)-(b).

It can be convenient for an attorney to overlook the requirement to provide explanations to the client regularly, particularly when strategic action is being taken and the case is moving rapidly. The ABA Model Rules provide some level of flexibility in this regard, stating that the adequacy of communication depends in part on the kind of

advice or assistance that is involved. The Rules differentiate explaining general trial strategies and prospects of success, which require communication and explanation to the client, versus describing trial or negotiation strategy in detail. Model Rules of Prof'l Conduct, R. 1.4, cmt 5. The Model Rules note that the guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests. Id. Because "reasonable client expectations" can be subject to varying interpretations, and particularly given that most lawyers now have smart phones which allow the free exchange of e-mails frequently and instantaneously, clients are more deserving than ever of communications from their lawyers. It is prudent, therefore, to err on the side of having open and continuous lines of communication.

A lawyer must also determine which decisions are solely the client's to make, and which decisions can be made by the attorney on the client's behalf. This generally depends on both the importance of the action under consideration and the feasibility of consulting with the client prior to action being taken. Model Rules of Prof'l Conduct, R. 1.4, cmt 3. In certain circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. Id. When such a situation presents itself, the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Id.

One area of required client communications that can be the most difficult in practice is the duty of the attorney to self-report a potential malpractice action to his own client. Although the Model Rules do not make this requirement explicit, it is clear when reviewing Model Rule 1.4, which requires candor in attorney-client communications, and

Model Rule 1.7, which prohibits representation when a known conflict arises, that such a requirement exists. The requirement has been fleshed out in more detail in ethics opinions, court cases, and legal articles. Restatement (Third) of the Law Governing Lawyers, § 20 cmt. c (2000) provides that if the lawyer‘s conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client. The New York Court of Appeals has held that an attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may have against him. In re Tallon, 447 N.Y.S.2d 50 (App. Div. 1982) The California Court of Appeals notes that this is to be done "with complete disregard to any personal embarrassment, benefit, or interests." 51 Goldfiser v. Superior Court, 183 Cal. Rptr. 609, 615 (Cal. Ct. App. 1982). The California rules of professional ethics even require that a lawyer inform an existing client in writing if the lawyer does not have malpractice insurance. Cali. R. Prof'l. Conduct, R. 3-410.

If an attorney's legal representation possibly rises to the level of professional malpractice, then the lawyer's personal interests could not be in more direct conflict with the client's and the issue could dramatically worsen if ignored. In addition to potential sanctions for violating rules of professionalism, the failure to notify a client of a potential malpractice action could also give rise to its own independent malpractice action. *See* Benjamin P. Cooper, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 Baylor L. Rev. 174, 209-213 (2009). Thus, while financial fears, embarrassment, and basic urges of self-preservation can discourage an attorney to self-report a potential malpractice action, the attorney is under a heightened ethical obligation for disclosure.

B. Incapacitated Clients and Powers of Attorney

The typical communication from a lawyer to a client is one of legal advice and counsel only. After receiving that legal advice, the big decisions are left to the client. However, in addition to providing the legal advice to the client, the lawyer must also be satisfied that the client is capable of making the decision in the first place. This obligation first requires knowing how to determine whether a client is incapacitated and then knowing what action to take in protecting the client's interests.

ABA Rule 1.14 (b) suggests that a client is incapacitated "when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest." Model Rules of Prof'l Conduct, R. 1.14 (b). In order to determine whether the client is indeed incapacitated, the lawyer is encouraged to consider factors such as "the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client." Model Rules of Prof'l Conduct, R. 1.14, cmt 6. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician. Id.

If the attorney determines that the client is incapacitated for purposes of making a decision, it is the lawyer's ethical responsibility to then take protective action. Protective

action can include using a reconsideration period to allow the client to clarify the situation or allow time for improvement of the circumstances, consulting with individuals and family members, consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In appropriate cases, using voluntary surrogate decision-making tools such as durable powers of attorney or seeking the appointment of a guardian ad litem, conservator or guardian are allowed, though the action allowed can vary by state. Model Rules of Prof'l Conduct, R. 1.14 (b); *see also* Model Rules of Prof'l Conduct, R. 1.14, cmt 5.

The attorney must be particularly careful in the protective action he or she takes, because while a lawyer must protect the interests of a client, the attorney must also be compliant with confidentiality and the ultimate duty of loyalty. In order to get around confidentiality issues, Rule 1.14(a) expressly states that communications from an attorney to a third party that are reasonably necessary to protect the client's interests are impliedly authorized as contemplated by Rule 1.6(a). However, in certain circumstances, the disclosure of client communications made by an attorney in an effort to determine whether the client is incapacitated or take protective action if that has already been determined could have an adverse impact on the client's interests. Then it becomes tricky, as the communication could be considered beyond that which is "reasonably necessary to protect the client's interests" if it could reasonably be expected to result in a negative result for the client, such as involuntary commitment.

States have approached this predicament differently. California is in conflict with the ABA Model Rules, as it prohibits an attorney from initiating conservatorship proceedings on behalf of an incapacitated client, noting that such action would be a breach of the duty of confidentiality regarding communications, and would constitute a position adverse to the client's. *See* Cal. Formal Opinion No. 1989-112. Therefore, in California, the only option is for the attorney to withdraw. Id. New York and Massachusetts allow the lawyer to initiate conservatorship or guardianship proceedings if there is no practical alternative and the initiation of the proceedings is a last resort. *See* NY State 746 (2001); *See also*, Mass. R. Prof'l. C. 1.7(a). Massachusetts prohibits the lawyer from also representing the third party seeking the appointment of conservator because the interests of the client and the interests of the conservator would be in direct conflict. Mass. R. Prof. C. 1.7(a).

However, much of the action addressed above requires time, which is often not an available luxury when a client is incapacitated. The ABA Model rules do allow for some level of flexibility if the circumstances are so urgent as to prevent the attorney from being able to establish a lawyer-client relationship. The ABA Rules provide that if the health, safety, or financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, the attorney may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship. This can be done only if the lawyer reasonably believes that the person has no other lawyer, agent or other representative available, and the action taken must only be to the extent

reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. Model Rules of Prof'l Conduct, R. 1.14, cmt 9.

While the majority of states follow the ABA Model Rules in these situations, it is important to refer to the particular rules and opinions in the appropriate tribunal when determining the appropriate action when dealing with an incapacitated client and determining the appropriate action to take, particularly if an emergency situation exists. Regardless of the mental state of the client, it is always the attorney's responsibility to treat the client with attention and respect, and maintain as normal an attorney-client relationship as is reasonably possible. *See* Model Rules of Prof'l Conduct, R. 1.14(a); *see also* Model Rules of Prof'l Conduct, R. 1.14, cmt 2.

C. When and How to Decline/Withdraw Representation

Knowing when to withdraw from representing a client, or decline to represent a client can prove to be one of the more difficult decisions for an attorney to face. If clients are particularly difficult to come by, or if the attorney is already heavily involved in a case, it can be a tough call to make. However, it is helpful to set certain boundaries and guidelines for yourself to reference if you feel uncomfortable with initiating or continuing the legal representation of a particular client. Having guidelines to fall back on can help take the emotion and financial interest out of the decision.

One important red flag to look for is the client who has already been through at least one attorney in their case. Make it a practice of calling the former attorney and asking if there is anything in the case that you need to be aware of before taking it on.

While the other attorney will not likely comment on matters that are protected by the attorney-client privilege, they can certainly shed light on a particular case from their point of view, which can provide helpful insight into whether the case is worth the undertaking.

Additionally, the comment to the ABA Model Rule 1.16 provides a helpful mantra of questions to consider. Before taking on any client, make it a habit of asking yourself, if I accept representation in this matter, 1) can I perform competently and promptly?, 2) can I perform without improper conflict of interest?, and 3) can I perform in this matter to completion? If the answer to any of these questions is "no", then the attorney should not accept representation of the case. Model Rules of Prof'l Conduct, R. 1.16, cmt 1.

Withdrawing from representation can be a bit trickier, as you are already invested in the case and often already identified as the attorney of record with the Clerk of Court. Withdrawing from a case, particularly when it has not been requested by the client, must be done strategically and in compliance with the Professional Rules of Ethics in the appropriate tribunal. The Model Rules provide restrictions for when and how an attorney can withdraw his or her representation of a client. ABA Model Rule 1.16 (b) on "Declining or Terminating Representation" defines several instances where withdrawing from representation may be permissible. Good cause for withdrawal exists when:

(1) Withdrawal can be accomplished without adverse effect on the interests of the client;

(2) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) The client has used the lawyer's services to perpetrate a crime or fraud;

(4) The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.

While some of these categories, such as those addressing crime and fraud are pretty clear. However, many of these categories are subject to varying interpretations. In nearly every tribunal, permission from the Court is required before an attorney may withdraw his or her representation from a case, and that tribunal's view regarding the reason for the withdrawal will determine whether the withdrawal is permitted. For example, a client failing to pay the fees agreed upon does not automatically mean that the client has failed to "fulfill an obligation to the lawyer regarding the lawyer's services" sufficient to permit a withdrawal. In fact, this can run afoul of the requirement that an attorney confirm, in advance of taking on the representation, that he or she can see the representation through until the matter is complete. Model Rules of Prof'l Conduct, R. 1.16, cmt 1. One the one hand, it can be viewed as unseemly to abandon a client for nonpayment of fees after you have affirmatively declared before the Court that you are counsel of record. On the other hand, ensuring access to justice for clients tends to favor the right to withdraw for nonpayment of fees.

Courts in Massachusetts and Rhode Island have been cited as allowing attorney to withdraw based on a client's failure to pay outstanding invoices, while Courts in Texas and New Hampshire have refused to grant withdrawals for these reasons. *See, e.g.*, Hammond v. T.J. Little & Co., 809 F.Supp. 156 (DMass 1992); Silva v. Perkins Mach. Co., 622 A2d 443 (RI 1993); *compared to* Fed. Trade Comm'n v. Intelipay, Inc. 828 F.Supp 33 (SD Tex 1993); Gibbs v. Lappies, 828 F.Supp. 6 (DNH 1993). New York requires that the client have deliberately disregarded an obligation to pay fees and expenses before an attorney may withdraw, and that the failure to pay fees and expenses must have been conscious, not inadvertent, and not de minimis in either amount or duration. *See* N.Y. State 598 (1989). A number of courts and ethics opinions have found that prior to withdrawal for non-payment of fees, a lawyer first must ask the client to honor the outstanding payment obligations and also warn the client that the lawyer will withdraw unless the fees are paid. *See* ABA/BNA Lawyers' Manual on Professional Conduct 31:1108 (2006). By contrast, California does not expressly require a lawyer to provide a reasonable warning to the client before seeking to withdraw due to non-payment of fees. *See* Cal. Rules of Prof'l Conduct, R. 3-700(A) (2). Some state ethics boards have gone so far as to discourage lawyers from placing the client's advanced assent to his/her withdrawal for non-payment of fees in the initial retainer agreement. *See* N.Y. State 805 (2007).

Moreover, how "adverse" must the effects be on the client to yield a situation where the lawyer is not permitted to withdraw? Certainly being in a position of having retain new counsel has at least an incidental adverse effects on the client, particularly if

there is a hearing or court date scheduled. The Model Rules provide additional direction in this regard, with ABA Model Rule 1.16(d) requiring that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law." Model Rules of Prof'l Conduct, R. 1.16(d). It will be up to the tribunal to determine whether the lawyer's view of "reasonable notice" is in fact, reasonable. However, in certain instances, the decision is made quite easy, if the situation the lawyer finds him or herself falls into a category wherein withdrawal is not just an option, but a mandatory requirement. ABA Model Rule 1.16 (a) for "Declining or Terminating Representation" provides that an attorney must withdraw if 1) the representation will result in violation of the rules of professional conduct; 2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or, 3) the lawyer is discharged. Model Rules of Prof'l Conduct, R. 1.16(a).

IV. THE ETHICS OF HANDLING WITNESSES AND EVIDENCE

A. Talking to Witnesses Before They Testify

It is helpful for an attorney to speak with each witness before he or she testifies, particularly if the attorney will be calling that witness to the stand. Most lay witnesses have never testified before and are open to guidance regarding what to expect. However,

in order to comply with the rules of ethics, it is important to keep certain precautions in mind.

First, before you can talk with a witness, you must confirm that he or she is not represented by an attorney in the matter at issue. Often witnesses choose to obtain legal representation when testifying, which can be easily overlooked. ABA Model Rule 4.2 provides that "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." (*emphasis supplied*) Model Rules of Prof'l Conduct, R. 4.2. The Model Rule applies to any person known to be represented in the matter and is not limited to the opposing party. When in doubt, just ask.

Second, it is important during your discussion with any witness not to tamper with the witness by seeking to influence his or her testimony. You can collect information from the witness, but cannot coach the witness. The most effective way to prevent being accused of witness tampering is to let them do the talking, avoid suggesting answers to them, and be open and encouraging with the witness about the importance of telling the truth.

It is also not appropriate to encourage a witness not to speak with opposing counsel, as that decision is solely within the discretion of the witness. ABA Model Rule 3.4(f) provides that a lawyer shall not "request a person other than a client to refrain from voluntarily giving relevant information to another party unless 1) the person is a relative or an employee or other agent of a client, and 2) the lawyer reasonably believes that the

person's interests will not be adversely affected by refraining from voluntarily giving such information." Model Rules of Prof'l Conduct, R. 3.4(f).

This issue was recently addressed by a Tennessee Circuit Court. *See* Sara E. Costello, *Counsel Enjoined from Contacting Non-Party Witnesses*, Litigation News, Jan. 6, 2012. In Abbott v. A.W. Chesterton Company, counsel for the Plaintiff, who was suing various manufacturers and suppliers of asbestos-containing products for injuries, sent a letter to 16 of the Plaintiff's co-workers. Id. The letter recommended that they "firmly refuse to speak or respond" to defense counsel, noting that their refusal "will minimize [their] involvement and will help make sure that the testimony [they] give is the truth". Id. The letter also advised the potential witnesses not to sign "any affidavits or other documentation" they might receive from defense counsel without first allowing plaintiff's counsel to review them. Id.

In reviewing the matter, the Court noted that "the letter implied that defense counsel would attempt to mislead and distort the witness's statements." Id. The court found the letter to be "improper", though ultimately determined that the witnesses would be permitted to testify. Id. Not all courts have been as forgiving. Id. In Kensington Intern. Ltd. v. Republic of Congo, counsel for the Republic of Congo contacted a non-party witness several times in an attempt to convince him not to attend a post-judgment deposition. Id. The Court in Kensington found that counsel acted in bad faith and imposed $165,000 in sanctions. Id.

Finally, if the trial or hearing has already begun, the attorney must comply with the rule of sequestration if it has been invoked, which it almost always is. The purpose of

the rule of sequestration is to ensure that one witness's testimony is not impacted by the testimony of another. An attorney must be particularly mindful of the rule of sequestration and the requirements against witness tampering when speaking with a witness during breaks or recesses while the witness's testimony is ongoing.

In United States v. Guthrie, 557 F.3d 243 (6th Cir. 2009), the Court of Appeals for the 6th Circuit noted that "sequestration orders, even when granted, do not prohibit witnesses from speaking with counsel." Id. *citing* United States v. Maliszewski, 161 F.3d 992, 1011-12 (6th Cir. 1998). In Guthrie, a witness was released from the witness stand for an overnight recess while her cross-examination by the defense attorney was still ongoing. As the witness was dismissed, the defense counsel requested that the prosecutor be instructed not to speak with the witness during the overnight recess. Id. The Court refused the request, and the 6th Circuit noted that "[i]n permitting the prosecutor to speak with the victim while she was still on cross examination, the district court did not explicitly violate the rule on sequestration of witnesses. Federal Rule of Evidence 615 provides that 'at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses.'"

But while an attorney is permitted to speak to a witness during recesses at trial, the attorney must also be ever mindful that discussions they have with witnesses, whether before, during, or after trial, are not privileged and can be subject to thorough examination by the other attorney. While the Court in Guthrie did not preclude the prosecutor from speaking to the witness during an overnight recess while cross-examination was still ongoing, the Court did note that "she is going to be here tomorrow

morning at 9:00 o'clock, and you may examine her about anything improper in the interim. Guthrie, 557 F.3d at 249. Anything said between an attorney and a witness can ultimately see the light of day in a courtroom.

B. Handling Highly Prejudicial Evidence

The mishandling of prejudicial evidence, even if inadvertent, can be both a discovery violation, an ethical violation, and in extreme cases of falsifying evidence, a crime. ABA Model Rule 3.4 provides that a lawyer shall not:

> (a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
>
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
>
> (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
>
> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Model Rules of Prof'l Conduct, R. 3.4.

These ethical obligations were long ago addressed by the U.S. Supreme Court in the context of criminal cases, with the Court establishing proactive duties in criminal cases to disclose evidence prejudicial to its case. In Brady v. Maryland, 373 U.S.83 (1963), the Court stated the constitutional basis of the duty of prosecutors to disclose evidence to the defense. The U.S Supreme Court expanded this position in Giglio v. United States, 405 U.S. 150, 154 (1972), making it clear that a prosecutor's duty to disclosure is not limited to exculpatory evidence, but also covers evidence affecting credibility. The Supreme Court went even further in United States v. Agurs, 427 U.S. 97 (1976), holding that the prosecution's constitutional duty to disclose is not limited to situations where the defendant made a specific request for the relevant evidence.

The legislative branch of government has just recently become motivated on this topic as well. On March 15, 2012, Senator Lisa introduced the "Fairness in Disclosure of Evidence Act of 2012", which would require federal prosecutors to make early disclosure of evidence that is favorable to a defendant and may demonstrate his or her innocence, regardless of whether the evidence is deemed material to the case by the prosecutors. Matthew Umhofer, *Fairness in Disclosure of Evidence Act of 2012*, Thomson Reuters News & Insight, April 23, 2012. The Act moves up the timing of the mandatory disclosure evidence that is exculpatory or favorable to the defense as required by Brady, requiring that the information be provided information to be provided "before the entry of any guilty plea." Id. The Act also seeks to define what is in the government's "possession" for discovery purposes, defining it as including any agency that participates

in any investigation, and requires the disclosure of items the prosecutors know about or should know about. Id.

The legislation also would make clear that failure to abide by Brady obligations is a serious breach of the government's responsibilities and would give judges a broad range of remedies, including postponing or adjourning the proceedings, excluding or limiting testimony or evidence, ordering a new trial, or dismissing the case with or without prejudice. Id. The appellate standard for a violation is also modified as it forbids an appellate court from finding a failure to disclose under Brady harmless "unless the United States demonstrates beyond a reasonable doubt that the error did not contribute to the verdict obtained." Id. During a March 15 press conference, the ABA maintained that this Bill would be "an important step toward achieving consistency and improving fairness in the federal civil justice system and will serve the cause of achieving justice in countless individual cases." Id.

The ABA Model Rule Comments provides an excellent summary outlining why it is vital for our legal justice system as a whole to have full compliance from its representatives when dealing with prejudicial evidence:

> *Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense.*
> Model Rules of Prof'l Conduct, R. 3.4, cmt 2

While the violation of the rules of fairness to opposing counsel and the Brady requirements to hand over prejudicial evidence can lead to severe consequences such as sanctions, suspension and disbarment, the United States Supreme Court recently chimed in on the issue of whether a municipality can be held liable for a single (highly egregious) Brady violation. The answer, with dissenting voices heard all around was a resounding no. Connick v. Thompson, 131 S.Ct. 1350 (2011). In Connick, the trial court upheld a $14 million jury verdict for a man who was sentenced to death only to be exonerated 18 years later after learning that prosecutors had withheld crucial blood sample evidence in his murder trial. Id. The man sued the Orleans Parish in Louisiana and after receiving a $14 million jury verdict, the trial court added another $1 million to the verdict. Id. The 5th Circuit Court of Appeals affirmed the decision, and then affirmed it again in an en banc sitting. Id. The U.S. Supreme Court reversed the 5th Circuit in a 5-4 opinion, with Justice Thomas's opinion noting that the municipality cannot be held responsible for a single Brady violation. Id. Justice Ruth Bader Ginsberg was so offended by the outcome that she read her dissent from the bench. The result of the opinion was widespread condemnation in the media and legal community addressing the Opinion's indirect tolerance for attorney misconduct. So while a successful civil lawsuit against an attorney or government authority for withholding evidence is not likely under the current state of the law, there are certainly dissenting voices seeking to change that.

C. Work-product Doctrine as it Applies to Expert Witness Reports in Progress

From 1993 to December 1, 2010, the Federal Rules of Civil Procedure required the broad disclosure of draft expert reports. Specifically, FRCP 26 provided that the expert's written report "contain a complete statement of all opinions to be expressed and the basis and reasons therefore, the **data or other information** considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." Fed. R. Civ. P. 26(a)(2)(B)(ii). The phrase "or other information" was often interpreted to include draft reports as well as communications between the attorneys and the expert witnesses. The idea was that even data that was rejected by the expert in formulating his/her opinion was required to be disclosed because it was at least considered prior to its rejection. The 1993 Committee Note accompanying the amendment underscored the significance of that term:

> *The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.*

Under the old version of the expert disclosures federal rule, communication with an expert witness was a risky undertaking, as all communications between counsel and

expert witnesses were potentially discoverable. Moreover, every draft reflecting every word change in the expert's report can be sought and obtained by the other side. The result of the Rule's broad inclusion of sensitive information was magnified costs for clients. Because the discoverability of communications between the attorney and the expert witness prevented the attorney and the expert witness from communicating freely in order to obtain a meaningful opinion in the case, attorneys began hiring expert "consultants" to insulate the expert "witness" from these invasive discovery rules. The non-testimonial consultant would be hired to provide initial observations and opinions, and often screen the communications between the attorneys and the testimonial expert. Costs were further increased by the requirement that the testimonial expert gather all written communications, notes, and draft language considered in formulating his or her opinion.

In response, the ABA proposed an amendment to Rule 26 in 2006 that would provide a limited privilege to an expert's draft reports and communications with counsel and on December 1, 2010, the new version of FRCP 26 took effect. The new 2010 rule limited the information that was subject to expert discovery by removing the catch-all phrase "or other information" that was previously in Rule 26(a)(2)(B)(ii). The Rule went even further to protect attorney communications with expert witnesses and the draft reports that were created in that the new Rule 26(b)(4) specifically designates draft expert reports and most attorney-expert communications as "work product". Fed. R. Civ. P. 26(b)(4).

There are a few limited exceptions to the new work product designation. Specifically, communications that relate to expert compensation identify facts or data given to the expert that the expert considered, or identify assumptions that the expert relied on are still discoverable. Fed. R. Civ. P. 26(b)(4). Even those communications and reports that do not fall into one of these three exceptions can be discoverable if the party seeking the information can show a substantial need for such a report and demonstrate that they could not otherwise obtain the information sought without undue hardship, in which case the Court has discretion to order its production. Fed. R. Civ. P. 26(b)(4).

The new rule does, however, create more disclosures for non-reporting experts, such as treating physicians or other witnesses who were not retained or specifically employed to provide expert testimony. Fed. R. Civ. P. 26(a)(2)(C). The old version of FRCP 26 did not require any disclosures for non-reporting experts, merely requiring the attorney to identify the non-reporting exert by name. Under the current rule, a party is required to disclose the identity of *any* witness who will be offering expert opinion evidence at trial. Fed. R. Civ. P. 26(a)(2)(A), and further provide "(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C). However, these disclosure requirements are much less time consuming than the comprehensive expert reports required for experts specifically retained to provide testimony, as they merely required summary statements that can be prepared by the attorney.

V. OUTSIDE ACTIVITIES THAT MAY CREATE CONFLICTS OF INTEREST

Lawyers should be mindful of emerging areas of outside activity which can create a conflict of interest ethical problem under the Model Rules of Professional Conduct. The conduct relates to public speaking and debate (blogging, social media, etc…) in violation of Model Rule 1.6 (Confidentiality) Model Rule 3.6 (Trial Publicity), Model Rules 7.1 – 7.6 (Advertising) and Model Rule 8.2(a) (False or Reckless Statements Concerning Judges) and Model Rule 8.4(d) (Conduct Prejudicial to the Administration of Justice). As a general rule, the activity which is deemed problematic can generally be categorized as either online speech related to a current client or case or online speech related to a current Judge or tribunal.

In the cases involving current client's and cases, lawyers must remain cognizant that their duties of professional responsibility govern their speech. Examples include:

- A former Illinois assistant public defender suspended for 60 days for disclosing client protected information on the blog. The attorney referred to her clients by either their first names, a derivative of their first names, or by their jail identification numbers, thus making it possible to identify them. In addition, the attorney failed to inform a judge about a client's misstatement about methadone use and complained that one judge was clueless and another was an ---hole.
- A North Carolina judge reprimanded for "friending" a lawyer in a pending case, posting and reading messages about the litigation, and accessing the

website of the opposing party. Both the Judge and the lawyer posted messages about the child custody and support case.

- ABA Formal Opinion 10-457 (2010) (followed in many states) if online activities promote a law practice, it is attorney advertising. This would include
    - announcing a victory on Twitter,
    - maintaining a listing on LinkedIn (which could include "recommendations" by others see Ethics Advisory Committee of the South Carolina Bar, Advisory Opinion 09-10 (2009) and The Ohio Board of Commissioners on Grievances and Discipline Op.No. 2000-6 (2000) or,
    - too-favorable comments posted by a client on the client's own online site if the lawyer does not tell the client to stop and if the client refuses, the lawyer must stop representing the client at the risk of being deemed to have authorized or adopted the comments.

"Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous", Steven Seidenberg, ABA Law Journal, February 2011.

Grumbling about Judges over coffee or outside the Courtroom is nothing new to litigators. However, social media has allowed some lawyers to go public in a more permanent fashion. Lawyer Sean W. Conway wound up subject to ethics charges after acting out against a Judge who he felt was methodically depriving criminal defendants of their right to a speedy trial. In 2006, he posted comments on a Broward County Court

blog site asserting that the Judge was trying "to make defendants waive their right to a speedy trial," and calling her an "evil, unfair witch," "seemingly mentally ill" and "clearly unfit for her position and knows not what it means to be a neutral arbiter." The Florida Bar, however, concluded that he had violated five ethics rules, including those mentioned above. The Florida Supreme Court specifically rejected any First Amendment Protection. "Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous", Steven Seidenberg, ABA Law Journal, February 2011.

VI. NEW ETHICAL PITFALLS TO BE AWARE OF

A. Social Media in Discovery & in the Courtroom

i. In Discovery

By the same token, most Courts are holding that the Facebook and other online content is discoverable, subject to tradition restrictions related to burden, applicable discovery/relevance standards and privilege protection. 2011 saw the state of Pennsylvania take the lead in fashioning discovery rulings on the issue of social media content.

In *McMillen v. Hummingbird Speedway, Inc.,* 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, the Court granted a Motion to Compel Discovery and Ordered that a Plaintiff produce Facebook and Myspace access information to Defendant's Counsel. The Plaintiff's lawsuit claimed injuries, including possible permanent injury and the inability to enjoy certain pleasures of life. The Defendant's Counsel had reviewed the public portion of plaintiff's Facebook account and discovered comments about a fishing trip and

attendance at the Daytona 500 race in Florida. The Court denied any claim of privilege based on the communication being tacitly understood to be submitted to multiple parties.

In *Zimmerman v. Weis Markets, Inc.*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187 (Pa. County Ct. May 19, 2011), the Court also ruled against a Plaintiff on an on-the-job injury claim. The Plaintiff had posted un-protected photos which might have questioned the severity and timing of the injury The photos included activities such as bike stunts and included photos of the Plaintiff, in shorts with his leg scar visible, despite testimony in deposition that he could not wear shorts any longer due to embarrassment.

The preceding cases gave way to *Largent v. Reed*, No. 2009-1823 (Pa. C.P. Franklin November 8, 2011). Although the underlying facts and basis for discovery were similar, the Court entered a broad ruling that the Plaintiff's Facebook and MySpace user names, log-in names and passwords were discoverable. The Court provided an excellent summary of the case law as developed thus far, but rejected any sort of "threshold" analysis that seemed to be emerging whereby the Defendant would be forced to show some basis or initial facts supporting the request. The Court held that despite any of the privacy settings, "there is no reasonable expectation of privacy on Facebook."

The emerging trend in the foregoing opinions seems to center around the following analysis (which is in keeping with traditional discovery analysis related to medical issues or treatment which touch on privileged areas):

- Has the litigant undertaken activity to post or place information on social media sites wherein no reasonable expectation of privacy exists?

- Is the condition of the litigant at issue such that discovery on those facts would be reasonable?
- Can a "threshold" showing be made related to the social media content or is the Defendant merely "fishing"?
- Can the material be produced in a manner so as to restrict the discovery and protect, where possible, the Plaintiff? (i.e., in camera review, use of special masters, allowing Plaintiff to change his/her Password immediately after production, print format production of the site, etc..)

ii. In the Courtroom

As more and more courtrooms become "wired" to the Internet, these inquiries could literally be run during the voir dire phase of jury selection in order to find publicly available information regarding potential jurors. Public records inquiries would quickly reveal whether jurors were being honest and forthright about issues such as property ownership, criminal records, and involvement in civil actions. Movies have been written and legends told about jurors lying about elements of their own past in order to get on a jury to deliver payback. The public records inquiry can help rate the validity or invalidity of answers.

Social media sites, particularly Facebook, present an even more interesting opportunity for the trial process. The Wall Street Journal recently published an article "Searching for Details Online, Lawyers Facebook the Jury" *Anna Campoy*, February 22, 2011, in which numerous potential examples of useful information were discovered, even on the "public" portions of potential jurors pages.

- District attorneys in one Oregon jurisdiction frequently strike jurors who are fans of TV shows like “CSI” fearing that they have an unrealistic expectation of criminal evidence;
- A Plaintiff’s lawyer in Beverly Hills, CA ran social media searches on jurors during a sex-abuse case in order to eliminate those devoutly identified with the Catholic religion; and
- A Defense lawyer in a personal injury case ran social media searches on potential jurors and discovered that one spent extensive amounts of time blogging and Facebooking regarding her attempts to contact extraterrestrials.

In New Jersey, a lower court prohibited an attorney from using the Internet during the trial. The trial court was reversed by an appellate court. The appellate court held that the fact “the Plaintiff’s lawyer had the foresight to bring his laptop computer to court and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of fairness or maintaining a level playing field.”

Lawyers should be aware that the use of the Internet is a two-way street. Despite all of the instructions of the Court to the contrary, a lawyer should assume that the jurors are checking on-line for all publicly available information concerning the lawyer, his staff, the party and the witnesses!

END