Michael R. N. McDonnell Inn of Court

April 12, 2016 Presentation

Practicing With Professionalism Both Inside And Outside The Courtroom

1. Opening remarks and legal overview of the implicated rules and new standards / guidelines of professional conduct (which will address the new Professionalism Expectations (adopted by the Florida Supreme Court in September 2015) and the Bar Rules and/other professionalism standards (Electronic Communications Guidelines adopted by the Bar in August 2015) - Jason Korn.

2. Skit involving lawyer communications and conduct, following the real life examples of the above-referenced Bar discipline case facts of Martocci, Wasserman and Ratiner - Marshall Bender, Jaime Hewitt, Barbara Woodcock, Judge Crown, Tara Miller Dane, with discussion to follow by Marshall Bender.

3. Video presentation of the Ratiner case and subsequent discussion regarding the behavior at the deposition - Abood Shebib to provide discussion after.

4. Social Media (Facebook items removal, modifications) and Mediation skit involving the Bar's Professional Ethics Opinion 14-1 (2015) and the Mediation Advisory Opinion 2008-006 - Damian Taylor, Amy Garrard, Abood Shebib, Colleen Kerins, with Damian Taylor and Tara Miller Dane to provide discussion after.

5. Video of Supreme Court public reprimand of attorney Norkin re: The Florida Bar v. Norkin, and discussion of the underlying issues - Jason Korn.

Team Members:

Judge Crown
Tara Miller Dane (co-capt)
Jason Korn (co-capt)
Marshall Bender (deputy capt)
Damian Taylor
Abood Shebib
Barbara Ballard Woodcock
Amy L. Garrard
Colleen Anne Kerins
Jaime Hewitt

Advisory Opinion **MEAC 2008-006**

Mediator Ethics Advisory Committee c/o DRC, Supreme Court Building, 500 S. Duval Street, Tallahassee, FL 32399

September 15, 2008

The Question

I am a certified family law mediator and have the following questions:

[A] May a mediator allow a third party, unrelated to the litigation (such as a friend or other family member), sit in during "caucus" if the other side objects?

[B] Does this violate the confidentiality provisions?

Submitted by
Certified Family Mediator
Southern Division

Authorities Referenced

Rules 10.310(a) and 10.420, Florida Rules for Certified and Court-Appointed Mediators
Sections 44.403(2) and 44.405(1), Florida Statutes
MEAC Opinion 2006-007

Summary

A. It is not permissible for a mediator to dictate, over the parties' objections, who participates in a mediation caucus.

B. If someone participates in a mediation, either a full session or just a caucus, that person is a mediation participant subject to the confidentiality requirements under Florida's Mediation Confidentiality and Privilege Act. Under the statute, there is no violation of confidentiality associated with disclosing mediation communications to another mediation participant.

Opinion

A. As stated in a previous MEAC opinion, it is not permissible for a mediator to dictate, over the parties' objections, who attends mediation. MEAC 2006-007. This prohibition extends to all portions of a mediation, including the caucus. The Committee understands that there are times when

it may be appropriate to have a non-party participate in a caucus and the other party's objection may appear to be ill-advised. Thus, a mediator may engage in a discussion with the parties about the advisability of non-party participation and help them to understand each other's perspectives so they may decide whether they want to include a non-party in their mediation. The guiding principle remains: "Decisions made during a mediation are to be made by the parties." Rule 10.310(a). Therefore, if the parties are not in agreement regarding a non-party's participation, the mediator may not allow that person to participate. Note that this does not mean that the party wishing the participation of another is forced to continue mediation without the assistance of the non-party. If a party decides not to participate in a mediation without the involvement of a non-party or a mediator believes that the party will be unable to participate meaningfully in the process, the mediation must be adjourned or terminated. Rule 10.420. When faced with these options, oftentimes, the parties will reach an agreement acceptable to both regarding non-party participation. While this may take more time, it is consistent with the requirements of the ethical standards.

B. A "mediation participant" is defined in the confidentiality statute as "a mediation party or a person who attends a mediation in person or by telephone, video conference, or other electronic means." § 44.403(2), Fla. Stat. (2007). Thus, by definition, if someone participates in a mediation, either a full session or just a caucus, that person is a mediation participant and subject to the confidentiality requirement under section 44.405(1), Florida Statutes, which states, "A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or participant's counsel." The plain language of the statute suggests that there is no violation of confidentiality associated with disclosing mediation communications to another mediation participant.

____________________ ______________________________

Date Fran Tetunic, Committee Chair

THE FLORIDA BAR BEST PRACTICES

FOR EFFECTIVE ELECTRONIC COMMUNICATION

August 7, 2015

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Foreword by Gregory W. Coleman

One of my priorities as president was to help our Florida Bar members embrace technology. Electronic communication dominates the way in which we interact today. E-mails, text messages and social media are all effective new ways to communicate with our clients, build our practices and educate ourselves on the law. Lawyers can no longer operate in the time "B.C." (Before Computers) but must embrace the "A.D" (After Devices) age in their practices.

During my year as president, I asked the Bar to publish "The Best Practices for Effective Electronic Communication," as a guide and resource for our members. This manual is intended to help all Florida lawyers. Whether you are starting out or have been practicing for many years, these guidelines will help you flourish in the A.D. age.

We must be aware of the ways technology, and how we communicate, can create ethical, legal and professional issues. Some of what is contained in this guide is common sense; all of it has important ramifications for Florida's lawyers trying to understand not only the best way to use technology, but the best way to protect themselves.

The use of technology in the practice of law requires a new approach to time management and the need to follow "e-etiquette," using courtesy and respect in electronic communications. You may violate the Rules Regulating The Florida Bar if you don't devote attention to these essential elements.

There are many Rules of Professional Conduct, Professionalism Expectations and sound business practices that apply to the way lawyers and law firms communicate. These apply to electronic communications, just as they apply to other modes of communication. Resources for additional information and guidance are included in this guide.

The Florida Bar desires to serve all of its members, and we hope that you find these Best Practices useful.

Sincerely,

Florida Bar President 2014-2015

Resource:

ABA requires lawyers to understand technology, By: Gina M. Sansone and Howard J. Reissner (New York Journal 2013)

I. Communication

Oxford Dictionaries defines communication as: “The imparting or exchanging of information or news” or, alternatively, “The successful conveying or sharing of ideas and feelings.”

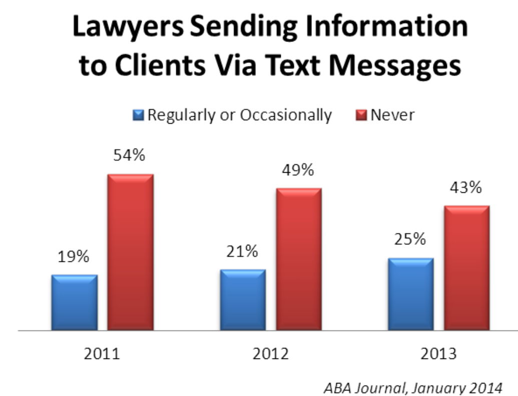
Lawyers use multiple forms of communication on a daily basis to diligently advocate and are in a constant state of communication with clients, opposing counsel, the court and colleagues. This guide provides best practices for the most popularly used forms of electronic communication.

The Oath of Admission to The Florida Bar includes a pledge of “fairness, integrity and civility, not only in court, but also in all written and oral communications.”

II. Texting

Texting has become a common form of communication, and a level of basic etiquette is required. It is best practice to:

- Keep texts short. More than 160 characters means that a telephone call or e-mail is the better way to deliver your message. Think of texts as preludes or follow-ups to conversation, not the conversation itself.
- Because of the brevity of most texts, your tone can be misunderstood by the recipient. Texts are best left for general messages such as, “I will be arriving at mediation in less than five minutes” or “Our conference call will start at 2 p.m.”



- Texting is the most informal form of communication. If the message is important, deliver it in person or via e-mail. Do not use texting to resolve a situation that went sour or to air frustrations, anger or any other negative emotion.
- Never use texting lingo or shorthand. Spell out all words to eliminate confusion. Never use ALL CAPS; it can be read as the equivalent of yelling. Check your spelling; the auto correct will often change words that you intend to use into words that you did not intend to use.
- Do not assume the recipient has your name stored. End texts with your name and affiliation (i.e. Susan Doe, Drake and Drake Law Firm).

- If the matter is not resolved with the exchange of 2-3 texts, it is probably better to communicate face-to-face or by e-mail or telephone.Be sure you have permission to text the person. Just because the person provided a cell phone number does not mean you have permission to text.

- Do not text while in the company of others or social settings (be aware of Rule 4-1.6 Confidentiality) or in business meetings or court proceedings. Do not text while driving or send a text to someone who you know is driving.
- Respect the time of others. Do not send text messages to clients, opposing counsel or others involved with legal matters outside of normal business hours (8 a.m.-5 p.m.) unless you have permission. Be mindful of time zones.
- The Florida Bar Board of Governors has determined that texts sent unsolicited to potential clients are a form of written communication that must comply with the requirements of Rule 4-7.18(b), and that lawyers who send text solicitations should ensure that recipients are not charged for text solicitations, that text solicitations comply with all state and federal law, including FCC regulations, and that recipients are permitted to "opt out" of receiving text solicitations.

Technology Considerations of Texting

- Texts are not temporary. Text messages can be saved on a cell phone within the actual conversation or on a smartphone by simply taking a screenshot of the conversation. These captured text messages can be forwarded to other recipients or exported off the device.
- Text threads can be altered. Most smartphones allow users to delete individual text messages in a thread/conversation. Do not assume the thread you are seeing, reading or sending will remain intact.
- When dealing with text messages related to a client, you should be familiar with the backup policies, methods, retrieval, metadata, etc. that texting service providers and devices employ for retaining and destroying sent and received text messages.

Use sound judgment when texting. Although texting is an easy and quick form of communication, lawyers should consider whom they text and whom they receive texts from. Responding to clients via text could consume a large part of your day if you do not control communication.

Resources:

Texting Etiquette – Everyone Should Know These Rules of Texting, By: Karen Anise
Seven Ways to Text with Graciousness and Savvy, By: Maralee McKee

III. E-mail

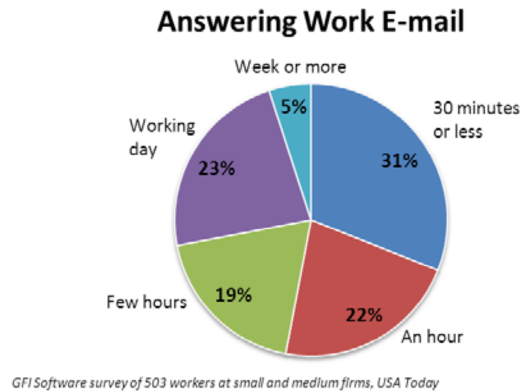
E-mail is a quick and convenient way to connect with clients, colleagues, the court system and opposing counsel. It is not a good substitute for face-to-face contact and telephone calls for interpersonal communication. E-mail messages may become part of a court record and may be subject to disclosure to third parties. Compose e-mail messages in the same manner and with the same good judgment that you would employ for any other communication. It is best practice to:

- Use a descriptive subject line; never leave the subject line blank.
- Use a salutation. Make no assumptions about the receiving party's gender. Using someone's first name generally resolves the problem. Another idea is skipping the salutation altogether and starting with "Good morning/Good afternoon."
- Be courteous. As with any other form of business correspondence, e-mail messages should be written using courtesy and respect – two hallmarks of professionalism. Do not employ rude or facetious remarks that could be deemed unethical, unprofessional, defamatory or prejudicial (Rule 4-8.4(d)).
- Don't use ALL CAPS. It can be read as shouting and makes your e-mail difficult to read.
- Check, revise and edit your e-mail. Do not ignore the basics of writing, punctuation and spelling. Watch your tone. Avoid slang, jargon and abbreviations. Be succinct without coming across as rude.
- Sign your e-mail. Include information such as your telephone number, position, location and e-mail address. Different signatures for different recipients may be appropriate. For example, shorter signatures may suffice for e-mail to internal colleagues.
- Appropriately use "cc." A "cc" (carbon copy) suggests that the message is for information only; no action is necessary on the part of the "cc" recipients. Send carbon copies only to those who need a copy.
- Appropriately use "bcc." Use blind carbon copies with caution. They may give the appearance that you are going behind a person's back.
- Use attachments for long messages or when special formatting is necessary. The attachment should not contain unnecessary graphics (such as letterhead or logos) or embedded multimedia.

E-mail can be unforgiving. Recalling an e-mail that already may have been read by the unintended party only calls more attention to the original message, your mistake and your attempts to undo it. E-mail should not be used to resolve conflict or to say things that would not be said in person.

A. Replying to E-mail

Colleagues expect prompt responses to e-mail questions. A recent survey produced the following results:



It is best practice not to leave the sender hanging. If you cannot send a full response in a reasonable time, it is best practice to send a quick reply stating that you have received the message and give an estimate of when you will provide a more detailed response.

It is also best practice to use "Reply to All" only when appropriate. Typically, you should address a reply only to a single person and not to all those who received the original message. Likewise, be careful when replying to a message that was sent by a bulletin board or automatic remailer. Your reply may be sent to the entire audience subscribing to the bulletin board.

As a matter of both courtesy and efficiency, include the original e-mail when replying. It avoids making the sender search for the original message and avoids confusion. Where your reply is relevant to only a portion of the original message, consider excerpting and including in your reply only the relevant portions.

Note: The previous information is from *Employee Use of the Internet and E-Mail: A Model Corporate Policy with Commentary on Its Use in the U.S. and Other Countries*, edited by David M. Doubilet and Vincent I. Polley. This excerpt from "Model Guidelines and Policy" was contributed by Vincent I. Polley, Schlumberger Limited. Copyright 2002 by the American Bar Association.

B. Rules for E-mail Discussion Groups

Group e-mail discussions on listservs are meant to stimulate conversation, not create contention. Here are best practices for navigating the realm of listservs:

- Do not post anything in a message that you would not want the world to see or that you would not want anyone to know came from you.
- Be aware that advertising rules apply to commercial messages or promotional information regarding yourself or your firm that is posted on the listserv (Rule 4-7.11).
- Do not post messages to all members of the list disparaging the system of justice or any individual who is a part of the system of justice. (Rule 4-8.2(a).)
- Do not use a listserv to vent about the particulars of a case (Rule 4-1.6; also, Rule 4-3.6 Trial Publicity and Rule 4-3.5 Impartiality).
- Do not post any information or other material protected by copyright without the permission of the copyright owner.
- Do not challenge or attack others. Let others have their say.

C. Responding to an Angry E-mail

As e-mail has made it easier for people to communicate with lightning-fast efficiency, it also has made it easier for people to forget about civility. What do you do when you are the recipient of an angry e-mail? How do you keep the situation from escalating? It is best practice to:

- Step away from the computer. An angry e-mail will usually trigger your own anger. Never reply to the e-mail right away; it will only escalate the issue.
- Identify the facts in the e-mail. Does the writer have a reason to be angry? Did you say or do something that legitimately offended the person? Be objective.
- Evaluate what the writer got wrong. Did the writer misinterpret a letter or get the wrong information?
- Put yourself in the writer's shoes. What kind of response would you expect? Understanding the writer's perspective will aid in your response.
- Verify all the facts and fix what you can before writing back. Being able to state in your reply that you already have taken action will go a long way toward resolving the issue.
- Begin your reply with positives. Explain where the writer was right and how you understand why the writer is upset. Explain what has been done to fix the problem, and apologize if necessary.
- Once you provide the positives, ease into explaining where the writer was wrong. Do not get emotional or confrontational. Avoid name-calling, placing the blame, and sarcasm. State your side of the issue. If it was a misunderstanding, try to interject that you understand what caused it.

- Do not be afraid to give consequences. If the business relationship cannot continue, say so. Be straightforward so it does not sound like a threat. Don't make ultimatums if you cannot or will not follow through. Do not threaten to file a Bar complaint or seek criminal prosecution, as these violate Rule 4-3.4(g) and (h).
- Be respectful and civil, even if the writer failed to show you the same respect.
- Think about how permanent e-mails are. They can be forwarded, printed and shared. Make sure you are prepared to stand by your words; do not write anything you might regret later.
- Save records of the correspondence. It is easier to defend yourself later if you have proof.

A lawyer should be mindful of Florida Bar Rule 4-8.4 Misconduct when engaging in an angry e-mail exchange. In addition, review Rule 3-4.3 Misconduct and Minor Misconduct before responding.

D. Technology Considerations of E-mail

- When sending attachments, be aware that they may contain metadata that could disclose unwanted information to the recipient.
- Attachments may contain malicious software code. Use scanning software for both outbound and inbound e-mails.
- If you use e-mail as form of confidential communication, you should know the risks and be familiar with the options of sending secure/encrypted messages.
- There is always a chance that your e-mail may be intercepted. Many of these risks are mitigated if not entirely eradicated when using an encrypted e-mail service.
- Secure client portals are an emerging and safe alternative to e-mail. There are many case and practice management systems that offer a client portal component. You should seriously consider this option as a method of communication for confidential information.

Resources:

The Florida Bar v. Mooney, 49 So. 3d 748 (Fla. 2010). An e-mail exchange between two lawyers escalated when the parties attempted to schedule a deposition. This is only a snippet of how things got out of control:

"Wow, you are delusional!! What kind of drugs are you on??? I can handle anything a little punk like you can dish out … otherwise, go back to your single wide trailer in the dumps of Pennsylvania and get a life!!"

Additionally, there was an explosive exchange between the lawyers once the deposition was finally scheduled. The Florida Supreme Court made it very clear when amending the oath that

lawyers must be civil not only in court, but also in all written and oral communications, which includes e-mails, letters and depositions.

The Florida Bar and the Supreme Court found that these two lawyers violated Rule 3-4.3 (commission of an act that is contrary to justice) and Rule 4-8.4 (conduct that is prejudicial to the administration of justice). Further, the Court sanctioned the lawyer who filed the complaint and provided the e-mail exchange with a public reprimand, while the other lawyer received a 10-day suspension.

The Florida Bar v. Norkin, 38 Fla. L. Weekly S786 SC11-1356 (Fla. Oct. 31, 2013). A lawyer was suspended for two years for multiple instances of disrupting the courtroom by shouting at judges during hearings (two separate judges had to end hearings), disparaging a judge in a motion to recuse, falsely accusing a senior judge of having a "cozy, conspiratorial" relationship with opposing counsel, disparaging opposing counsel in e-mails (copying others), shouting at opposing counsel in the courthouse (that he was dishonest and a scumbag), and disparaging and shouting at Bar counsel in the referee hearing. The Court found violations of Rules 4-3.1, 4-4.4, and 4-8.4(d).

IV. Social Media

Social media allow interaction among people in which they create and share information and ideas in virtual communities. Social media include but are not limited to blogging, micro-blogging (i.e., Twitter), social networking sites (Facebook, LinkedIn) and interactive multimedia sites (YouTube).

Here are best-practice tips, rules and real-life scenarios:

- The Florida Supreme Court's Civility Pledge added to the Oath of Admission in 2011 requires lawyers to promise fairness, integrity and civility, not only in court, but also in all written and oral communications. This includes e-mails, blogs and social media sites.
- Any communication made by a lawyer must refrain from fraud, deceit, dishonesty and misrepresentation (See Rules 4-7.13, 4-7.14, and 4-8.4(c)). These rules apply to posts on social media sites such as Twitter, Facebook, Instagram and LinkedIn. (For example, do not allow family members to praise your legal services on social media if they have not been a client.)
- Social media sites are not a way to circumvent the lawyer advertising rules. Information appearing on networking sites that are used to promote the lawyer or law firm are subject to the lawyer advertising rules and must comply with all substantive lawyer advertising rules (see Subchapter 4-7).

- Invitations sent directly from a social media site via instant message to a third party to view or link to the lawyer's page on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business are solicitations and violate Rule 4-7.18(a), unless the recipient is the lawyer's client, former client or relative, has a prior professional relationship with the lawyer or is another lawyer.
- There is no expectation of privacy on the Internet. There is no such thing as a true delete of information. Privacy settings are not a safeguard to protect what you post, and information is stored forever.
- In general, if you would be ashamed to see it on a billboard, do not post it.
- Do not disparage or seek to humiliate the judicial system, judges, opposing counsel, clients or others via social media (Rules 4.82 and 4.8-4(d)).
- Do not post inappropriate or unprofessional pictures.
- If misleading or dishonest information has been posted on your social media profile or account by others, remove the information.
- Visit your social media profile or account on a consistent basis to ensure that you are not running afoul of the rules of the disciplinary system or any of the lawyer advertising rules. If you are unable to actively engage on a social media site, deactivate your account to avoid hackers and inappropriate commentary being placed in your name.
- Responsible participation in social media is time-consuming. Keeping abreast of one social media site may be all that your schedule will allow, as opposed to being involved with many.
- If you do not know much about the social media site, educate yourself before joining.
- Change your password frequently to avoid hackers and spam messages being sent to those with whom you interact.
- Log off after visiting your social media page.
- Delete browsing history, saved passwords and cookies on a regular basis to avoid your social media accounts from being hacked.

Social media can be fun and a way for your practice to reach an entirely new audience. Following these tips will keep you safe and within the rules.

Real-life social media situations

- An assistant state attorney (ASA) in Miami at the conclusion of a trial, while the jury was deliberating, thought it would be entertaining to post a poem on his "personal" Facebook page regarding the trial. The poem was composed to the tune of the television show "Gilligan's Island." Within the poem, the ASA referred to opposing counsel as "weasel face" and the defendant as a "gang banger." In addition, the ASA stated that the judge and the jury were confused and not a single ounce of evidence,

professionalism or integrity existed during the trial. To the ASA's dismay, the poem was leaked and published in a local newspaper. The ASA took the position that the poem was posted on his personal and private Facebook account only for his friends and family to see. Later, the ASA admitted it was a lapse of judgment. The Grievance Committee compelled the ASA to attend an Ethics School and Professionalism Workshop and to issue an apology letter to the judge and opposing counsel.

- A judge declared a mistrial in a murder case after a public defender posted a photo of her male client's leopard print underwear on Facebook. The client was accused of stabbing his girlfriend to death. The client's family brought him a bag of fresh clothes to wear during trial. When correction officers lifted up the pieces for a routine inspection, his public defender snapped a photo of the underwear with a cell phone. While on break, the public defender posted the picture of the underwear on Facebook with caption "proper attire for trial." Although the public defender's Facebook page was private and could be viewed only by friends, someone who saw the posting notified the judge. The public defender was fired from the PD's office.
- *The Florida Bar v. Conway*, 996 So.2d 213 (Fla. 2008). In Conway, the lawyer received a public reprimand for posting derogatory comments about a judge on a blog that included, "Evil Unfair Witch; seemingly mentally ill; ugly condescending attitude, she is clearly unfit for her position and knows not what it means to be a neutral arbiter, and there is nothing honorable about that malcontent." The referee found the statements not only undermined public confidence in the administration of justice but also were prejudicial to the proper administration of justice (Rule 4.8-4(d)).

There is no reasonable expectation of privacy when using the Internet or social media. Be cautious about what you are disseminating on Facebook, Twitter, LinkedIn, Instagram and all other social media sites. What may appear as simple humor or a discussion topic could cost you your job or a client, or force you to answer to a Bar grievance.

Resources:

Rules Regulating The Florida Bar
The Oath of Admission to The Florida Bar

V. Telephone/Cell Phone

A. Telephone

Telephone calls frequently serve as an introduction that could lead to a new client or business venture. Telephone conversations also provide an efficient means of negotiating, scheduling and generally informing all parties as a case progresses. It is best practice to:

- Answer a call before the fourth ring.
- Set your phone to divert to voicemail or an alternate line where another person or service will answer after the fourth ring.
- Before answering, determine whether you can devote your full attention to the caller; if not, allow it to go to voicemail and return the call within a reasonable amount of time.
- Ask for clarification – "If I understand you correctly …"
- Take notes.
- If you need to place the caller on hold, ask first and assure it will not be long (15-30 seconds maximum). If you need longer, ask if you can return the call later.
- Consider whether the conversation is better suited for a face-to-face meeting.
- Place the caller on hold if seeking assistance of a co-worker rather than muffle the phone with your hand.
- If you need to transfer the caller, advise and provide the extension in case the caller is disconnected.

Lawyers should train their support staff to adopt these principles. Telephone calls cannot be recorded without the consent of all parties and generally are not recorded as a business practice. For communications that need to be memorialized, consider either a written communication or a telephone call followed by written confirmation.

B. Cell Phone

Most people use a cell phone on a daily basis and keep it close at all times. Use cell phones with caution, remaining mindful that conversations conducted in public regarding client affairs may inadvertently disclose confidential information to others (Rule 4-1.6). When using a cell phone, it is best practice to:

- Keep your voice low. Unless necessary, do not place or accept phone calls when you are in locations that will make it difficult for you to be heard.
- Ensure your phone is off or silenced when entering court or meetings. Federal courthouses have strict rules regarding cell phones.
- Keep conversations private. If you are expecting an important call or one that deals with confidential matters, remove yourself from the company of others. Be cautious of personal space and keep several feet from others when conducting legal matters.
- Know when to call. Best practice is normal business hours, which are 8 a.m.-5 p.m., unless you are authorized to call at other times. Keep time zones in mind.

- Use a speaker phone only when you are alone. Advise callers when you put them on a speaker phone.

C. Hostility via the Telephone/Cell Phone

Dealing with an angry person over the phone requires a patient and thoughtful response. As lawyers, we pledge to "abstain from all offensive personality." It is best practice to:

- Keep your composure. Attempting to combat an angry caller will only escalate the situation.
- Listen. Figure out what is causing the hostility and begin to generate ideas on how to resolve the issue.
- Do not interrupt. Let the caller vent. If you cut them off, it will only frustrate them further and make constructive communication more difficult.
- Be empathetic. Does their anger have any validity? Indicate that insults and disrespect are not acceptable, but attempt to understand and address the root of the issue.
- Ask questions. Make sure you truly understand the situation.
- Seek a solution. Indicate you will do your best to resolve the matter.
- Apologize. We all make mistakes; if an apology is appropriate, offer one.
- Get solutions approved. Do not impose a solution; get the caller to agree.
- If all else fails, put the phone down. Politely explain that calmer heads may prevail and indicate that the conversation should be resumed at a later time. It is not ideal, but sometimes it is your best option. Do not feel pressured to resolve the matter; the person could be having a bad day. Know when to end the call and move on.

Resources:

How to Deal With Difficult People on the Phone, By: Peter Murphy
The Florida Bar v. Wasserman, 675 So.2d 103 (Fla. 1996). A lawyer who made profane statements to a judicial assistant over the phone was found guilty of indirect criminal contempt and violated Rules 3-4.3 and 4-8.4(a). The lawyer received a six-month suspension.

D. Setting Voicemail

Keep things simple and to the point. It is best practice to:

- Identify your name and organization.
- State that you are unavailable and any other important information.
- Ask the caller to leave a message.

Change your voicemail if you go out of the office. Return calls as promised. Best practice dictates that a person leaving a voicemail should hear from you or your assistant within 24

hours (this advice does not circumvent Rule 4-1.4 Communication). The longer you wait to return calls, the more likely your backlog will get out of hand. After you have written the message down, delete it from your voicemail box. It can be very irritating to a caller to find a voicemail box that is full.

E. Leaving a Voicemail

When leaving a voicemail it is best practice to:

- Speak slowly and leave your number at both the beginning and end of the message.
- Limit your comments to one or two matters. Keep your message short.
- Never leave a message to defend your character, establish your reputation or resolve a feud.
- Make the call's purpose clear, beyond just please return my call.
- Don't leave confidential information on a voicemail; you could have dialed a wrong number (Rule 4-1.6). If you receive a voicemail related to the representation of your client that you reasonably should know was sent inadvertently, you should promptly notify the caller (See Rule 4-4.4(b)).

Here is an example of a professional voicemail:

"Hi, this is Cathy Smith with Dale and Dale Law Firm at 112-555-1245. I am calling to let you know that I received a settlement offer in your case, and I would like to schedule an appointment with you. Please call me at your earliest convenience to schedule an appointment. Again, this is Cathy Smith with Dale and Dale Law Firm, and you can reach me at 112-555-1245. Thank you."

VI. Laptop/Tablet Usage in Public

The ability to take work anywhere with a laptop or tablet comes with potential threats to confidentiality (Rule 4-1.6) and security of client information. It is best practice to:

- Use a VPN. A virtual private security network set up by your company allows you to connect remotely using a secure connection.
- Keep your laptop/tablet secure. A thief can physically steal your laptop, but you can keep your information secure by using a strong access password or passcode.
- Use built-in security features. Your device may already have security features built in. Use these features to keep hackers from accessing data.
- Keep your software updated. Many updates include security patches to correct problems found in outdated versions.
- Turn off sharing. You may have your device set up so others can access documents while you are in the office, but turn off this feature when you are in public.

- Be aware of your surroundings. Not all dangers in the digital world are high-tech. Someone may simply be looking over your shoulder.
- Use a privacy screen to keep people from looking over your shoulder and seeing your data.
- Avoid "free" and "unsecured" Wi-Fi connections. Always use a Wi-Fi service or connection that encrypts your data transmission.

Resources:

www.pcworld.com
www.bnlug.org

VII. Records Management

A core asset of every law firm and legal organization is information. Lawyers sift through enormous amounts of information daily – everything from client files to printed contracts to the e-mails they receive. Making sense of all this information and ensuring that it is sufficiently protected and accessible is daunting but necessary.

There are several Bar rules dealing with record-keeping. (See "Ethics Informational Packet: Closed Files," produced by The Florida Bar's Ethics Department.)

Records information management, often abbreviated "RIM," encompasses the policy, processes and procedures that law office administrators employ to manage such information. RIM is the process of identifying, organizing, maintaining and accessing all of the records created or

received by an organization in its day-to-day operations. These records can be electronic or paper and include virtually everything that passes through an organization's doors. There are many reasons a firm or individual lawyer might employ a particular RIM strategy, but the most important are the most practical: improving productivity, cutting costs and complying with legislative, regulatory, Bar-mandated and internal policy requirements.

For best practices, consult:

- *The Lawyer's Guide to Records Management* (2007). This important book is under re-editing by the ABA but is still available on Amazon.com.
- ARMA International, the association for records managers. It includes SIGs (specific industry groups), including one for law firm and legal department records managers. www.arma.org. The ARMA online bookstore has several law firm-specific publications addressing the lawyer's needs for guidance in records information management.

VIII. Expectations

Best practice dictates that lawyers must manage expectations in electronic communication. When dealing with a client or opposing counsel, explain to them how your office works, and that if you are not available they are welcome to speak with your staff. Let them know when you generally return calls.

Before you give out your cell phone number, consider whether it is necessary for the contact to have this access. Advise whether it is for emergency purposes only. Let contacts know if you will receive and respond to text messages. If you are leaving the office for an extended period, set an away message for your e-mail and voicemail. If you take a long vacation, file notices of unavailability on all of your cases.

Set limits on access to you via cell phone, e-mail and text. If you do not work on weekends, let people know and set a message on your cell phone and work phone that calls will be returned during the workweek. When expectations are established in the beginning, people will generally respect boundaries.

IX. A discussion of Ethics Issues in Electronic Communication

The increased use of technology makes it imperative that lawyers be well-versed not only in technology but also in the issues that may arise with the use of technology. The Rules Regulating The Florida Bar and various Florida Bar ethics opinions set forth guidelines and limitations of the use of technology.

A. Creating Inadvertent Relationships

Lawyers should not give off-the-cuff advice via social networking sites or other electronic communication, particularly specific advice in response to online questions, to avoid inadvertently creating a lawyer-client relationship. Ethics rules do not create lawyer-client relationships; instead, they guide the lawyer's conduct once the relationship has been established. Whether a lawyer-client relationship has been established is a legal and factual matter based on the reasonable, subjective belief of the person seeking legal advice or services, not the lawyer's intent or belief.

B. Electronic Practice

Lawyers may provide legal services over the Internet, as long as the services do not require in-person consultation with the client or court appearances (Florida Ethics Opinion 00-4). All of the Rules of Professional Conduct apply to representation over the Internet, including diligence, competence, communication, confidentiality, conflicts of interest, etc. (*Id.*). Florida Ethics Opinion 00-4 was written before adoption of Rule 4-1.2(c), which permits limited representation as long as the limitation is reasonable under the circumstances and is not prohibited by law or rule, and the client gives informed consent in writing. Rule 4-1.2(c) applies if the Internet representation is a limited form of representation.

C. Confidentiality

Many lawyers treat confidentiality as synonymous with privilege, but the two are distinct, and confidentiality is much broader. A lawyer may not disclose any information relating to a client's representation, regardless of the source, without the client's informed consent (with limited exceptions) (Rule 4-1.6). For resources on how to keep information secure, see the Records Management section.

Many confidentiality issues relate to electronic communications. For example:

- Lawyers who use cloud computing must take appropriate care to ensure confidentiality of client information (Florida Ethics Opinion 12-3).
- Lawyers who use electronic devices such as printers, copiers and scanners should be aware that those devices can store data, and take appropriate steps to secure client information (Florida Ethics Opinion 10-2).
- A lawyer who uses electronic forms of communication should take care not to inadvertently provide confidential client information via metadata (see section on metadata below) (Florida Ethics Opinion 06-2).
- When a lawyer outsources paralegal services, communication often occurs via electronic means. The lawyer should take appropriate steps to ensure confidentiality of client

> information, including investigating any non-lawyer services to be used and appropriately supervising the non-lawyers involved (Florida Ethics Opinion 07-2). Consider a secure client portal when using outside services.

There have been disciplinary cases in other states involving violation of the confidentiality rule via electronic communication:

Illinois Disciplinary Board v. Peshek, No. M.R. 23794 (Ill. May 18, 2010). An assistant public defender was suspended for 60 days for blogging about her clients' cases, including providing confidential information, some of which was detrimental to her clients and some of which indicated that the lawyer may have knowingly failed to prevent a client from making misrepresentation to the court. Reciprocal discipline of 60-day suspension by Wisconsin in *In re Peshek*, 798 N.W.2d 879 (2011).

In Re Quillinan, 20 DB Rptr. 288 (2006). The Oregon disciplinary board approved a stipulation for a 90-day suspension of a lawyer who sent an e-mail disclosing to members of the Oregon State Bar's workers' compensation listserv personal and medical information about a client whom she named, indicating the client wanted a new lawyer.

In re Skinner, 740 S.E.2d 171 (Ga. 2013). The Supreme Court of Georgia rejected a petition for voluntary discipline seeking a public reprimand for a lawyer's violation of the confidentiality rule by disclosing confidential client information on the Internet in response to the client's negative reviews of the lawyer, citing lack of information about the violation in the record. Presumably the court felt the public reprimand too lenient as it cited to the 60-day suspension in *Peshek* and 90-day suspension in *Quillinan* above.

D. Inadvertent Disclosure via Metadata

Metadata is information about a particular document or data set that describes how, when and by whom it was created, modified and formatted. It helps users revise, organize and access electronically created files. Lawyers who send documents electronically (outside the discovery context) should take appropriate steps to prevent the disclosure of confidential client information via metadata (Florida Ethics Opinion 06-2). Lawyers should not "mine" the metadata of documents sent to them electronically (*Id.*). Lawyers who receive information inadvertently via metadata (e.g., tracked changes and comments) that were clearly not intended for them must notify the sender of the receipt of the information (*Id.*). After the adoption of Florida Ethics Opinion 06-2, Rule 4-4.4(b) was adopted, which states:

> (b) 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.

The comment provides further guidance:

> Subdivision (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.
>
> Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 4-1.2 and 4-1.4.

Microsoft Word documents can contain the following types of hidden data and personal information:

- Comments, revision marks from tracked changes, versions and ink annotations.
- Document properties and personal information.
- Headers, footers and watermarks.
- Hidden text.
- Document server properties.
- Custom XML data.

In Microsoft Word, the Document Inspector can be used to find and remove hidden data and personal information in Word documents. Refer to the help function to search for instructions specific to a particular version of Word.

E. Impugning Integrity of Judges

Electronic communications create the possibility that lawyers may impugn the integrity of a judge, which is prohibited under the rules. Social media and blogging in particular create a situation in which lawyers may post information without thinking about the potential consequences (Rule 4-8.2 and *The Florida Bar v. Conway*, Case No. SC08-326 (2008)).

F. Communication with/Investigating Witnesses

A lawyer generally may view the public social networking pages of a witness. A lawyer generally may subpoena the social networking page of a witness (See New York City Ethics Opinion 2010-2). A lawyer may or may not be able to "friend" an unrepresented witness using the lawyer's own name and profile. Although at least one state has taken the position that a lawyer may do so, The Florida Bar Professional Ethics Committee has not addressed the issue and may take the position that any friend request would have to clearly indicate that a lawyer is making the request in a representational capacity (New York City Ethics Opinion 2010-2).

Rule 4-4.3 prohibits a lawyer from "stating or implying the lawyer is disinterested." A lawyer also "may not engage in conduct involving fraud, dishonesty, deceit or misrepresentation" under Rule 4-8.4(c), nor violate the rules of conduct through an agent under 4-8.4(a). Thus, a lawyer may not create a false social networking profile to "friend" an unrepresented witness to obtain information, or use an investigator to create a false profile to make a "friend" request (New York City Ethics Opinion 2010-2). A lawyer also may not use an investigator or other third person to "friend" an unrepresented witness to obtain possible impeachment material, because use of the third party is deceptive (See Philadelphia Ethics Opinion 2009-02).

G. Communicating with Represented Persons via Social Networking Sites

A lawyer may access the public pages of an opposing party's social networking site (See New York State Bar Ethics Opinion 843 (2010)). A lawyer may subpoena an opposing party's social networking site pages, including private portions of the profile (See *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d (N.Y. Sup. 2010)). A lawyer may not make a "friend" request to high-ranking employees of a represented corporation that is the defendant in a lawyer's case who have supervisory authority, whose statements can be imputed to the corporation, or who can bind the corporation. They are considered represented for purposes of the ex parte rule (See, San Diego Ethics Opinion 2011-2; Rule 4-4.2, 4-8.4(c)). A lawyer would not be able to use an investigator to do so either (Rule 4-4.2, 4-8.4(c) and 4-8.4(a)).

H. Social Networking and Judges

Judges should be careful regarding social networking. In Florida, judges may not "friend" lawyers who appear before them, or permit lawyers who appear before them to list the judge as a "friend" (Florida Judicial Ethics Advisory Opinion 2009-20). Florida Bar members should not make a "friend" request to a judge, to avoid assisting a judge in violating the Code of Judicial Conduct.

Judges also should avoid the potential for ex parte communications – at least one judge has received a public reprimand for ex parte communications on Facebook with a lawyer for a party in a pending matter before him (See North Carolina Judicial Standards Commission 08-234).

Judges should be careful regarding their campaign activities relating to social media. In Florida, judges' election committees may have social networking sites that comply with campaign requirements and may allow lawyers to list themselves as "fans" as long as the committees/judges do not control who may list themselves as fans (See Florida Judicial Ethics Advisory Opinion 2009-20).

I. Social Networking and Mediators

In Florida, a mediator may "friend" lawyers and parties appearing before the mediator on the mediator's social networking page and may become a "friend" on the pages of parties or lawyers appearing before the mediator. However, doing so may limit a mediator's ability to handle future mediations, as "friending" may create an appearance that the party or lawyer can influence the mediator, and the mediator would therefore lack the required impartiality (See Florida Mediator Ethics Advisory Opinion 2010-001).

J. Social Networking and Jurors

Lawyers may view public portions of prospective jurors' networking sites. However, lawyers may not "friend," contact, communicate or subscribe to Twitter accounts of jurors. Lawyers also may not make any misrepresentation or engage in any deceit in viewing jurors' social networking sites (See New York County Ethics Opinion 743 (2011); New York City Formal Opinion 2012-2). Lawyers must bring juror misconduct to the court's attention following rules on court and juror contact (*Id*.; see also Rule Regulating The Florida Bar 4-3.5). Lawyers also should be mindful of any rules of civil or criminal procedure that address juror contact (e.g., Fla. R. Civ. Pro. 1.431(h), Fla. R. Crim. Pro. 3.575, which prohibit a lawyer from communicating with a juror after trial unless the lawyer has legal grounds, has filed a motion and has obtained an order permitting the contact).

Juror misconduct during trials relating to social media includes: researching information on the Internet, posting real time information about ongoing trials, "friending" a defendant in an ongoing trial and polling friends to determine the juror's verdict (e.g., "Social Media, Jury Duty a Bad Mix," *Miami Herald*, May 5, 2012).

Resources:

The Florida Bar
850-561-5600
800-342-8060

www.FLORIDABAR.org

The Henry Latimer Center for Professionalism
850-561-5747
www.flabar.org/professionalism

The Florida Bar Ethics and Advertising Department
850-561-5780
Ethics Hotline (for Florida Bar Members Only)
800-235-8619
www.FLORIDABAR.org/ethics

FLA, Inc. (Florida Lawyers Assistance – Substance Abuse Help)
800-282-8981
www.fla-lap.org

The Florida Bar's Practice Resource Institute
850-561-5616
www.FLORIDABAR.org/pri

The Florida Bar Attorney Client Assistance Program (ACAP)
850-561-5673
866-352-0707
www.FLORIDABAR.org/ACAP

The Florida Bar Unlicensed Practice of Law
850-561-5840
www.FLORIDABAR.org

Florida Board of Bar Examiners
850-487-1292
www.floridabarexam.org

Updates

Aug. 7, 2015: Updates requirements of Rule 4-7.18(b) under Section II "Texting."

The Florida Bar
www.floridabar.org

PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 14-1

June 25, 2015

Advisory ethics opinions are not binding.

A personal injury lawyer may advise a client pre-litigation to change privacy settings on the client's social media pages so that they are not publicly accessible. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the lawyer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as the social media information or data is preserved.

Note: This opinion was approved by The Florida Bar Board of Governors on October 16, 2015.

RPC: 4-3.4(a)
Opinions: New York County Ethics Opinion 745; North Carolina Formal Ethics Opinion 5; Pennsylvania Bar Association Opinion 2014-300; Philadelphia Bar Association Professional Guidance Committee Opinion 2014-5

Cases: *Allied Concrete Co. v. Lester,* 736 S.E.2d 699 (Va. 2013); *Gatto v. United Airlines,* 2013 WL 1285285, Case No. 10-cv-1090-ES-SCM (U.S. Dist. Ct. NJ March 25, 2013); *In the Matter of Matthew B. Murray,* 2013 WL 5630414, VSB Docket Nos. 11-070-088405 and 11-070-088422 (Virginia State Bar Disciplinary Board July 17, 2013); *Romano v. Steelcase, Inc.* 907 N.Y.S.2d 650 (NY 2010); *Root v. Balfour Beatty Construction, Inc.,*132 So.3d 867, 869-70 (Fla. 2nd DCA 2014)

Misc.: Guideline No. 4.A, Social Media Ethics Guidelines, New York State Bar Association's Commercial and Federal Litigation Section

A Florida Bar member who handles personal injury and wrongful death cases has asked the committee regarding the ethical obligations on advising clients to "clean up" their social media pages before litigation is filed to remove embarrassing information that the lawyer believes is not material to the litigation matter. The inquirer asks the following 4 questions:

1) Pre-litigation, may a lawyer advise a client to remove posts, photos, videos, and information from social media pages/accounts that are related directly to the incident for which the lawyer is retained?

2) Pre-litigation, may a lawyer advise a client to remove posts, photos, videos, and information from social media pages/accounts that are not related directly to the incident for which the lawyer is retained?

3) Pre-litigation, may a lawyer advise a client to change social media pages/accounts privacy settings to remove the pages/accounts from public view?

4) Pre-litigation, must a lawyer advise a client not to remove posts, photos, videos and information whether or not directly related to the litigation if the lawyer has advised the client to set privacy settings to not allow public access?

Rule 4-3.4(a) is applicable and states as follows:

A lawyer must not:

(a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act;

The comment to the rule provides further guidance:

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

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 the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Subdivision (a) applies to evidentiary material generally, including computerized information.

Under these facts, the proper inquiry is whether information on a client's social media page is relevant to a "reasonably foreseeable proceeding," rather than whether information is "related directly" or "not related directly" to the client's matter. Information that is not "related directly" to the incident giving rise to the need for legal representation may still be relevant. However, what is relevant requires a factual, case-by-case determination. In Florida, the second District Court of Appeal has determined that normal discovery principles apply to social media, and that information sought to be discovered from social media must be "(1) relevant to the case's subject matter, and (2) admissible in court or reasonably calculated to lead to evidence that is admissible in court." *Root v. Balfour Beatty Construction, Inc.,*132 So.3d 867, 869-70 (Fla. 2nd DCA 2014).

What constitutes an "unlawful" obstruction, alteration, destruction, or concealment of evidence is a legal question, outside the scope of an ethics opinion. The committee is aware of cases addressing the issue of discovery or spoliation relating to social media, but in these cases, the issue arose in the course of discovery after litigation commenced. *See, Allied Concrete Co. v. Lester,* 736 S.E.2d 699 (Va. 2013) (Sanctions of $542,000 imposed against lawyer and $180,000 against the client for spoliation when client, at lawyer's direction, deleted photographs from client's social media page, the client deleted the accounts, and the lawyer signed discovery requests that the client did not have the accounts); *Gatto v. United Airlines,* 2013 WL 1285285, Case No. 10-cv-1090-ES-SCM (U.S. Dist. Ct. NJ March 25, 2013) (Adverse inference instruction, but no monetary sanctions, against plaintiff who deactivated his social media accounts, which then became unavailable, after the defendants requested access); *Romano v. Steelcase, Inc.* 907 N.Y.S.2d 650 (NY 2010) (Court granted request for access to plaintiff's MySpace and Facebook pages, including private and deleted pages, when plaintiff's physical condition was at issue and information on the pages is inconsistent with her purported injuries based on information about plaintiff's activities available on the public pages of her MySpace and Facebook pages). In the disciplinary context, at least one lawyer has been suspended for 5 years for advising a client to clean up the client's Facebook page, causing the removal of photographs and other material after a request for production had been made. *In the Matter of Matthew B. Murray,* 2013 WL 5630414, VSB Docket Nos. 11-070-088405 and 11-070-088422 (Virginia State Bar Disciplinary Board July 17, 2013).

The New York County Lawyers Association has issued NYCLA Ethics Opinion 745 (2013) addressing the issue. The opinion concludes that lawyers may advise their clients to use the highest level of privacy settings on their social media pages and may advise clients to remove information from social media pages unless the lawyer has a duty to preserve information under law and there is no violation of law relating to spoliation of evidence. Other states have since come to similar conclusions. See, e.g., North Carolina Formal Ethics Opinion 5 (attorney must advise client about information on social media if information is relevant and material to the client's representation and attorney may advise client to remove information on social media if not spoliation or otherwise illegal); Pennsylvania Bar Association Opinion 2014-300 (attorney may advise client to delete information from client's social media provided that this does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information); and Philadelphia Bar Association Professional Guidance Committee Opinion 2014-5 (attorney may advise a client to change the privacy settings on the client's social media page but may not instruct client to destroy any relevant content on the page). Subsequent to the publication of the opinion, the New York State Bar Association's Commercial and Federal Litigation Section adopted Social Media Ethics Guidelines. Guideline No. 4.A, citing to the opinion, states as follows:

A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information. Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject to a duty to preserve. [Footnote omitted.]

The committee agrees with the NYCLA that a lawyer may advise a client to use the highest level of privacy setting on the client's social media pages.

The committee also agrees that a lawyer may advise the client pre-litigation to remove information from a social media page, regardless of its relevance to a reasonably foreseeable proceeding, as long as the removal does not violate any substantive law regarding preservation and/or spoliation of evidence. The committee is of the opinion that if the inquirer does so, the social media information or data must be preserved if the information or data is known by the inquirer or reasonably should be known by the inquirer to be relevant to the reasonably foreseeable proceeding.

The committee is of the opinion that the general obligation of competence may require the inquirer to advise the client regarding removal of relevant information from the client's social media pages, including whether removal would violate any legal duties regarding preservation of evidence, regardless of the privacy settings. If a client specifically asks the inquirer regarding removal of information, the inquirer's advice must comply with Rule 4-3.4(a). What information on a social media page is relevant to reasonably foreseeable litigation is a factual question that must be determined on a case-by-case basis.

In summary, the inquirer may advise that a client change privacy settings on the client's social media pages so that they are not publicly accessible. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the inquirer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as the social media information

[Revised: 01-11-2016]

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Florida Lawyers Assistance
E-filing Resources
Practice Resource Institute
Pro Bono Information
Legislative Activity
Lawyer Referral Service
Voluntary Bar Center

Directories
Lawyers
Authorized House Counsel
Certified Foreign Legal Consultants
Law Faculty Affiliates
Florida Registered Paralegals
Section Membership
Board Certified Lawyers
Florida Bar Staff
Courts and Judges
Legal Groups and Law Schools
Judicial Nominating Commission

Research & Professionalism
Ethics Opinions
Rules Regulating the Bar
Fastcase Legal Research
PRI - Practice Resource Institute
Henry Latimer Center for Professionalism

Professionalism Expectations

"Professionalism is the pursuit and practice of the highest ideals and tenets of the legal profession. It embraces far more than simply complying with the minimal standards of professional conduct. The essential ingredients of professionalism are character, competence, commitment, and civility."

- The Florida Bar Standing Committee on Professionalism

Preamble:

As The Florida Bar grows, it becomes more important to articulate the bar's professionalism expectations and for Florida lawyers to demonstrate these expectations in practice. The guidance provided in these Professionalism Expectations originates both from (1) the ethical duties established by the Florida Supreme Court in the Rules Regulating The Florida Bar and (2) the long-standing customs of fair, civil, and honorable legal practice in Florida. Where a Professionalism Expectation is coextensive with a lawyer's ethical duty, the expectation is stated as an imperative, cast in the terms of "must" or "must not." Where a Professionalism Expectation is drawn from a professional custom that is not directly provided for in the Rules Regulating The Florida Bar, the expectation is stated as a recommendation of correct action, cast in terms of "should" or "should not." To The Florida Bar, lawyer professionalism is:

1. embracing a commitment to serve others;

2. dedicating to properly using knowledge and skills to promote a fair and just result;

3. endeavoring to enhance knowledge, skills, and competence;

4. ensuring that concern for a client's desired result does not subvert the lawyer's fairness, honesty, civility, respect, and courtesy during interactions with fellow professionals, clients, opponents, public officials, members of the judiciary, or the public;

5. contributing skill, knowledge, and influence to further the profession's commitment to service and the public good, including efforts to provide all persons, regardless of their means or popularity of their causes, with access to the law and the judicial system;

6. enhancing the legal system's reputation by educating the public about the profession's capabilities and limits, specifically about what the legal system can achieve and the appropriate methods of obtaining those results; and

7. accepting responsibility for one's own professional conduct and the conduct of others in the profession, including encouraging other lawyers to meet these civility and Professionalism Expectations and fostering peer regulation to ensure that each lawyer is competent and public-spirited.

To reinforce and communicate its expectations of lawyer professionalism among our members, The Florida Bar adopts the following Professionalism Expectations:

1. Commitment to Equal Justice Under the Law and to the Public Good

A license to practice law is a privilege that gives the lawyer a special position of trust, power, and influence in our society. This privilege requires a lawyer to use that position to promote the public good and to foster the reputation of the legal profession while protecting our system of equal justice under the law.

Expectations:

1.1 A lawyer should avoid the appearance of impropriety.

1.2 A lawyer should counsel and encourage other lawyers to abide by these Professionalism Expectations.

1.3 A lawyer should promote the public's understanding of the lawyer's role in the legal profession and protect public confidence in a just and fair legal system founded on the rule of law.

1.4 A lawyer should not enter into a lawyer-client relationship when the lawyer cannot provide competent and diligent service to the client throughout the course of the representation.

1.5 A lawyer must not seek clients through the use of misleading or manipulative oral and written representations or advertisements. (*See* R. Regulating Fla. Bar 4-7.13 and 4-7.14). Contingency fee arrangements must be in writing and follow R. Regulating Fla. Bar 4-1.5(f).

1.6 When employed by a new client, a lawyer should discuss fee and cost arrangements at the outset of the representation and promptly confirm those arrangements in writing.

1.7 A lawyer must place a client's best interest ahead of the lawyer's or another party's interests. (*See* R. Regulating Fla. Bar 4-1.7(a)(2)).

1.8 A lawyer must maintain and preserve the confidence and private information of clients. (*See* R. Regulating Fla. Bar 4-1.6).

1.9 In any representation where the fee arrangement is other than a contingent percentage-of-recovery fee or a fixed, flat-sum fee or in which the representation is anticipated to be of more than brief duration, a lawyer should bill clients on a regular, frequent interim basis, and avoid charging unnecessary expenses to the client.

1.10 When a fee dispute arises that cannot be amicably resolved, a lawyer should endeavor to utilize an alternative dispute resolution mechanism such as fee arbitration.

1.11 A lawyer must routinely keep clients informed and attempt to resolve client concerns. (*See* R. Regulating Fla. Bar 4-1.4). In the case of irreconcilable disagreements with a client, the lawyer must provide diligent representation until the lawyer-client relationship is formally dissolved in compliance with the law and the client's best interests. (*See* R. Regulating Fla. Bar 4-1.16).

1.12 A lawyer must devote professional time and resources and use civic influence to ensure equal access to our system of justice. (*See* R. Regulating Fla. Bar 4-6.1).

1.13 A lawyer must avoid discriminatory conduct prejudicial to the administration of justice in connection with the practice of law. (*See* R. Regulating Fla. Bar 4-8.4(d)).

2. Honest and Effective Communication

A lawyer's word is his or her bond. Effective communication requires lawyers to be honest, diligent, civil, and respectful in their interactions with others.

Expectations:

2.1 A lawyer should inform every client what the lawyer expects from the client and what the client can expect from the lawyer during the term of the legal representation.

2.2 Candor and civility must be used in all oral and written communications. (*See* R. Regulating Fla. Bar 4-8.4(c)).

2.3 A lawyer must avoid disparaging personal remarks or acrimony toward opposing parties, opposing counsel, third parties or the court. (*See* R. Regulating Fla. Bar 4-8.4(d)).

2.4 A lawyer must timely serve all pleadings to prevent prejudice or delay to the opposing party. (*See* R. Regulating Fla. Bar 4-3.2).

2.5 A lawyer's communications in connection with the practice of law, including communications on social media, must not disparage another's character or competence or be used to inappropriately influence or contact others. (*See* R. Regulating Fla. Bar 4-8.4(d)).

2.6 A lawyer should use formal letters or e-mails for legal correspondence and should not use text messages to correspond with a client or opposing counsel unless mutually agreed.

2.7 In drafting a proposed letter of intent, the memorialization of an oral agreement, or a written contract reflecting an agreement reached in concept, a lawyer should draft a document that fairly reflects the agreement of the parties.

2.8 In drafting documents, a lawyer should point out to opposing counsel all changes that the lawyer makes or causes to be made from one draft to another.

2.9 A lawyer should not withhold information from a client to serve the lawyer's own interest or convenience.

2.10 A lawyer must not knowingly misstate, misrepresent, or distort any fact or legal authority to the court or to opposing counsel and must not mislead by inaction or silence. Further, the discovery of additional evidence or unintentional misrepresentations must immediately be disclosed or otherwise corrected. (*See* R. Regulating Fla. Bar 4-3.3 and 4-8.4).

2.11 A lawyer must not inappropriately communicate with a party represented by a lawyer (*See* R. Regulating Fla. Bar 4-4.2), including not responding "reply all" to e-mails.

2.12 A lawyer should diligently prepare legal forms and documents to avoid future harm or litigation for the client while ensuring compliance with the requirements of the law.

2.13 Social media must not be used to disparage opposing parties, lawyers, judges, and members of the public. (*See* R. Regulating Fla. Bar 4-8.2(a) and 4-8.4(d)).

2.14 Social media should not be used to avoid the ethical rules regulating lawyer advertising.

2.15 Social media must not be used to inappropriately contact judges, mediators, jurors, witnesses, or represented parties. (*See* R. Regulating Fla. Bar 4-3.5 and 4-4.2).

2.16 Social media must not be used for the purpose of influencing adjudicative proceedings. (*See* R. Regulating Fla. Bar 4-3.6).

2.17 A lawyer must ensure that the use of electronic devices does not impair the attorney-client privilege or confidentiality. (*See* R. Regulating Fla. Bar 4-1.6).

2.18 A lawyer must diligently respond to calls, correspondences, complaints, and investigations by The Florida Bar. (*See* R. Regulating Fla. Bar 4-8.4(g)).

3. Adherence to a Fundamental Sense of Honor, Integrity, and Fair Play

Courtesy, cooperation, integrity, fair play, and abiding by a sense of honor are paramount for preserving the integrity of the profession and to ensuring fair, efficient, and effective administration of justice for the public.

Expectations:

3.1 A lawyer must not engage in dilatory or delay tactics. (*See* R. Regulating Fla. Bar 4-3.2).

3.2 A lawyer should not make scheduling decisions that limit opposing counsel's opportunity to prepare or respond.

3.3 A lawyer should not unreasonably oppose an adversary's motion.

3.4 A lawyer must not permit non-lawyer personnel to communicate with a judge or judicial officer on any matters pending before the judge or officer or with other court personnel except on scheduling and other ministerial matters. (*See* R. Regulating Fla. Bar 4-3.5(b) and 4-8.4(a)).

3.5 A lawyer must avoid substantive *ex parte* communications in a pending case with a presiding judge. The lawyer must notify opposing counsel of all communications with the court or other tribunal, except those involving only scheduling or clerical matters. (*See* R. Regulating Fla. Bar 4-3.5).

3.6 When submitting a written communication to a court or other tribunal, a lawyer should provide opposing counsel with a copy of the document contemporaneously or sufficiently in advance of any related hearing.

3.7 A lawyer must promptly prepare a proposed order, ensure that the order fairly and adequately represents the court's ruling before submitting the order to the court, and advise the court whether opposing counsel has approved the order. (*See* R. Regulating Fla. Bar 4-3.4(c)).

3.8 A lawyer should only schedule depositions to ascertain relevant facts and not to generate income or harass deponents or opposing counsel.

3.9 A lawyer must not ask a deponent irrelevant personal questions or questions designed to embarrass a deponent. (*See* R. Regulating Fla. Bar 4-4.4(a)).

3.10 A lawyer should not make improper objections in depositions.

3.11 A lawyer must not prevent a deponent from answering questions unless a legal privilege applies. (*See* R. Regulating Fla. Bar 4-3.4(c)).

3.12 When scheduling depositions, hearings, and other court proceedings, a lawyer should request an amount of time that permits all parties in the case the opportunity to be fully and fairly heard on the matter.

3.13 A lawyer should immediately provide a scheduling notice for a hearing, deposition, or trial to all opposing parties.

3.14 A lawyer should notify opposing parties and subpoenaed witnesses of a cancelled or rescheduled hearing, deposition, or trial.

3.15 During pre-trial disclosure, a lawyer should make a reasonable, good-faith effort to identify witnesses likely to be called to testify.

3.16 During pre-trial disclosure, a lawyer should make a reasonable good-faith effort to identify exhibits to be proffered into evidence.

3.17 A lawyer should not mark on or alter exhibits, charts, graphs, or diagrams without opposing counsel's permission or leave of court.

3.18 A lawyer must not threaten opposing parties with sanctions, disciplinary complaints, criminal charges, or additional litigation to gain a tactical advantage. (*See* R. Regulating Fla. Bar 4-3.4(g) and (h)).

4. Fair and Efficient Administration of Justice

The just, speedy, and inexpensive determination of every controversy is necessary to preserve our system of justice.

Expectations:

4.1 A lawyer should be familiar with the court's administrative orders, local rules, and each judge's published standing orders, practices, and procedures.

4.2 A lawyer should endeavor to achieve the client's lawful objectives as economically and expeditiously as possible.

4.3 A lawyer should counsel the client concerning the benefits of mediation, arbitration, and other alternative methods of resolving disputes.

4.4 A lawyer should counsel the client to consider settlement in good faith.

4.5 A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not adversely affected.

4.6 A lawyer must not invoke a rule for the purpose of creating undue delay, or propose frivolous oral or written arguments which do not have an adequate basis in the law nor fact. (*See* R. Regulating Fla. Bar 4-3.1).

4.7 A lawyer must not use discovery to harass or improperly burden an adversary or cause the adversary to incur unnecessary expense. (*See* R. Regulating Fla. Bar 4-4.4).

4.8 A lawyer should frame reasonable discovery requests tailored to the matter at hand.

4.9 A lawyer should assure that responses to proper discovery requests are timely, complete, and consistent with the obvious intent of the request. A lawyer should not avoid disclosure unless a legal privilege prevents disclosure.

4.10 A lawyer should not respond to discovery requests in a disorganized, unintelligible, or inappropriate manner, in an attempt to conceal evidence.

4.11 A lawyer should stipulate to all facts and principles of law that are not in dispute and should promptly respond to requests for stipulations of fact or law.

4.12 After consulting with the client, a lawyer should voluntarily withdraw claims and defenses that are without merit, superfluous, or cumulative.

4.13 A lawyer should be fully prepared when appearing in court or at hearings.

4.14 A lawyer should not use *voir dire* to extract promises from or to suggest desired verdicts to jurors.

4.15 A lawyer should abstain from all acts, comments, and attitudes calculated to curry favor with jurors.

4.16 A lawyer should not express bias or personal opinion concerning any matter at issue in opening statements and in arguments to the jury.

4.17 A lawyer should not make offers or requests for a stipulation in front of the jury.

4.18 A lawyer should not use the post-hearing submission of proposed orders as an opportunity to argue or reargue a matter's merits.

4.19 A lawyer must not request rescheduling, cancellations, extensions, and postponements without legitimate reasons or solely for the purpose of delay or obtaining unfair advantage. (*See* R. Regulating Fla. Bar 4-4.4).

4.20 A lawyer must not criticize or denigrate opposing parties, witnesses, or the court to clients, media, or members of the public. (*See* R. Regulating Fla. Bar 4-8.2(a) and 4-8.4(d)).

5. Decorum and Courtesy

When lawyers display reverence for the law, the judicial system, and the legal profession by acting with respect, decorum, and courtesy, they earn the trust of the public and help to preserve faith in the operation of a fair judicial system.

Expectations:

5.1 A lawyer should abstain from rude, disruptive, and disrespectful behavior. The lawyer should encourage clients and support personnel to do the same.

5.2 A lawyer should be civil and courteous in all situations, both professional and personal, and avoid conduct that is degrading to the legal profession. (*See* R. Regulating Fla. Bar 3-4.3).

5.3 A lawyer must always behave in a courteous and formal manner in hearings, depositions, and trials and should refrain from seeking special consideration from a judge or juror.

5.4 A lawyer should refer to all parties, witnesses, and other counsel by their last names during legal proceedings.

5.5 A lawyer should request permission from the court before approaching the bench or submitting any document.

5.6 A lawyer should state only the legal grounds for an objection unless the court requests further argument or elaboration.

5.7 A lawyer should inform clients and witnesses that approving and disapproving gestures, facial expressions, or audible comments are absolutely prohibited in legal proceedings.

5.8 A lawyer should abstain from conduct that diverts the fact-finder's attention from the relevant facts or causes a fact-finder to make a legally impermissible decision.

5.9 A lawyer should address objections, requests, and observations to the judge.

5.10 A lawyer should attempt to resolve disagreements before requesting a court hearing or filing a motion to compel or for sanctions.

6. Respect for the Time and Commitments of Others

Respecting the time and commitments of others is essential to the efficient and fair resolution of legal matters.

Expectations:

6.1 A lawyer should not impose arbitrary or unreasonable deadlines on others.

6.2 A lawyer should schedule a deposition during a time period sufficient to allow all parties to examine the deponent.

6.3 Unless circumstances compel more expedited scheduling, a lawyer should provide litigants, witnesses, and other affected persons with ample advance notice of hearings, depositions, meetings, and other proceedings, and whenever practical, schedule these events at times convenient for all interested persons.

6.4 A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client's opportunity for full, fair, and prompt adjudication.

6.5 A lawyer should promptly agree to a proposed time for a hearing, deposition, meeting or other proceeding or make his or her own counter proposal of time.

6.6 A lawyer should promptly call potential scheduling conflicts or problems to the attention of those affected, including the court or tribunal.

6.7 A lawyer should avoid last-minute cancellations of hearings, depositions, meetings, and other proceedings.

6.8 A lawyer should promptly notify the court or tribunal when a scheduled court appearance becomes unnecessary.

6.9 A lawyer should be punctual in attending all court appearances, depositions, meetings, conferences, and other proceedings.

6.10 A lawyer must respond promptly to inquiries and communications from clients and others. (*See* R. Regulating Fla. Bar 4-1.4.)

7. Independence of Judgment

An enduring value of a lawyer's service is grounded in the lawyer's willingness to exercise independent judgment in practice and while giving the client advice and counsel.

Expectations:

7.1 A lawyer should exercise independent judgment and should not be governed by the client's ulterior motives, ill will, or deceit.

7.2 A lawyer should counsel a client or prospective client, even with respect to a meritorious claim or defense, about the public and private burdens of pursuing the claim as compared with the benefits to be achieved.

7.3 In advising a client, a lawyer should not understate or overstate achievable results or otherwise create unrealistic expectations.

7.4 A lawyer should not permit a client's ill will toward an adversary, witness, or tribunal to become that of the lawyer.

7.5 A lawyer must counsel a client against using tactics designed: (a) to hinder or improperly delay a legal process; or (b) to embarrass, harass, intimidate, improperly burden, or oppress an adversary, party or any other person and should withdraw from representation if the client insists on such tactics. (*See* R. Regulating Fla. Bar 4-1.16, 4-3.2, and 4-4.4).

7.6 In contractual and business negotiations, a lawyer should counsel the client concerning what is reasonable and customary under the circumstances.

History

The Florida Bar Commission on Lawyer Professionalism promulgated a set of Standards of Professionalism submitted to the Board of Governors in May of 1989. The Board appointed a Special Committee who revised the Standards and amended the title to the "Ideals and Goals of Professionalism." These aspirational guidelines were adopted by the Board of Governors of The Florida Bar on May 16, 1990.

The Florida Supreme Court has added the civility provision in the Oath of Admission to The Florida Bar adopted on September 10, 2011, and implemented SC13-688: Code for Resolving Professionalism Complaints adopted on June 6, 2013.

As a result of this change and a perceived decline in the lack of professionalism in the practice of law, in May 2014, The Florida Bar Standing Committee on Professionalism was requested by Bar leadership to review and develop uniform professionalism guidelines including electronic communications for statewide distribution. The Professionalism Expectations resulted from pairing existing professionalism guides with new technological concepts and this document was approved by the Standing Committee on Professionalism on October 16, 2014, and The Florida Bar Board of Governors on January 30, 2015.

MICHAEL R.N. MCDONNELL INNS OF COURT

April 2016 Team Presentation

Practicing with Professionalism Both Inside and Outside of the Courtroom

April Team Members

- The Honorable Robert L. Crown
- Tara Miller Dane
- Jason Korn
- Marshall Bender
- Amy Garrard
- Jamie Hewitt
- Colleen Anne Kerins
- Abood Shebib
- Damian Taylor
- Barbara Ballard Woodcock

History of Professionalism Efforts

- In 1986, the ABA Commission on Professionalism studied professionalism and published a report entitled *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism.* That report cited:

- **"Lawyers' professionalism may well be in steep decline."**

- In 1993, The Florida Bar commissioned as survey regarding the attitudes and characteristics of Florida lawyers. Many of those surveyed believed a substantial minority of lawyers in Florida are:
  - Money grubbing
  - Cannot be trusted
  - Have little regard for truth or fairness
  - Willing to distort, manipulate and conceal to win
  - Abusive, pompous and obnoxious

- In 1995, The Florida Bar commissioned a survey to follow up on the 1993 attitudes.
- The Study found the most serious problems we face as Florida lawyers are:
  - Lack of professionalism
  - Lack of ethics

Existing Standards

- In 2013, the Supreme Court of Florida issued the opinion "In re: Code for Resolving Professionalism Complaints" (amended 2013, 2015)
- Adopted a collection of existing standards:
  - Oath of Admission
  - Creed of Professionalism
  - Professionalism Expectations (2015)
  - Rules Regulating The Florida Bar
  - Decisions of The Florida Supreme Court

Most Recent Guidelines

- *Professionalism Expectations*
  - Adopted by Fla. Sup. Ct. September 10, 2015
  - Replaces the *Ideals and Goals of Professionalism*

- *The Florida Bar Best Practices for Effective Electronic Communication*
  - Published August 7, 2015
  - References Rules of Professional Conduct

Rules applied for discipline for Unprofessional Conduct

- Rule 3-4.3 Misconduct and Minor Misconduct

The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations or otherwise … may constitute a cause for discipline.

- Rule 4-8.4(d) Misconduct

A lawyer shall not:

***

(d) engage in conduct … that is <u>prejudicial to the administration of justice</u>, including knowingly, or through callous indifference, <u>disparage</u>, <u>humiliate</u>… litigants, jurors, witnesses, court personal or other lawyers…

Presentation Skits and Videos

- Based upon actual facts from Florida Supreme Court cases.
- Based upon facts leading to discipline of the attorneys involved
- Based upon the standards of conduct and ethical opinions
- Concluding with video of actual public reprimand

I. PROFESSIONALISM DURING DEPOSITIONS AND COURT APPEARANCES

What Not to Do…….

Skit – Deposition Scene

Scene Set up: deposition questioning, and after a break, the examination turns to the topic of the deponent's knowledge of photocopying machines

Skit is based upon facts from actual cases involving disciplinary proceedings

What not to do in a deposition…

(to be followed by a discussion)

Facts taken from: The Florida Bar v. Martocci

Unprofessional Conduct at Deposition and Hearings Included:

- Made insulting facial gestures to opposing party and opposing counsel
- Called opposing counsel a "bush leaguer"
- Told opposing counsel that depositions are not conducted under "girl's rules"
- After hearing referred to opposing counsel as a "stupid idiot" and that she should "go back to Puerto Rico"

The Florida Bar v. Martocci (cont.)

- Continually disparaged opposing counsel's knowledge and ability to practice law
- "Record replete with evidence of Martocci's verbal assaults and sexist, racial and ethnic insults."
- Martocci given public reprimand and two year probation.

The Florida Bar v. Martocci (cont.)

- Rule 4-8.4(d):

A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis…

The Florida Bar v. Martocci (cont.)

- "A lawyer's obligation of zealous representation should not and cannot be transformed into a vehicle intent upon harassment and intimidation." *Martocci* at 1077-78 (quoting *Florida Bar v. Buckle,* 771 So. 2d 1131, 1133 (Fla. 2000).

Facts taken from: The Florida Bar v. Wasserman

- After getting unfavorable response to a question asked over telephone to Judge through judicial assistant, Wasserman said to the assistant, “You little motherf____; you and that judge, that motherf______ son of a b______.” Judicial assistant was so upset she had to leave the office early that day.

The Florida Bar v. Wasserman (cont.)

- Wasserman contended his statements to the judicial assistant were protected by the First Amendment, but the Court held that "**the right to free speech…does not preclude the disciplining of a lawyer for speech directed at the judiciary**."

- Wasserman given two consecutive six-month suspensions, required to prove rehabilitation prior to reinstatement.

Florida Bar v. Wasserman (cont.)

- Rule 3-4.3
  - …The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney **or otherwise**,…whether or not the act is a felony or misdemeanor, may constitute a cause for discipline.
- Rule 4-3.5(c)
  - A lawyer must not engage in conduct intended to disrupt a tribunal.

Facts taken from: Florida Bar v. Abramson

- Abramson interrupted judge and asked to approach the bench. Judge asks Abramson to be seated but Abramson continued to ask to approach.
- Abramson was discourteous and disrespectful to Judge in presence of prospective jurors.
- Abramson stated in voir dire that "the judge was the one that was completely disrespectful, lacking in respect, lacking in professionalism, and it was not me."
- Abramson suspended for ninety-one days.

II. The Florida Bar v. Ratiner
(video presentation)

- Video of behavior at deposition, leading to discipline
- Deposition in case involving product liability claim against Dupont.
- Attorney Ratiner took the 5 day deposition of the Dupont corporate representative in Delaware. This incident took place on the 4th day.

(Ratiner is the man standing; woman is the deponent)

Hearing.mpg

Ratiner's Discipline

- Suspension for 60 days
- 2 years probation with conditions:
  - Required to undergo Mental Health Counseling
  - Prepare and mail letters of apology to the witness, the court reporters, and the videographer
  - Be accompanied by co-counsel approved by the Bar during any depositions or other legal proceedings where there is no judge
    - (or alternatively, ensure such appearances and proceedings are video-recorded

Ratiner – Standards Cited by the Court

- Rule 3.4-3 (Misconduct)
  - The commission by a lawyer of any act that is unlawful or contrary to honesty and justice
- Rule 4-4.4(a)
  - In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person

Ratiner (continued)

- Rule 4-8.4(d)
  - A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly or through callous indifference, disparage, humiliate or discriminate against litigants, jurors, witnesses, court personnel or other lawyers…
- Professionalism Expectations (2015)
  - Would have been implicated if after September 2015

Ratiner (continued)

- Referee found Ratiner's conduct during the deposition as "outrageous, disruptive, and intimidating to the witness, opposing counsel, and other persons present during the deposition and otherwise prejudicial to the administration of justice."

- While this occurred, the court reporter stated, "I can't work like this!"

III. Professionalism Issues at Mediation and Social Media

(video skit)

Videoclip of Mediation Issue

- Set up discussion
  - Celebrity in Mediation
  - Issues about Social Media
  - Issues about posting and "confidentiality"
  - Issues about Mediation Confidentiality
  - Issues about involving others

Rules and Standards Implicated

- Florida Bar Professional Ethics Opinion 14-1
  - Social Media Guidelines

- Mediator Ethics Advisory Opinion 2008-06

- Facts in one scene based upon public defender posting to Facebook as referenced in *The Florida Bar Best Practices for Effective Electronic Communication* (2015)

IV. Public Reprimand Disciplinary Proceedings – Norkin (video of public reprimand)

- The Florida Bar v. Norkin (Fla. 2013)
- Bar rejected referee's recommended sanction of a 90 day suspension
- Instead, imposed a 2 year suspension along with a public reprimand

Video of Norkin Public Reprimand

- Insert Video here

Norkin's Conduct Toward the Bench

- Yelled at judges on multiple occasions during hearings
- When Norkin was not winning during a particular hearing, he would raise his voice and behave in an angry, disrespectful manner
- Engaged in antagonistic and unprofessional behavior toward judges

Norkin's Conduct Toward Opposing Counsel

- Emails/Statements Quoted by Florida Supreme Court:
  - "You will join the many attorneys who have done so and lived to regret their incompetent, unethical and improper litigation practices."
  - "You must really lie a lot to even think I would. Liars, in general, not you necessarily, are so suspicious of others lying."

Norkin's Letters to opposing counsel

- "…I believe that you committed malpractice by allowing your client to file this lawsuit and judging by your client's nature, I have no doubt he will be suing you in the near future…Show the evidence or you are about to have a very massive problem."

- "…your client might have a suit against you, for your poor advice and other misconduct…I would respectfully suggest you put your carrier on notice."

- The Court in its decision stated:
  - Such misconduct cannot and will not be tolerated as it sullies the dignity of judicial proceedings and debases the constitutional republic we serve.

Norkin – Subsequent Proceedings

- Permanently Disbarred
- October 8, 2015 – Norkin disbarred from the practice of law for failure to comply with suspension notification requirements, violations of the suspension, and continued offensive behavior
- The Bar's motion for sanctions against Norkin, pointed out: "Norkin, through his countenance and physical conduct while the public reprimand was being administered [see video], showed his contempt for the Court."

THE END