THE MICHAEL R.N. MCDONNELL
AMERICAN INN *of* COURT

**October 18, 2016**

# TRICK OR TREAT: PROFESSIONALISM IN THE 21ST CENTURY

## Team 1

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**Internet news outlets and news outlet Facebook pages all include Comment sections that have become an open forum for discussion, and at times heated arguments on various legal topics both nationally and locally.**

**Is it unprofessional for attorneys to engage in these internet disputes with strangers?**

**How far should an attorney defend his or her point of view on internet discussion forums without being unprofessional?**

- Florida State Bar Association Committee on Professional Ethics, Advisory Opinion Number A-00-1 (Revised) 2010 WL 5393358

  *An attorney may not solicit prospective clients through Internet chat rooms, defined as real time communications between computer users. Lawyers may respond to specific questions posed to them in chat rooms. Lawyers should be cautious not to inadvertently form attorney-client relationships with computer users.*

- 4-1.6 – confidentiality issues when discussing cases that may be in the public
- 4-1.18 – duties to prospective client that you may be speaking with in a public forum
- 4-3.6 – trial publicity – likelihood of materially prejudicing a proceeding
- 4-8.4 – general misconduct rules will apply to all forums

**Svitlana Sangary is the California lawyer who is facing license suspension for allegedly Photoshopping herself into pictures with politicians and celebrities and placing them on her official website. Were her actions unprofessional?**

**Were her actions unethical?**

- Svitlana Sangary was accused of violating Rule 1-400(D)(2) of the California Rules of Professional Conduct, prohibiting deceptive advertising. Ms. Sangary was ultimately disbarred and subject to involuntary inactive enrollment pursuant to an order entered on June 15, 2015.

- The Rules Regulating the Florida Bar 4-7.13 through 4-7.16 cover attorney advertisements.

- Rule 4-7.15, titled "Unduly Manipulative or Intrusive Advertisements," addresses this issue and states: "A lawyer may not engage in unduly manipulative or intrusive advertisements. An advertisement is unduly manipulative if it…(c) ***contains the voice or image of a celebrity***, except that a lawyer may use the voice or image of a local announcer, disc jockey or radio personality who regularly records advertisements so long as the person recording the announcement does not endorse or offer a testimonial on behalf of the advertising lawyer or law firm." (emphasis added) California Rule 1-400 and Florida Rule 4-7.15 are attached.

**What are some problems an attorney or judge may encounter with having a Facebook or Twitter account that is open to the public?**

- FL Eth. Op. 07-3
  *A person seeking legal services who sends information unilaterally to a lawyer has no reasonable expectation of confidentiality regarding that information. A lawyer who receives information unilaterally from a person seeking legal services is not a prospective client within Rule 4-1.18, has no conflict of interest if already representing or is later asked to represent an adversary, and may use or disclose the information. If the lawyer agrees to consider representing the person or discussed the possibility of representation with the person, the person is a prospective client under Rule 4-1.18, and the lawyer does owe a duty of confidentiality which may create a conflict of interest for the lawyer. Lawyers should post a statement on their websites that the lawyer does not intend to treat as confidential information sent to the lawyer via the website, and that such information could be used against the person by the lawyer in the future.*

**Is a Facebook page or any social media that is used to promote the lawyer or law firm's practice subject to the lawyer advertising rules? What about lawyers who post on Twitter? Even though you can restrict access through privacy settings, don't the rules of professionalism apply?**

- The Florida Bar Standing Committee on Advertising Guidelines for Networking Sites
  *Pages appearing on networking sites that are used to promote the lawyer or law firm's practice are subject to the lawyer advertising rules. These pages must therefore comply with all of the general regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21. Regulations include prohibitions against any misleading information, which includes references to past results that are not objectively verifiable, predictions or guaranties of results, and testimonials that fail to comply with the requirements listed in Rule 4-7.13(b)(8). Regulations also include prohibitions against statements characterizing skills, experience, reputation or record unless they are objectively verifiable. Lawyers and law firms should review the lawyer advertising rules in their entirety to comply with their requirements. Additional information is available in the Handbook on Lawyer Advertising and Solicitation on the Florida Bar website*

  *Lawyers who post information to Twitter whose postings are generally accessible are subject to the lawyer advertising regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21 as above. A lawyer may post information via Twitter and may restrict access to the posts to the lawyer's followers, who are persons who have specifically signed up to receive posts from that lawyer. If access to a lawyer's Twitter postings is restricted to the followers of the particular lawyer, the information posted there is information at the request of a prospective client and is subject to the lawyer advertising rules, but is exempt from the filing requirement under Rule 4-7.20(e). Any communications that a lawyer makes on an unsolicited basis to prospective clients to obtain "followers" is subject to the lawyer advertising rules, as with any other social media as noted above. Because of Twitter's 140-character limitation, lawyers may use commonly recognized abbreviations for the required geographic disclosure of a bona fide office location by city, town or county as required by Rule 4-7.12(a).*

**Are unsolicited instant messages on social media sites or by email asking the recipient to view or link to the lawyer's page on subject to the requirements under 4-7.11 through 4-7.18 and 4-7.21.**

**Do these rules this apply to attorneys who ask to people to" like" their Facebook profile?**

**What about their firm's Facebook page?**

- The Florida Bar Standing Committee on Advertising Guidelines for Networking Sites

  *Invitations sent directly from a social media site via instant messaging 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 must meet the requirements for written solicitations under Rule 4-7.18(b), unless the recipient is the lawyer's current client, former client, relative, has a prior professional relationship with the lawyer, or is another lawyer. Any invitations to view the page sent via email must comply with the direct e-mail rules if they are sent to persons who are not current clients, former clients, relatives, other lawyers, persons who have requested information from the lawyer, or persons with whom the lawyer has a prior professional relationship. Instant messages and direct e-mail must comply with the general advertising regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21 as well as additional requirements set forth in Rule 4-7.18(b). Information on complying with the direct e-mail rules is available in the Handbook on Lawyer Advertising and Solicitation and in the Direct E-Mail Quick Reference Checklist on the Florida Bar website.*

**May an attorney or paralegal "friend" a potential defendant to gain access to information on social media websites before filing a lawsuit?**

- It does not appear that Florida has directly addressed this issue.

- Other jurisdictions have considered this issue, and a helpful article from the ABA - *Ethics of Using Social Media During Case Investigation and Discovery* is attached.

- This article cites the New York City Bar Formal Ethics Opinion 2010-2 and the Philadelphia Bar Association Professional Guidance Committee Opinion 2014-5. The New York City Bar concluded that an attorney or her agent may send a friend request to an unrepresented party on a social networking site without disclosing the reason for sending the request, provided that the attorney uses her real name and profile.

- The Philadelphia Bar Association concluded that asking a third party, whose name a hostile witness will not recognize, to send a friend request without revealing her association to the attorney or the reasons for making contact, constitutes deceptive and unethical conduct. The New York and Philadelphia Bar opinions are attached.

**You have an opposing counsel who text messages you all the time, preferring to use that as a quick mode of communication. The informality of the medium has occasioned many informal responses from you to opposing counsel, screenshots of which are now being used by opposing counsel as exhibits in motion practice before the court.**

- Florida Bar "Best Practices for Effective Electronic Communication" recommends:
  - "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 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."
  - "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."
  - "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."
    - Although, a duty of candor with the court may dissuade an opposing counsel from doing this, if you've deleted a thread of texts between you and opposing counsel and all that remains are screenshots of the past conversation that opposing counsel is using as exhibits to motions, you cannot challenge the content as effectively if any alterations have been made. More importantly, sending texts back and forth with opposing counsel allows this situation to occur in the first place.
  - Keep in mind that even in texting, lawyers must be bound by the Oath of Admission and:
    - Rule 3-4.3 (commission of any act that is unlawful or contrary to honesty and justice); and,
    - 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, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic).

- By way of analogy, one can take note of *The Florida Bar v. Mooney*, 49 So. 3d 748 (Fla. 2010) and *The Florida Bar v. Mitchell*, 46 So.3d 1003 (Fla. 2010). An e-mail exchange between two lawyers, Mr. Mooney and Mr. Mitchel, escalated when the parties attempted to schedule a deposition and included the following email exchanges: "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!!" This was a relatively tame comment considering the thread involved one attorney making fun of the disabled son of the other. This violated the Oath of Admission, which requires lawyers be civil not only in court, but in all written and oral communications, including 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). Note that the Florida Bar used the heated and inappropriate email exchange between the two attorneys as exhibits in its complaints against both; another cautionary tale that could apply to heated text message exchanges – they could be used as evidence against the sender! Further, the Court sanctioned the lawyers who filed the complaint, and the Court also provided the e-mail exchange with a public reprimand. The other lawyer received a 10-day suspension.
    - So, filing an acrimonious text message may result in public reprimand depending on the circumstances.

    - The Florida Bar news published the following notices of discipline in that case:
        - "**Nicholas Francis Mooney**, 201 E Kennedy Blvd., Suite 500, Tampa, to be publicly reprimanded following a Nov. 16 court order. (Admitted to practice: 1985) Mooney was found guilty of unlawful misconduct directed at opposing counsel. He engaged in a series of e-mail exchanges with rival counsel that were disparaging, humiliating, and discriminatory. Mooney also engaged in hostile confrontation with the same rival counsel at a deposition. (Case Nos. SC10-640 & SC10-1584)
        - **Kurt D. Mitchell**, P.O. Box 1055, Palmetto, suspended for 10 days, effective 30 days from an Oct. 5 court order. (Admitted to practice: 2005) Mitchell engaged in a series of e-mail exchanges with rival counsel that were disparaging, humiliating and discriminatory, and later engaged in a hostile confrontation with the same rival counsel at a deposition. In a separate instance, Mitchell made disparaging,

humiliating and discriminatory remarks about his former landlord in the course of litigation between them. Mitchell also made a false statement of fact in response to a court reporter's complaint regarding his failure to pay for a deposition transcript he had ordered. (Case Nos. SC10-637, SC10-639 & SC10-1583)

- I attached the Florida Bar Complaints against both attorneys; the emails are horrific!

- Lastly: there are concerns about sharing text messages that may constitute confidential settlement negotiations; be aware of publicly filing the same.

**If a former client makes false or misleading statements about an attorneys' representation of the client in a negative online review, what can the attorney do about it? To what degree can the lawyer respond online?**

**Does the lawyer have any other recourse?**

- *Blake v. Ann-Marie Guistibelli, P.A.*, 182 So. 3d 881 (Fla. 4th DCA 2016)
  Affirming trial court award of damages in libel case brought by attorney against former client arising out of the former client's false internet reviews

**Is it unethical for an attorney to advise a client change his or her social media privacy settings before filing a lawsuit? During the litigation?**

- See Ethics Opinion 14-1
    - 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.
    - A lawyer may advise a client to use the highest level of privacy setting on the client's social media pages.
    - Distinction between removal and preservation – *"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."*

**Is it permissible to friend and/or interact with Judges on social networks (i.e. *ex parte* communications)?**

- *Domville v. Florida*, 103 So. 3d 184 (Fla. 4th DCA 2012)
  Petitioner Pierre Domville moved to disqualify the trial judge. The motion was supported by an affidavit averring that the prosecutor handling the case and the trial judge are Facebook "friends." This relationship caused *Domville* to believe that the judge could not "be fair and impartial."

- *Chace v. Loisel*, 170 So. 3d 802, 803 (Fla. Dist. Ct. App. 2014)
  Prior to entry of final judgment, the trial judge reached out to Petitioner, ex parte, in the form of a Facebook "friend" request. Upon advice of counsel, Petitioner decided not to respond to that invitation. Thereafter, the trial court entered a final judgment of dissolution, allegedly attributing most of the marital debt to Petitioner and providing Respondent with a disproportionately excessive alimony award.

**AVVO has a program, whereby an individual can call and speak with a Florida attorney for 15 minutes for a fixed fee of $39.00. From the fee, $29.00 goes to the attorney, and $10.00 goes to Avvo for the referral. Is this ethical?**

- Rule 4-5.4 -Professional Independence of a Lawyer

(a) Sharing Fees with Nonlawyers. A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to 1 or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, in accordance with the provisions of rule 4-1.17, pay to the estate or other legally authorized representative of that lawyer the agreed upon purchase price;

(4) bonuses may be paid to nonlawyer employees for work performed, and may be based on their extraordinary efforts on a particular case or over a specified time period. Bonus payments shall not be based on cases or clients brought to the lawyer or law firm by the actions of the nonlawyer. A lawyer shall not provide a bonus payment that is calculated as a percentage of legal fees received by the lawyer or law firm; and

(5) a lawyer may share court-awarded fees with a nonprofit, pro bono legal services organization that employed, retained, or recommended employment of the lawyer in the matter.

* * *

(d) Exercise of Independent Professional Judgment. A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

2010 WL 5393358 (Fla.St.Bar Assn.)

Florida State Bar Association
Committee on Professional Ethics


Advisory Opinion Number A-00-1 (Revised)
April 13, 2010

An attorney may not solicit prospective clients through Internet chat rooms, defined as real time communications between computer users. Lawyers may respond to specific questions posed to them in chat rooms. Lawyers should be cautious not to inadvertently form attorney-client relationships with computer users.

***1 RPC: 4-7.4(a)**

**Opinions: Illinois 96-10, Michigan RI-276, Philadelphia 98-6, Utah 97-10, Virginia A-0110, West Virginia 98-03**

As use of the Internet becomes more and more a part of the practice of law, questions arise as to whether attorneys may ethically participate in chat rooms. As used in this opinion, the term "chat room" refers to a real time communication between computer users. A foremost concern in attorney participation in chat rooms is whether such activity constitutes impermissible solicitation. Rule 4-7.4(a) provides:

**(a) Solicitation**. Except as provided in subdivision (b) of this rule, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of rule 4-7.6.

Several other states have considered the issue of whether attorney participation in chat rooms constitutes impermissible solicitation. For example, in Michigan Opinion RI-276, it was concluded that while e-mail communications were akin to direct mail communications:

A different situation arises if a lawyer is participating in interactive communication on the Internet, carrying on an immediate electronic conversation. If the communication was initiated by the lawyer without invitation, such "real time: communications about the lawyer's services would be analogous to direct solicitations, outside the activity permitted by MRPC 7.3.

Similarly, the West Virginia Lawyer Disciplinary Board stated in Opinion 98-03:

> The Board is of the opinion that solicitations via real time communications on the computer, such as a chat room, should be treated similar to telephone and in-person solicitations. Although this type of communication provides less opportunity for an attorney to pressure or coerce a potential client than do telephone or in-person solicitations, real time communication is potentially more immediate, more intrusive and more persuasive than e-mail or other forms of writing. Therefore, the Board considers

> Rule 7.3(a) to prohibit a lawyer from soliciting potential clients through real-time communications initiated by the lawyer.

***2** The Utah State Bar's Ethics Advisory Opinion Committee has likewise concluded that an attorney's use of a chat room for advertising and solicitation are considered to be in person communications for the purposes of its Rule 7.3(a) and, thus, restricted by that rule. Utah Ethics Opinion 97-10. The Virginia State Bar Advertising Committee's Lawyer Advertising Opinion A-0110 is in accord with this reasoning.

Other states have also recognized the dangers inherent in attorney participation in chat rooms. For example, the Philadelphia Bar Association, in Opinion 98-6, acknowledged that attorneys could not engage in any activity that would be improper solicitation. The Committee further stated, "In the opinion of the Committee, conversation interactions with persons on the Internet do not constitute improper solicitation, but in any one particular case the interaction may evolve in such a way that it could be characterized as such." The Illinois State Bar Association, in Ethics Opinion 96-10, has also stated:

> The Committee does not believe that merely posting general comments on a bulletin board or chat room should be considered solicitation. However, if a lawyer seeks to initiate an unrequested contact with a specific person or group as a result of participation in a bulletin board or chat group, then the lawyer would be subject to the requirements of Rule 4-7.3. For example, if the lawyer sends unrequested electronic messages (including messages in response to inquiries posted in chat groups) to a targeted person or group, the messages should be plainly identified as advertising material.

After considering the above opinions, the Standing Committee finds the reasoning of the opinions from Michigan, West Virginia, Utah and Virginia to be persuasive. The Standing Committee, therefore, finds that an attorney's participation in a chat room in order to solicit professional employment is prohibited by Rule 4-7.4(a).

This opinion should not be interpreted as suggesting that a lawyer cannot respond to specific requests for information about the lawyer or the lawyer's services in a chat room that were initiated by a prospective client and not at the prompting of the lawyer. A lawyer may also respond to the posting of a general question such as "Does anyone know a lawyer who handles X type of matter?" Only a lawyer's unsolicited offers to provide legal services or information about the lawyer's services are prohibited by Rule 4-7.4(a).

The Committee believes that the most likely type of question to which a lawyer will want to respond is one involving a specific legal issue, such as "I just received a speeding ticket - what should I do?" or "I have heard that I can avoid probate if I have a trust - is that true?" The Committee cautions lawyers that they may inadvertently form a lawyer-client relationship with a person by responding to specific legal inquiries, which will require that a lawyer comply with all Rules of Professional Conduct, including rules regarding conflicts of interest, confidentiality, competence, diligence, and avoiding engaging in the unlicensed practice of law. See, e.g., Florida Ethics Opinion 00-4. Although interpretation of these rules is outside the scope of the Committee's authority, the Committee feels obligated to point out that lawyers who engage in discussions in chat rooms may have other ethical obligations, regardless of whether the lawyer's communications are permissible under the lawyer advertising rules.

***3** Of course, any communication by a lawyer, regardless whether the lawyer is responding to a posting of another person, is subject to Rule 4-8.4(c), which prohibits conduct involving dishonesty or misrepresentation. Additionally, this opinion should not be construed so broadly as to prohibit a Florida

  

attorney from participating in chat rooms when it is *completely unrelated to seeking professional employment*, such as when the chat concerns the attorney's personal interests or hobbies. Nor should this opinion be construed as limiting an attorney's ability to send e-mail to prospective clients in accordance with Rule 4-7.6(c). Other communications about a lawyer's services over the Internet remain subject to the requirements of the rules regulating attorney advertising.

2010 WL 5393358 (Fla.St.Bar Assn.)

**End of Document**

West's Florida Statutes Annotated
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-1. Client-Lawyer Relationship

West's F.S.A. Bar Rule 4-1.6

Rule 4-1.6. Confidentiality of Information

Currentness

**(a) Consent Required to Reveal Information.** A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

**(b) When Lawyer Must Reveal Information.** A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

**(c) When Lawyer May Reveal Information.** A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with the Rules Regulating The Florida Bar; or

(6) to detect and resolve conflicts of interest between lawyers in different firms arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

  

**(d) Exhaustion of Appellate Remedies.** When required by a tribunal to reveal confidential information, a lawyer may first exhaust all appellate remedies.

**(e) Inadvertent Disclosure of Information.** A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

**(f) Limitation on Amount of Disclosure.** When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

**Credits**

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); Oct. 20, 1994 (644 So.2d 282); March. 23, 2006, effective May 22, 2006 (933 So.2d 417); May 29, 2014, effective June 1, 2014 (140 So.3d 541); June 11, 2015, effective Oct. 1, 2015 (167 So.3d 412).

**Editors' Notes**

**COMMENT**

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 4-1.9(c) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and rules 4-1.8(b) and 4-1.9(b) for the lawyer's duties with respect to the use of confidential information to the disadvantage of clients and former clients.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See terminology for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based on experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The

  

confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose confidential information except as authorized or required by the Rules Regulating The Florida Bar or by law. However, none of the foregoing limits the requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

**Authorized disclosure**

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

**Disclosure adverse to client**

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by the client is encouraged, several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In this situation the lawyer has not violated rule 4-1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer must reveal information in order to prevent these consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

Subdivision (b)(2) contemplates past acts on the part of a client that may result in present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule

  

4-1.6(b)(2) would now require the lawyer to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

**Withdrawal**

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8(b) nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b).

**Dispute concerning lawyer's conduct**

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure this advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, subdivision (c)(5) permits this disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of complicity has been made. Subdivision (c) does not require the lawyer to await the commencement of an action or proceeding that charges complicity, so that the defense may be established by responding directly to a third party who has made the assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

  

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. A charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subdivision (c) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

**Disclosures otherwise required or authorized**

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against a supersession.

**Detection of Conflicts of Interest**

Subdivision (c)(6) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, for example, when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See comment to rule 4-1.17. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. The disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, subdivision (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these rules.

  

Any information disclosed under this subdivision may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. This subdivision does not restrict the use of information acquired by means independent of any disclosure under this subdivision. This subdivision also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, for example, when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

**Acting Competently to Preserve Confidentiality**

Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See rules 4-1.1, 4-5.1 and 4-5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forgo security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, for example state and federal laws that govern data privacy or that impose notification requirements on the loss of, or unauthorized access to, electronic information, is beyond the scope of these rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see the comment to rule 4-5.3.

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule. Whether a lawyer may be required to take additional steps in order to comply with other law, for example state and federal laws that govern data privacy, is beyond the scope of these rules.

**Former client**

The duty of confidentiality continues after the client-lawyer relationship has terminated. See rule 4-1.9 for the prohibition against using such information to the disadvantage of the former client.

  

Notes of Decisions (62)

West's F. S. A. Bar Rule 4-1.6, FL ST BAR Rule 4-1.6
Florida Supreme Court Rules of Civil Procedure, Judicial Administration, Criminal Procedure, Civil Procedure for Involuntary Commitment of Sexually Violent Predators, Worker's Compensation, Probate, Traffic Court, Small Claims, Juvenile Procedure, Appellate Procedure, Certified and Court-Appointed Mediators, Court Appointed Arbitrators, Family Law, Certification and Regulation of Court Reporters, Certification of Spoken Language Interpreters, and Qualified and Court-Appointing Parenting Coordinators are current with amendments received through 08/15/16. All other State Court Rules are current with amendments received through 08/15/16.

**End of Document**

West's Florida Statutes Annotated
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-1. Client-Lawyer Relationship

West's F.S.A. Bar Rule 4-1.18

# Rule 4-1.18. Duties to Prospective Client

Currentness

**(a) Prospective Client.** A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

**(b) Confidentiality of Information.** Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client may not use or reveal that information, except as rule 4-1.9 would permit with respect to information of a former client.

**(c) Subsequent Representation.** A lawyer subject to subdivision (b) may not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be used to the disadvantage of that person in the matter, except as provided in subdivision (d). If a lawyer is disqualified from representation under this rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter, except as provided in subdivision (d).

**(d) Permissible Representation.** When the lawyer has received disqualifying information as defined in subdivision (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(A) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(B) written notice is promptly given to the prospective client.

**Credits**

Added March 23, 2006, effective May 22, 2006 (933 So.2d 417). Amended Nov. 19, 2009, effective Feb. 1, 2010 (24 So.3d 63); May 21, 2015, effective Oct. 1, 2015 (164 So.3d 1217).

  

**Editors' Notes**

**COMMENT**

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and the lawyer sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of subdivision (a).

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn this information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Subdivision (b) prohibits the lawyer from using or revealing that information, except as permitted by rule 4-1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial consultation to only information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under rule 4-1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See terminology for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Even in the absence of an agreement, under subdivision (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a

  

substantially related matter unless the lawyer has received from the prospective client information that could be used to the disadvantage of the prospective client in the matter.

Under subdivision (c), the prohibition in this rule is imputed to other lawyers as provided in rule 4-1.10, but, under subdivision (d)(1), the prohibition and its imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, the prohibition and its imputation may be avoided if the conditions of subdivision (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See terminology (requirements for screening procedures). Subdivision (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

The duties under this rule presume that the prospective client consults the lawyer in good faith. A person who consults a lawyer simply with the intent of disqualifying the lawyer from the matter, with no intent of possibly hiring the lawyer, has engaged in a sham and should not be able to invoke this rule to create a disqualification.

For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see rule 4-1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see chapter 5, Rules Regulating The Florida Bar.

Notes of Decisions (1)

West's F. S. A. Bar Rule 4-1.18, FL ST BAR Rule 4-1.18
Florida Supreme Court Rules of Civil Procedure, Judicial Administration, Criminal Procedure, Civil Procedure for Involuntary Commitment of Sexually Violent Predators, Worker's Compensation, Probate, Traffic Court, Small Claims, Juvenile Procedure, Appellate Procedure, Certified and Court-Appointed Mediators, Court Appointed Arbitrators, Family Law, Certification and Regulation of Court Reporters, Certification of Spoken Language Interpreters, and Qualified and Court-Appointing Parenting Coordinators are current with amendments received through 08/15/16. All other State Court Rules are current with amendments received through 08/15/16.

West's Florida Statutes Annotated
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-3. Advocate

West's F.S.A. Bar Rule 4-3.6

Rule 4-3.6. Trial Publicity

Currentness

**(a) Prejudicial Extrajudicial Statements Prohibited.** A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

**(b) Statements of Third Parties.** A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule.

**Credits**

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); Oct. 20, 1994 (644 So.2d 282).

**Editors' Notes**

**COMMENT**

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

Notes of Decisions (13)

West's F. S. A. Bar Rule 4-3.6, FL ST BAR Rule 4-3.6
Florida Supreme Court Rules of Civil Procedure, Judicial Administration, Criminal Procedure, Civil Procedure for Involuntary Commitment of Sexually Violent Predators, Worker's Compensation, Probate, Traffic Court, Small Claims, Juvenile Procedure, Appellate Procedure, Certified and Court-Appointed Mediators, Court Appointed Arbitrators, Family Law, Certification and Regulation of Court

  

Reporters, Certification of Spoken Language Interpreters, and Qualified and Court-Appointing Parenting Coordinators are current with amendments received through 08/15/16. All other State Court Rules are current with amendments received through 08/15/16.

**End of Document**

West's Florida Statutes Annotated
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-8. Maintaining the Integrity of the Profession

West's F.S.A. Bar Rule 4-8.4

Rule 4-8.4. Misconduct

Currentness

A lawyer shall not:

**(a)** violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

**(b)** commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

**(c)** engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule;

**(d)** 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, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;

**(e)** state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

**(f)** knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

**(g)** fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency, as defined elsewhere in these rules, when bar counsel or the agency is conducting an investigation into the lawyer's conduct. A written response shall be made:

  

(1) within 15 days of the date of the initial written investigative inquiry by bar counsel, grievance committee, or board of governors;

(2) within 10 days of the date of any follow-up written investigative inquiries by bar counsel, grievance committee, or board of governors;

(3) within the time stated in any subpoena issued under these Rules Regulating The Florida Bar (without additional time allowed for mailing);

(4) as provided in the Florida Rules of Civil Procedure or order of the referee in matters assigned to a referee; and

(5) as provided in the Florida Rules of Appellate Procedure or order of the Supreme Court of Florida for matters pending action by that court.

Except as stated otherwise herein or in the applicable rules, all times for response shall be calculated as provided elsewhere in these Rules Regulating The Florida Bar and may be extended or shortened by bar counsel or the disciplinary agency making the official inquiry upon good cause shown.

Failure to respond to an official inquiry with no good cause shown may be a matter of contempt and processed in accordance with rule 3-7.11(f) of these Rules Regulating The Florida Bar.

**(h)** willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation; or

**(i)** engage in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship.

If the sexual conduct commenced after the lawyer-client relationship was formed it shall be presumed that the sexual conduct exploits or adversely affects the interests of the client or the lawyer-client relationship. A lawyer may rebut this presumption by proving by a preponderance of the evidence that the sexual conduct did not exploit or adversely affect the interests of the client or the lawyer-client relationship.

The prohibition and presumption stated in this rule do not apply to a lawyer in the same firm as another lawyer representing the client if the lawyer involved in the sexual conduct does not personally provide legal services to the client and is screened from access to the file concerning the legal representation.

**Credits**

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); July 1, 1993 (621 So.2d 1032); July 1, 1993, eff. Jan. 1, 1994 (624 So.2d 720); Feb. 9, 1995 (649 So.2d 868); July 20, 1995 (658 So.2d 930); Sept. 24, 1998, effective Oct. 1, 1998 (718 So.2d 1179); Feb. 8, 2001 (795 So.2d 1); May 20, 2004 (875 So.2d 448); Oct. 6, 2005, effective Jan. 1, 2006 (916 So.2d 655); March 23, 2006, effective May 22, 2006 (933 So.2d 417); Nov. 19, 2009, effective Feb. 1, 2010 (24 So.3d 63).

  

**Editors' Notes**

**COMMENT**

Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Subdivision (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take, provided that the client is not used to indirectly violate the Rules of Professional Conduct.

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of rule 4-1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

Subdivision (c) recognizes instances where lawyers in criminal law enforcement agencies or regulatory agencies advise others about or supervise others in undercover investigations, and provides an exception to allow the activity without the lawyer engaging in professional misconduct. The exception acknowledges current, acceptable practice of these agencies. Although the exception appears in this rule, it is also applicable to rules 4-4.1 and 4-4.3. However, nothing in the rule allows the lawyer to engage in such conduct if otherwise prohibited by law or rule.

Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney.

  

The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, or agent and officer, director, or manager of a corporation or other organization.

A lawyer's obligation to respond to an inquiry by a disciplinary agency is stated in subdivision (g) of this rule and subdivision (h)(2) of rule 3-7.6. While response is mandatory, the lawyer may deny the charges or assert any available privilege or immunity or interpose any disability that prevents disclosure of a certain matter. A response containing a proper invocation thereof is sufficient under the Rules Regulating The Florida Bar. This obligation is necessary to ensure the proper and efficient operation of the disciplinary system.

Subdivision (h) of this rule was added to make consistent the treatment of attorneys who fail to pay child support with the treatment of other professionals who fail to pay child support, in accordance with the provisions of section 61.13015, Florida Statutes. That section provides for the suspension or denial of a professional license due to delinquent child support payments after all other available remedies for the collection of child support have been exhausted. Likewise, subdivision (h) of this rule should not be used as the primary means for collecting child support, but should be used only after all other available remedies for the collection of child support have been exhausted. Before a grievance may be filed or a grievance procedure initiated under this subdivision, the court that entered the child support order must first make a finding of willful refusal to pay. The child support obligation at issue under this rule includes both domestic (Florida) and out-of-state (URESA) child support obligations, as well as arrearages.

Subdivision (i) proscribes exploitation of the client or the lawyer-client relationship by means of commencement of sexual conduct. The lawyer-client relationship is grounded on mutual trust. A sexual relationship that exploits that trust compromises the lawyer-client relationship. Attorneys have a duty to exercise independent professional judgment on behalf of clients. Engaging in sexual relationships with clients has the capacity to impair the exercise of that judgment.

Sexual conduct between a lawyer and client violates this rule, regardless of when the sexual conduct began when compared to the commencement of the lawyer-client relationship, if the sexual conduct exploits the lawyer-client relationship, negatively affects the client's interest, creates a conflict of interest between the lawyer and client, or negatively affects the exercise of the lawyer's independent professional judgment in representing the client.

Subdivision (i) creates a presumption that sexual conduct between a lawyer and client exploits or adversely affects the interests of the client or the lawyer-client relationship if the sexual conduct is entered into after the lawyer-client relationship begins. A lawyer charged with a violation of this rule may rebut this presumption by a preponderance of the evidence that the sexual conduct did not exploit the lawyer-client relationship, negatively affect the client's interest, create a conflict of interest between the lawyer and client, or negatively affect the exercise of the lawyer's independent professional judgment in representing the client.

For purposes of this rule, a “representative of a client” is an agent of the client who supervises, directs, or regularly consults with the organization's lawyer concerning a client matter or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

  

Notes of Decisions (620)

West's F. S. A. Bar Rule 4-8.4, FL ST BAR Rule 4-8.4
Florida Supreme Court Rules of Civil Procedure, Judicial Administration, Criminal Procedure, Civil Procedure for Involuntary Commitment of Sexually Violent Predators, Worker's Compensation, Probate, Traffic Court, Small Claims, Juvenile Procedure, Appellate Procedure, Certified and Court-Appointed Mediators, Court Appointed Arbitrators, Family Law, Certification and Regulation of Court Reporters, Certification of Spoken Language Interpreters, and Qualified and Court-Appointing Parenting Coordinators are current with amendments received through 08/15/16. All other State Court Rules are current with amendments received through 08/15/16.

**End of Document**

West's Florida Statutes Annotated
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-7. Information About Legal Services (Refs & Annos)

West's F.S.A. Bar Rule 4-7.11

Rule 4-7.11. Application of Rules

Currentness

**(a) Type of Media.** Unless otherwise indicated, this subchapter applies to all forms of communication in any print or electronic forum, including but not limited to newspapers, magazines, brochures, flyers, television, radio, direct mail, electronic mail, and Internet, including banners, pop-ups, websites, social networking, and video sharing media. The terms “advertising” and “advertisement” as used in chapter 4-7 refer to all forms of communication seeking legal employment, both written and spoken.

**(b) Lawyers.** This subchapter applies to lawyers, whether or not admitted to practice in Florida or other jurisdictions, who advertise that the lawyer provides legal services in Florida or who target advertisements for legal employment at Florida residents. The term “lawyer” as used in subchapter 4-7 includes 1 or more lawyers or a law firm. This rule does not permit the unlicensed practice of law or advertising that the lawyer provides legal services that the lawyer is not authorized to provide in Florida.

**(c) Referral Sources.** This subchapter applies to communications made to referral sources about legal services.

  

West's Florida Statutes Annotated
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-7. Information About Legal Services (Refs & Annos)

West's F.S.A. Bar Rule 4-7.12

Rule 4-7.12. Required Content

Currentness

**(a) Name and Office Location.** All advertisements for legal employment must include:

(1) the name of at least 1 lawyer, the law firm, the lawyer referral service if the advertisement is for the lawyer referral service, or the lawyer directory if the advertisement is for the lawyer directory, responsible for the content of the advertisement; and

(2) the city, town, or county of 1 or more bona fide office locations of the lawyer who will perform the services advertised.

**(b) Referrals.** If the case or matter will be referred to another lawyer or law firm, the advertisement must include a statement to such effect.

**(c) Languages Used in Advertising.** Any words or statements required by this subchapter to appear in an advertisement must appear in the same language in which the advertisement appears. If more than 1 language is used in an advertisement, any words or statements required by this subchapter must appear in each language used in the advertisement.

**(d) Legibility.** Any information required by these rules to appear in an advertisement must be reasonably prominent and clearly legible if written, or intelligible if spoken.

**Credits**
Added Jan. 31, 2013, effective May 1, 2013 (108 So.3d 609).

  

 KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedHeld Unconstitutional by Rubenstein v. Florida Bar, S.D.Fla., Dec. 09, 2014



West's F.S.A. Bar Rule 4-7.13

Rule 4-7.13. Deceptive and Inherently Misleading Advertisements

Currentness

A lawyer may not engage in deceptive or inherently misleading advertising.

**(a) Deceptive and Inherently Misleading Advertisements.** An advertisement is deceptive or inherently misleading if it:

(1) contains a material statement that is factually or legally inaccurate;

(2) omits information that is necessary to prevent the information supplied from being misleading; or

(3) implies the existence of a material nonexistent fact.

**(b) Examples of Deceptive and Inherently Misleading Advertisements.** Deceptive or inherently misleading advertisements include, but are not limited to advertisements that contain:

(1) statements or information that can reasonably be interpreted by a prospective client as a prediction or guaranty of success or specific results;

(2) references to past results unless such information is objectively verifiable, subject to rule 4-7.14;

(3) comparisons of lawyers or statements, words or phrases that characterize a lawyer's or law firm's skills, experience, reputation or record, unless such characterization is objectively verifiable;

(4) references to areas of practice in which the lawyer or law firm does not practice or intend to practice at the time of the advertisement;

(5) a voice or image that creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee of the advertising firm. The following notice, prominently displayed would resolve the erroneous impression: “Not an employee or member of law firm”;

  

(6) a dramatization of an actual or fictitious event unless the dramatization contains the following prominently displayed notice: "DRAMATIZATION. NOT AN ACTUAL EVENT." When an advertisement includes an actor purporting to be engaged in a particular profession or occupation, the advertisement must include the following prominently displayed notice: "ACTOR. NOT ACTUAL [ .... ]";

(7) statements, trade names, telephone numbers, Internet addresses, images, sounds, videos or dramatizations that state or imply that the lawyer will engage in conduct or tactics that are prohibited by the Rules of Professional Conduct or any law or court rule;

(8) a testimonial:

(A) regarding matters on which the person making the testimonial is unqualified to evaluate;

(B) that is not the actual experience of the person making the testimonial;

(C) that is not representative of what clients of that lawyer or law firm generally experience;

(D) that has been written or drafted by the lawyer;

(E) in exchange for which the person making the testimonial has been given something of value; or

(F) that does not include the disclaimer that the prospective client may not obtain the same or similar results;

(9) a statement or implication that The Florida Bar has approved an advertisement or a lawyer, except a statement that the lawyer is licensed to practice in Florida or has been certified pursuant to chapter 6, Rules Regulating the Florida Bar; or

(10) a judicial, executive, or legislative branch title, unless accompanied by clear modifiers and placed subsequent to the person's name, in reference to a current, former or retired judicial, executive, or legislative branch official currently engaged in the practice of law. For example, a former judge may not state "Judge Doe (retired)" or "Judge Doe, former circuit judge." She may state "Jane Doe, Florida Bar member, former circuit judge" or "Jane Doe, retired circuit judge ...."

  

 KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedHeld Unconstitutional by Rubenstein v. Florida Bar, S.D.Fla., Dec. 09, 2014

West's Florida Statutes Annotated
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-7. Information About Legal Services (Refs & Annos)

West's F.S.A. Bar Rule 4-7.14

Rule 4-7.14. Potentially Misleading Advertisements

Currentness

A lawyer may not engage in potentially misleading advertising.

**(a) Potentially Misleading Advertisements.** Potentially misleading advertisements include, but are not limited to:

(1) advertisements that are subject to varying reasonable interpretations, 1 or more of which would be materially misleading when considered in the relevant context;

(2) advertisements that are literally accurate, but could reasonably mislead a prospective client regarding a material fact;

(3) references to a lawyer's membership in, or recognition by, an entity that purports to base such membership or recognition on a lawyer's ability or skill, unless the entity conferring such membership or recognition is generally recognized within the legal profession as being a bona fide organization that makes its selections based upon objective and uniformly applied criteria, and that includes among its members or those recognized a reasonable cross-section of the legal community the entity purports to cover;

(4) a statement that a lawyer is board certified, a specialist, an expert, or other variations of those terms unless:

(A) the lawyer has been certified under the Florida Certification Plan as set forth in chapter 6, Rules Regulating the Florida Bar and the advertisement includes the area of certification and that The Florida Bar is the certifying organization;

(B) the lawyer has been certified by an organization whose specialty certification program has been accredited by the American Bar Association or The Florida Bar as provided elsewhere in these rules. A lawyer certified by a specialty certification program accredited by the American Bar Association but not The Florida Bar must include the statement "Not Certified as a Specialist by The Florida Bar" in reference to the specialization or certification. All such advertisements must include the area of certification and the name of the certifying organization; or

  

(C) the lawyer has been certified by another state bar if the state bar program grants certification on the basis of standards reasonably comparable to the standards of the Florida Certification Plan set forth in chapter 6 of these rules and the advertisement includes the area of certification and the name of the certifying organization.

In the absence of such certification, a lawyer may communicate the fact that the lawyer limits his or her practice to 1 or more fields of law; or

(5) information about the lawyer's fee, including those that indicate no fee will be charged in the absence of a recovery, unless the advertisement discloses all fees and expenses for which the client might be liable and any other material information relating to the fee. A lawyer who advertises a specific fee or range of fees for a particular service must honor the advertised fee or range of fees for at least 90 days unless the advertisement specifies a shorter period; provided that, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees must be honored for no less than 1 year following publication.

**(b) Clarifying Information.** A lawyer may use an advertisement that would otherwise be potentially misleading if the advertisement contains information or statements that adequately clarify the potentially misleading issue.

  

West's Florida Statutes Annotated
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Chapter 4. Rules of Professional Conduct (Refs & Annos)
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West's F.S.A. Bar Rule 4-7.15

# Rule 4-7.15. Unduly Manipulative or Intrusive Advertisements

Currentness

A lawyer may not engage in unduly manipulative or intrusive advertisements. An advertisement is unduly manipulative if it:

**(a)** uses an image, sound, video or dramatization in a manner that is designed to solicit legal employment by appealing to a prospective client's emotions rather than to a rational evaluation of a lawyer's suitability to represent the prospective client;

**(b)** uses an authority figure such as a judge or law enforcement officer, or an actor portraying an authority figure, to endorse or recommend the lawyer or act as a spokesperson for the lawyer;

**(c)** contains the voice or image of a celebrity, except that a lawyer may use the voice or image of a local announcer, disc jockey or radio personality who regularly records advertisements so long as the person recording the announcement does not endorse or offer a testimonial on behalf of the advertising lawyer or law firm; or

**(d)** offers consumers an economic incentive to employ the lawyer or review the lawyer's advertising; provided that this rule does not prohibit a lawyer from offering a discounted fee or special fee or cost structure as otherwise permitted by these rules and does not prohibit the lawyer from offering free legal advice or information that might indirectly benefit a consumer economically.

  

West's Florida Statutes Annotated
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4-7. Information About Legal Services (Refs & Annos)

West's F.S.A. Bar Rule 4-7.16

Rule 4-7.16. Presumptively Valid Content

Currentness

The following information in advertisements is presumed not to violate the provisions of rules 4-7.11 through 4-7.15:

**(a) Lawyers and Law Firms.** A lawyer or law firm may include the following information in advertisements and unsolicited written communications:

(1) the name of the lawyer or law firm subject to the requirements of this rule and rule 4-7.21, a listing of lawyers associated with the firm, office locations and parking arrangements, disability accommodations, telephone numbers, website addresses, and electronic mail addresses, office and telephone service hours, and a designation such as “attorney” or “law firm”;

(2) date of admission to The Florida Bar and any other bars, current membership or positions held in The Florida Bar or its sections or committees or those of other state bars, former membership or positions held in The Florida Bar or its sections or committees with dates of membership or those of other state bars, former positions of employment held in the legal profession with dates the positions were held, years of experience practicing law, number of lawyers in the advertising law firm, and a listing of federal courts and jurisdictions other than Florida where the lawyer is licensed to practice;

(3) technical and professional licenses granted by the state or other recognized licensing authorities and educational degrees received, including dates and institutions;

(4) military service, including branch and dates of service;

(5) foreign language ability;

(6) fields of law in which the lawyer practices, including official certification logos, subject to the requirements of subdivision (a)(4) of rule 4-7.14 regarding use of terms such as certified, specialist, and expert;

(7) prepaid or group legal service plans in which the lawyer participates;

  

(8) acceptance of credit cards;

(9) fee for initial consultation and fee schedule, subject to the requirements of subdivisions (a)(5) of rule 4-7.14 regarding cost disclosures and honoring advertised fees;

(10) common salutary language such as "best wishes," "good luck," "happy holidays," "pleased to announce," or "proudly serving your community";

(11) punctuation marks and common typographical marks;

(12) an illustration of the scales of justice not deceptively similar to official certification logos or The Florida Bar logo, a gavel, traditional renditions of Lady Justice, the Statue of Liberty, the American flag, the American eagle, the State of Florida flag, an unadorned set of law books, the inside or outside of a courthouse, column(s), diploma(s), or a photograph of the lawyer or lawyers who are members of, or employed by, the firm against a plain background such as a plain unadorned office or a plain unadorned set of law books.

**(b) Lawyer Referral Services.** A lawyer referral service may advertise its name, location, telephone number, the referral fee charged, its hours of operation, the process by which referrals are made, the areas of law in which referrals are offered, the geographic area in which the lawyers practice to whom those responding to the advertisement will be referred. A lawyer referral service approved by The Florida Bar under chapter 8 of the Rules Regulating the Florida Bar may advertise the logo of its sponsoring bar association and its nonprofit status.

  

West's Florida Statutes Annotated
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Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-7. Information About Legal Services (Refs & Annos)

West's F.S.A. Bar Rule 4-7.17

Rule 4-7.17. Payment for Advertising and Promotion

Currentness

**(a) Payment by Other Lawyers.** No lawyer may, directly or indirectly, pay all or a part of the cost of an advertisement by a lawyer not in the same firm. Rule 4-1.5(f)(4)(D) (regarding the division of contingency fees) is not affected by this provision even though the lawyer covered by subdivision (f)(4)(D)(ii) of rule 4-1.5 advertises.

**(b) Payment for Referrals.** A lawyer may not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising permitted by these rules, may pay the usual charges of a lawyer referral service, lawyer directory or other legal service organization, and may purchase a law practice in accordance with rule 4-1.17.

**(c) Payment by Nonlawyers.** A lawyer may not permit a nonlawyer to pay all or a part of the cost of an advertisement by that lawyer.

  

West's Florida Statutes Annotated
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4-7. Information About Legal Services (Refs & Annos)

West's F.S.A. Bar Rule 4-7.18

Rule 4-7.18. Direct Contact with Prospective Clients

Currentness

**(a) Solicitation.** Except as provided in subdivision (b) of this rule, a lawyer may not:

(1) solicit, or permit employees or agents of the lawyer to solicit on the lawyer's behalf, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication, including any electronic mail communication, directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule and rules 4-7.11 through 4-7.17 of these rules.

(2) enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule.

**(b) Written Communication.**

(1) A lawyer may not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication directly or indirectly to a prospective client for the purpose of obtaining professional employment if:

(A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication;

(B) the written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter;

(C) it has been made known to the lawyer that the person does not want to receive such communications from the lawyer;

  

(D) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;

(E) the communication violates rules 4-7.11 through 4-7.17 of these rules;

(F) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer; or

(G) the communication concerns a request for an injunction for protection against any form of physical violence and is addressed to the respondent in the injunction petition, if the lawyer knows or reasonably should know that the respondent named in the injunction petition has not yet been served with notice of process in the matter.

(2) Written communications to prospective clients for the purpose of obtaining professional employment that are not prohibited by subdivision (b)(1) are subject to the following requirements:

(A) Such communications are subject to the requirements of 4-7.11 through 4-7.17 of these rules.

(B) Each page of such communication and the face of an envelope containing the communication must be reasonably prominently marked "advertisement" in ink that contrasts with both the background it is printed on and other text appearing on the same page. If the written communication is in the form of a self-mailing brochure or pamphlet, the "advertisement" mark must be reasonably prominently marked on the address panel of the brochure or pamphlet and on each panel of the inside of the brochure or pamphlet. If the written communication is sent via electronic mail, the subject line must begin with the word "Advertisement." Brochures solicited by clients or prospective clients need not contain the "advertisement" mark.

(C) Every written communication must be accompanied by a written statement detailing the background, training and experience of the lawyer or law firm. This statement must include information about the specific experience of the advertising lawyer or law firm in the area or areas of law for which professional employment is sought. Every written communication disseminated by a lawyer referral service must be accompanied by a written statement detailing the background, training, and experience of each lawyer to whom the recipient may be referred.

(D) If a contract for representation is mailed with the written communication, the top of each page of the contract must be marked "SAMPLE" in red ink in a type size one size larger than the largest type used in the contract and the words "DO NOT SIGN" must appear on the client signature line.

(E) The first sentence of any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member must be: "If you have already retained a lawyer for this matter, please disregard this letter."

  

(F) Written communications must not be made to resemble legal pleadings or other legal documents.

(G) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any written communication concerning a specific matter must include a statement so advising the client.

(H) Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member must disclose how the lawyer obtained the information prompting the communication. The disclosure required by this rule must be specific enough to enable the recipient to understand the extent of the lawyer's knowledge regarding the recipient's particular situation.

(I) A written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.

(3) The requirements in subdivision (b)(2) of this rule do not apply to communications between lawyers, between lawyers and their own current and former clients, or between lawyers and their own family members.

  

West's Florida Statutes Annotated
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4-7. Information About Legal Services (Refs & Annos)

West's F.S.A. Bar Rule 4-7.21

Rule 4-7.21. Firm Names and Letterhead

Currentness

**(a) False, Misleading, or Deceptive Firm Names.** A lawyer may not use a firm name, letterhead, or other professional designation that violates rules 4-7.11 through 4-7.15.

**(b) Trade Names.** A lawyer may practice under a trade name if the name is not deceptive and does not imply a connection with a government agency or with a public or charitable legal services organization, does not imply that the firm is something other than a private law firm, and is not otherwise in violation of rules 4-7.11 through 4-7.15. A lawyer in private practice may use the term "legal clinic" or "legal services" in conjunction with the lawyer's own name if the lawyer's practice is devoted to providing routine legal services for fees that are lower than the prevailing rate in the community for those services.

**(c) Advertising Under Trade Names.** A lawyer may not advertise under a trade or fictitious name, except that a lawyer who actually practices under a trade name as authorized by subdivision (b) may use that name in advertisements. A lawyer who advertises under a trade or fictitious name is in violation of this rule unless the same name is the law firm name that appears on the lawyer's letterhead, business cards, office sign, and fee contracts, and appears with the lawyer's signature on pleadings and other legal documents.

**(d) Law Firm with Offices in Multiple Jurisdictions.** A law firm with offices in more than 1 jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm must indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

**(e) Name of Public Officer in Firm Name.** The name of a lawyer holding a public office may not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

**(f) Partnerships and Business Entities.** A name, letterhead, business card or advertisement may not imply that lawyers practice in a partnership or authorized business entity when they do not.

**(g) Insurance Staff Attorneys.** Where otherwise consistent with these rules, lawyers who practice law as employees within a separate unit of a liability insurer representing others pursuant to policies of liability insurance may practice under a name that does not constitute a material misrepresentation. In order for the use of a name other than the name of the insurer not to constitute a material misrepresentation, all lawyers in the unit must comply with all of the following:

  

(1) the firm name must include the name of a lawyer who has supervisory responsibility for all lawyers in the unit;

(2) the office entry signs, letterhead, business cards, websites, announcements, advertising, and listings or entries in a law list or bar publication bearing the name must disclose that the lawyers in the unit are employees of the insurer;

(3) the name of the insurer and the employment relationship must be disclosed to all insured clients and prospective clients of the lawyers, and must be disclosed in the official file at the lawyers' first appearance in the tribunal in which the lawyers appear under such name;

(4) the offices, personnel, and records of the unit must be functionally and physically separate from other operations of the insurer to the extent that would be required by these rules if the lawyers were private practitioners sharing space with the insurer; and

(5) additional disclosure should occur whenever the lawyer knows or reasonably should know that the lawyer's role is misunderstood by the insured client or prospective clients.

  

FL Eth. Op. 07-3 (Fla.St.Bar Assn.), 2009 WL 799069

Florida State Bar Association
Committee on Professional Ethics


Opinion Number 07-3
January 16, 2009

A person seeking legal services who sends information unilaterally to a lawyer has no reasonable expectation of confidentiality regarding that information. A lawyer who receives information unilaterally from a person seeking legal services is not a prospective client within Rule 4-1.18, has no conflict of interest if already representing or is later asked to represent an adversary, and may use or disclose the information. If the lawyer agrees to consider representing the person or discussed the possibility of representation with the person, the person is a prospective client under Rule 4-1.18, and the lawyer does owe a duty of confidentiality which may create a conflict of interest for the lawyer. Lawyers should post a statement on their websites that the lawyer does not intend to treat as confidential information sent to the lawyer via the website, and that such information could be used against the person by the lawyer in the future.

***1 RPC: Preamble, 4-1.18**

**OPINIONS: 66-23 [since withdrawn], Arizona 02-04, California Formal Opinion 2005-168, New York City Bar Association 2001-1, San Diego County Bar Association 2006-1**

The Professional Ethics Committee has been asked by The Florida Bar Board of Governors to provide guidance to Florida Bar members regarding the issue of unilateral communications to lawyers from or on behalf of persons seeking legal representation. This issue is one of interest generally, particularly with advances in technology, because persons seeking legal representation are easily able to send information to lawyers electronically and via telephone message with the ability to provide large amounts of information regardless of whether the lawyer requested the information or even agreed to consider representing the person. Questions arising from this situation include whether the recipient lawyer has a duty of confidentiality regarding information received unilaterally from a person and whether receipt of the information may create a conflict of interest for the lawyer in continuing or beginning representation of an adversary of the person sending the information. This opinion addresses unilateral communications, including but not limited to electronic mail, regular mail, telephone message and facsimile, and does not address bilateral discussions between lawyers and persons seeking legal representation.

The preamble to the Rules of Professional Conduct, Rules Regulating The Florida Bar, provide as follows:

> [F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under rule 4-1.6, which attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See rule 4-1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

***2** Rule 4-1.18, adopted by the Supreme Court of Florida in 2006, defines a prospective client in subdivision (a) as "A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." Subdivision (b) provides that "Even when no client-lawyer

relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as rule 4-1.9 would permit with respect to information of a former client." The comment to Rule 4-1.18 provides as follows:

> Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of subdivision (a).

Florida Ethics Opinion 66-23, written before the adoption of Rule 4-1.18, concludes that a lawyer must treat as confidential information from a person seeking legal representation even if unsolicited, unless it is clear from the circumstances that the person had no expectation of confidentiality.

There are few other state bars that have addressed this issue recently. Arizona Ethics Opinion 02-04 (September 2002) concludes that an attorney owes no duty of confidentiality to persons who send unsolicited e-mails to attorney and may disclose and otherwise use such information, but law firm websites should include disclaimers indicating whether the law firm will treat e-mails as confidential information. New York City Bar Association Ethics Opinion 2001-1 (March 1, 2001) provides that a lawyer is not disqualified from representation of an existing client when the lawyer receives an unsolicited e-mail from an adverse party, but that the lawyer may not use or disclose that information if the lawyer's website has not adequately disclosed that the law firm will not treat such communications as confidential. San Diego County Bar Association Ethics Opinion 2006-1 concludes that a lawyer does not owe a duty of confidentiality to a person who sends unsolicited information to the lawyer and may use the information received unsolicited from another in the representation of an existing client. The State Bar of California has gone so far as to conclude that a lawyer can invite persons to provide information to the lawyer via e-mail or other form of electronic communication via the lawyer's website with no duty of confidentiality attaching if the lawyer provides a clear disclaimer that he or she will not treat the information provided as confidential. *See* California Formal Ethics Opinion 2005-168 (2005).

The committee generally agrees with the rationale of the state bars that have addressed this issue. The committee's opinion is that a person has no reasonable expectation that a lawyer will keep confidential information that is sent by that person unilaterally. The committee concludes that such a person is not a "prospective client" within the meaning of Rule 4-1.18, because the lawyer has not discussed the possibility of representation with the person. The lawyer therefore will not have a conflict of interest in representing the adversary of a person who has sent information to the lawyer unilaterally, and the lawyer may disclose or use that information in the representation of the adversary. On the other hand, if the lawyer has discussed the possibility of representation with a person or agreed to consider representing the person, that person is a "prospective client" under Rule 4-1.18, and the lawyer therefore owes the person a duty of confidentiality which may create a conflict of interest in representation of an adversary. In adopting this opinion, the committee withdraws Florida Ethics Opinion 66-23. This opinion addresses only unilateral communications. The committee recommends that lawyers who invite persons seeking legal representation to provide information via the lawyer's website, and do not intend for the information to be treated as confidential, should prominently post a disclosure statement. The disclosure statement should inform the invitees that the lawyer does not intend to treat such information as confidential, that no confidential information should be disclosed, and that the information provided through the website could be used in the future against the person.

FL Eth. Op. 07-3 (Fla.St.Bar Assn.), 2009 WL 799069

  

End of Document

# The Florida Bar Standing Committee on Advertising
# Guidelines for Networking Sites

**(Revised May 9, 2016)**

Networking sites accessed over the Internet have proliferated in the last several years. There are numerous networking sites of various types. Some networking sites were designed for social purposes, such as Facebook, MySpace, and Twitter. Notwithstanding their origins as social media, many use these social networking sites for commercial purposes. Other networking sites are specifically intended for commercial purposes, such as LinkedIn. In a networking site, a person has the capability of building a profile that includes information about that person. That profile is commonly referred to as the individual's "page." The individual chooses how much of the information on his or her page, if any, is available to all viewers of the site. Some individuals provide access to no information about themselves except to those other individuals that are invited to view the information. Others provide full access to all information about themselves to anyone on the networking site. Others provide access to some information for everyone, but limit access to other information only to those invited to view the information. Additionally, some individuals set their pages to permit posting of information by third parties. Networking sites provide methods by which users of the site may interact with one another, including e-mail and instant messaging. Twitter is a networking site in which brief posts of no more than 140 characters are sent to followers, or persons who have specifically requested to receive the postings of particular persons on Twitter. Twitter postings are generally public, but a person who posts via Twitter can choose to have Twitter postings sent only to that person's followers and not generally accessible to the public.

The SCA has reviewed the networking media, and issues the following guidelines for lawyers using them.

Pages of individual lawyers on social networking sites that are used solely for social purposes, to maintain social contact with family and close friends, are not subject to the lawyer advertising rules.

Pages appearing on networking sites that are used to promote the lawyer or law firm's practice are subject to the lawyer advertising rules. These pages must therefore comply with all of the general regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21. Regulations include prohibitions against any misleading information, which includes references to past results that are not objectively verifiable, predictions or guaranties of results, and testimonials that fail to comply with the requirements listed in Rule 4-7.13(b)(8). Regulations also include prohibitions against statements characterizing skills, experience, reputation or record unless they are objectively verifiable. Lawyers and law firms should review the lawyer advertising rules in their entirety to comply with their requirements. Additional information is available in the *Handbook on Lawyer Advertising and Solicitation* on the Florida Bar website.

Invitations sent directly from a social media site via instant messaging 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 must meet the requirements for written solicitations under Rule 4-7.18(b), unless the recipient is the lawyer's current client, former client, relative, has a prior professional relationship with the lawyer, or is another lawyer. Any invitations to view the page sent via e-mail must comply with the direct e-mail rules if they are sent to persons who are not current clients, former clients, relatives, other lawyers, persons who have requested information from the lawyer, or persons with whom the lawyer has a prior professional relationship. Instant messages and direct e-mail must comply with the general advertising regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21 as well as additional requirements set forth in Rule 4-7.18(b). Information on complying with the direct e-mail rules is available in the *Handbook on Lawyer Advertising and Solicitation* and in the Direct E-Mail Quick Reference Checklist on the Florida Bar website.

Although lawyers are responsible for all content that the lawyers post on their own pages, a lawyer is not responsible for information posted on the lawyer's page by a third party, unless the lawyer prompts the third party to post the information or the lawyer uses the third party to circumvent the lawyer advertising rules. If a third party posts information on the lawyer's page about the lawyer's services that does not comply with the lawyer advertising rules, the lawyer must remove the information from the lawyer's page. If the lawyer becomes aware that a third party has posted information about the lawyer's services on a page not controlled by the lawyer that does not comply with the lawyer advertising rules, the lawyer should ask the third party to remove the non-complying information. In such a situation, however, the lawyer is not responsible if the third party does not comply with the lawyer's request.

Lawyers who post information to Twitter whose postings are generally accessible are subject to the lawyer advertising regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21 as above. A lawyer may post information via Twitter and may restrict access to the posts to the lawyer's followers, who are persons who have specifically signed up to receive posts from that lawyer. If access to a lawyer's Twitter postings is restricted to the followers of the particular lawyer, the information posted there is information at the request of a prospective client and is subject to the lawyer advertising rules, but is exempt from the filing requirement under Rule 4-7.20(e). Any communications that a lawyer makes on an unsolicited basis to prospective clients to obtain "followers" is subject to the lawyer advertising rules, as with any other social media as noted above. Because of Twitter's 140 character limitation, lawyers may use commonly recognized abbreviations for the required geographic disclosure of a bona fide office location by city, town or county as required by Rule 4-7.12(a).

Finally, the SCA is of the opinion that a page on a networking site is sufficiently similar to a website of a lawyer or law firm that pages on networking sites are not required to be filed with The Florida Bar for review.

In contrast with a lawyer's page on a networking site, a banner advertisement posted by a lawyer on a social networking site is subject not only to the requirements of Rules 4-7.11 through 4-7.18 and 4-7.21, but also must be filed for review unless the content of the advertisement is limited to the safe harbor information listed in Rule 4-7.16. See Rules 4-7.19 and 4-7.20(a).

# QUICK REFERENCE CHECKLIST - ELECTRONIC MAIL

The following quick reference checklist is intended to assist advertising lawyers in developing advertisements that comply with the lawyer advertising rules. It is not a substitute for filing the advertisement as required by Rule 4-7.19. Furthermore, even if all the questions are answered NO, it does not mean the advertisement complies with the lawyer advertising rules.

If the answer to any of the following questions is YES, the advertisement does not comply with the lawyer advertising rules, subchapter 4-7, Rules Regulating The Florida Bar.

- Does the advertisement fail to contain the name of at least one lawyer, the law firm or lawyer referral service responsible for the advertisement? Is the name illegible or not reasonably prominent? Rules 4-7.12(a)(1) and Rule 4-7.12(d)

- Does the advertisement fail to disclose the city, town or county of at least one bona fide office location of the advertising lawyer? Is the geographic disclosure illegible or not reasonably prominent? Rules 4-7.12(a)(2) and 4-7.12(d)

- Does the advertisement fail to disclose that the case or matter will be referred to another lawyer or law firm if that is the case? Rule 4-7.12(b) Is this disclosure illegible or not reasonably prominent? Rule 4-7.12(d) If the advertisement appears in a language other than English, does the disclosure fail to appear in that language? Rule 4-7.12(c)

- Does the advertisement contain any aspect that is misleading or deceptive? Rule 4-7.13(a)

- Does the advertisement contain any material statements that are factually or legally inaccurate? Rule 4-7.13(a)(1)

- Does the advertisement omit any information necessary to prevent it from misleading consumers? Rule 4-7.13(a)(2)

- Does the advertisement contain any information that can reasonably be interpreted as a prediction or guaranty of success or specific results? Rule 4-7.13(b)(1)

- Does the advertisement contain any references to past results that are not objectively verifiable, that omit material information or that are "literally accurate, but could reasonably mislead a prospective client regarding a material fact?" Rules 4-7.13(a)(2) and (b)(2) and Rules 4-7.14(a)(2)

- Does the advertisement contain any statements that compare or characterize the lawyer or law firm's skills, experience, reputation or record that are not objectively verifiable? Rule 4-7.13(b)(3)

- Does the lawyer advertise for legal employment in an area of practice in which the lawyer does not currently practice? Rule 4-7.13(b)(4)

- Does the advertisement include the voice or image of a person appearing to be a member or employee of the law firm, if the person is not, without a prominent disclaimer "Not an employee or member of law firm"? Rule 4-7.13(b)(5) Is the disclosure illegible or not reasonably prominent? Rule 4-7.12(d) Does the disclosure fail to appear in the same language used in the advertisement? Rule 4-7.12(c)

- Does the advertisement include a dramatization of a real or fictitious event without the prominent disclaimer "DRAMATIZATION. NOT AN ACTUAL EVENT."? Rule 4-7.13(b)(6) Is the disclosure illegible or not reasonably prominent? Rule 4-7.12(d) Does the disclosure fail to appear in the same language used in the advertisement? Rule 4-7.12(c)

- Does the advertisement include an actor portraying a person in a specific profession or occupation without the prominent disclaimer "ACTOR. NOT ACTUAL [profession or occupation.]"? Rule 4-7.13(b)(6) Is the disclosure illegible or not reasonably prominent? Rule 4-7.12(d) Does the disclosure fail to appear in the same language used in the advertisement? Rule 4-7.12(c)

- Does the advertisement include any feature that states or implies that the lawyer will engage in conduct or tactics prohibited by law, court rule, or the Rules of Professional Conduct? Rule 4-7.13(b)(7)

- Does the advertisement contain any testimonials or endorsements that the person offering the testimonial is not qualified to make, that is not the actual experience of the person, that the person has received something of value for giving, that is not representative of the general experience of that lawyer or firm's clients, that the lawyer has written or drafted, or that does not include a disclaimer that prospective clients may not receive the same or similar results? Rule 4-7.13(b)(8) Is the disclosure illegible or not reasonably prominent? Rule 4-7.12(d) Does the disclosure fail to appear in the same language used in the testimonial? Rule 4-7.12(c)

- Does the advertisement state or imply that the advertisement, the advertising lawyer, or the advertising lawyer referral service is approved by The Florida Bar? Rule 4-7.13(b)(9)

- Does the advertisement include the name of a former judge preceded by the title judge (e.g., Judge Smith, retired)? Rule 4-7.13(b)(10)

- Does the advertisement include the name of a former executive official preceded by the executive title (e.g., Governor Smith, former)? Rule 4-7.13(b)(10)

- Does the advertisement include the name of a former legislator preceded by the legislative title (e.g., Sen. Smith, 2008-2012)? Rule 4-7.13(b)(10)

- Does the advertisement include any reference to membership or recognition by an entity that is not generally recognized within the legal professional as a bona fide organization that bases selection on objective and uniformly applied criteria? Rule 4-7.14(a)(3)

- Only lawyers who are board certified in a particular area of the law can claim to be certified or board certified. Lawyers who are board certified can make that claim only in the area(s) of law in which they are certified. A law firm cannot claim certification. A board certified lawyer must include the certifying organization and area of certification in an advertisement in which the lawyer is claiming certification. Lawyers and law firms claiming specialization or expertise in an area of law must be able to objectively verify those claims.

    - Does the advertising lawyer who is not board certified claim certification in an area of law? Rule 4-7.14(a)(4)

    - Does the advertising lawyer who is board certified claim a certification in an area of law other than that in which he or she is board certified? Rules 4-7.14(a)(4) and 6-3.9(a)

    - Does the advertising law firm claim a certification? Rules 6-3.4(c), 6-3.9(b), and 4-7.14(a)(4)

    - Does the advertisement fail to include the name of the certifying organization and area of certification? Rule 4-7.14(a)(4)

    - Does the advertisement include the a claim of specialization, expertise, or variations of those terms that cannot be objectively verified?

- If the advertisement quotes a fee, does it fail to disclose whether the client will be responsible for any costs or expenses in addition to the advertised fee? Rule 4-7.14(a)(5) Is the cost disclosure illegible or not reasonably prominent? Rule 4-7.12(d) If the advertisement appears in a language other than English, does the cost disclosure fail to appear in that language? Rule 4-7.12(c)

- If the advertisement states that the lawyer will not receive a fee unless a recovery is obtained, does the advertisement fail to disclose whether or not the client will be responsible for costs or expenses in the absence of a recovery? Rule 4-7.14(a)(5) Is the cost disclosure illegible? or not reasonably prominent Rule 4-7.12(d) If the information about fees appears in a language other than English, does the cost disclosure fail to appear in the same language? Rule 4-7.12(c)

- Does the advertisement include any image, sound, video or dramatization that solicits legal employment by appealing to a prospective client's emotions rather than to a rational evaluation of a lawyer's suitability to represent the prospective client? Rule 4-7.15(a)

- Does the advertisement use a judge or an actor portraying a judge to endorse or act as a spokesperson for the lawyer or law firm? Rule 4-7.15(b)

- Does the advertisement use a law enforcement officer or an actor portraying a law enforcement officer to endorse or act as a spokesperson for the lawyer or law firm? Rule 4-7.15(b)

- Does the advertisement contain the voice or image of a celebrity? Rule 4-7.15(c)

- Does the advertisement offer an economic incentive such as a give-away to hire the lawyer or review the advertisement? Rule 4-7.15(d)

- Has the advertisement been paid for by another lawyer who is not in the same firm as the advertising lawyer? Rule 4-7.17(a)

- Has the advertisement been paid for by a nonlawyer? Rule 4-7.17(c)

- If the advertising law firm employs a fictitious or trade name, does the fictitious or trade name fail to appear on all the firm's advertising, letterhead, business cards, office sign, pleadings, and other firm documents? Rule 4-7.21(c)

- Does the e-mail fail contain a subject line that begins with the word “ADVERTISEMENT"? Rule 4 7.18(b)(2)(B) Is the word “ADVERTISEMENT” in the subject line illegible or not reasonably prominent? Rule 4-7.12(d) If the advertisement appears in a language other than English, does the word “ADVERTISEMENT” fail to appear in that language? Rule 4-7.12(c)

- Does the e-mail fail to include a written statement of the advertising lawyer or law firm’s background, training and experience? Rule 4-7.18(b)(2)(C) Is the statement of qualifications illegible or not reasonably prominent? Rule 4-7.12(d) If the advertisement appears in a language other than English, does the statement of qualifications fail to appear in that language? Rule 4-7.12(c)

- Does the e-mail include a contract that is not marked "SAMPLE" at the top of each page in red ink in type size one size larger than the largest used in the contract and "DO NOT SIGN" in the client signature line? Rule 4-7.18(b)(2)(D) Are “SAMPLE” and “DO NOT SIGN” illegible or not reasonably prominent? Rule 4-7.12(d) If the advertisement appears in a language other than English, do the words “SAMPLE” and “DO NOT SIGN” fail to appear in that language? Rule 4-7.12(c)

- If the e-mail concerns a specific matter, does it fail to include as its first sentence "If you have already retained a lawyer for this matter, please disregard this letter." Rule 4-7.18(b)(2)(E) Is this first sentence illegible or not reasonably prominent? Rule 4-7.12(d) If the advertisement appears in a language other than English, does the first sentence fail to appear in that language? Rule 4-7.12(c)

- Does the written communication appear to resemble legal documents? Rule 4-7.18(b)(2)(F)

- If a lawyer other than the one whose name or signature appears in the e-mail will actually handle the case or matter or if the matter will be referred to a lawyer in another law firm, does the e-mail so indicate? Rule 4-7.18(b)(2)(G) Is this disclosure illegible or not reasonably prominent? Rule 4-7.12(d) If the advertisement appears in a language other than English, does this disclosure fail to appear in that language? Rule 4-7.12(c)

- If the e-mail has been prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member, does it fail to disclose how the lawyer obtained the information prompting the communication? Rule 4-7.18(b)(2)(H) Is this disclosure illegible or not reasonably prominent? Rule 4-7.12(d) If the advertisement appears in a language other than English, does the disclosure of where the information was obtained fail to appear in that language? Rule 4-7.12(c)

- If the e-mail concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the intended recipient or a relative of that person, have fewer than 30 days passed since the date of the injury, death, accident or disaster? Rule 4-7.18(b)(1)(A)

- If the e-mail concerns a request for injunction against violence and is sent to the respondent in the injunction petition, is the e-mail being sent before the respondent has been served with a notice of process in the matter? Rule 4-7.18(b)(1)(G)

# Ethics of Using Social Media During Case Investigation and Discovery

By Seth I. Muse – June 13, 2012

As social media become more and more important in the discovery process, so too do the ethical dilemmas attorneys face when tapping this evidentiary source. The Internet as we know it is not the same Internet we once knew. No longer a place to passively receive information, the Internet is now nearly dominated by its social-media component, which has exploded in usage. For example, in February 2012, Facebook reported that it had more than 845 million active users. Social media are turning traditional forms of communication into interactive dialogues generated by the public. The very nature of social media is creative, and this creativity is unearthing new ethical dilemmas for attorneys. With users more prone to "let their guard down" when generating social-media content, the legal relevance, applicability, and value of social media have been proven time and again. A poll administered in 2010, for example, found that 81 percent of matrimonial lawyers have used evidence from social networks.

State bar associations are beginning to tackle the ethical dilemmas arising from the discovery of "statuses," names, photos, comments, and "friends." Among the many model rules that may be violated when an attorney uses social media during case investigation and discovery, the most common include:

| | |
|---|---|
| Rule 1.6 | Confidentiality of Information |
| Rule 4.1 | Truthfulness in Statements to Others |
| Rule 5.3 | Responsibility Regarding Nonlawyer Assistant |
| Rule 8.4 | Misconduct |

ABA Model Rules of Professional Conduct. Generally, lawyers are familiar with how to avoid ethical dilemmas when their clients seek out information relevant to a matter. (The ethical bar prohibiting a lawyer or his or her agent from contacting a represented non-client does not extend to the client of the lawyer or the client's investigator or other agent.) Restatement (Third) of Lawyers § 99(2). However, directing one's client to deliver a particular message to a represented opposing party would likely be a violation of Rule 8.4. *See, e.g.,* Or. State Bar Comm. on Legal Ethics, Formal Op. 2005-164 (2005).

Due to the rapid expansion of social media, attorneys will likely encounter a significant number of ethical challenges when discovering social media. Most lawyers must rely on a limited number of state ethics rules, model ethics advisory opinions, and emerging case law when solving these ethical dilemmas. One of the most preeminent ethical dilemmas lawyers face when using social media involves its role in the collection of evidence in preparation for trial. To what extent may an attorney ethically use social media during case investigation and discovery?

As a general rule, attorneys may access and review the public portions of a party's social-networking pages without facing ethical repercussions. This rule was applied in *State ex. Rel. State Farm Fire & Cas. Co. v. Madden* where the Supreme Court of West Virginia held that lawfully observing a represented party's activities that occur in full view of the general public is not an ethical violation. *The Lawyer's Guide to Social Networking*, John G. Browning (2010). Furthermore, it is ethical for a client to provide his or her attorney with the client's login and password to let the attorney research using social media as long as the attorney is passively browsing and not directly communicating with other members. This behavior is deemed ethical because the attorney is only accessing information already available to the client and is acting as the client's agent. 28 Santa Clara Computer & High Tech. L.J. 31, 64–65 (2011). (However, attorneys should be cognizant of possible violations of the social-networking website's terms of use.)

A slightly more difficult question arises when the attorney, acting on his or her own accord, seeks access to a non-client's social-media page. The New York State Bar Ethics Committee recently addressed this ethical dilemma when asked:

> May a lawyer view and access the Facebook or MySpace pages of a party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit, including impeachment material, if the lawyer does not "friend" the party and instead relies on public pages posted by the party that are accessible to all members in the network?

NYSBA Ethics Opinion 843 (2010). The committee concluded that under such circumstances, a lawyer may access and review the public social-networking pages. Because accessing public social media does not require a lawyer to "friend" the other party or direct a third person to do so, "accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct). "Deception" or "misleading conduct" is not possible as long as "the party's profile is available to all members in the network and the lawyer neither 'friends' the other party nor directs someone else to do so." Nor would an attorney violate Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction)." Therefore, according to the committee, "[ a] lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material." *Id*. On the other hand, accessing private social media raises additional ethical considerations.

An even more difficult question is whether an attorney may contact a non-client to gain access to the non-client's private social media. (This process is often done by "friending" the non-client on Facebook). Two notable authorities—the New York City Bar Committee on Professional Ethics and the Philadelphia Bar Association Guidance Committee—are in disagreement. The New York City Bar was asked:

> May a lawyer, either directly or through an agent, contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation?

N.Y. City Bar Formal Ethics Opinion 2010-2. The committee adopted a broad view in concluding that a lawyer is ethically permitted to use truthful "friending" or a lawful subpoena to gain access to a non-client's private social media. This decision remains consistent with the New York's high court's policy favoring informal discovery in litigation. The committee opined:

> [W]e conclude that an attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request.

The committee did limit this broad view so as not to ethically endorse the use of deception to gain access to a non-client's social media. According to the committee, "a lawyer may not use deception to access information from a social networking page" (presumably a violation of ABA Model Rule(s) 4.1 or 8.3). Thus, the New York City Bar opinion implies that an attorney who omits his or her intent or rationale for "friending" a non-client is not deceptive and, therefore, not unethical. This conclusion is of particular importance because gaining access to private portions of social media via "friending" or similar actions rarely, if ever, requires an explanation of the underlying motivation.

The Philadelphia Bar Association Guidance Committee has adopted a heightened view on ethically permissible discovery using social media. Unlike the New York City Bar, which has limited "deception" to mean behavior resembling overt deception, the Philadelphia Bar's view is heightened because it also includes omissions of intent as another form of deception. In 2009, the Philadelphia Bar was asked:

> [whether an attorney may] ask a third person, someone whose name a hostile witness will not recognize, to go to the Facebook and Myspace pages of the witness, and seek to "friend" her in order to obtain access to the information on the pages. The third person would state only truthful information, [i.e., his or her true name], but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness.

Philadelphia Bar Opinion.

The committee found the proposed conduct was deceptive and, therefore, unethical. Although the conduct was not overt, it remained deceptive because it omitted "a highly material fact, namely, that the third party who asks to be allowed access to the witness's page is doing so only because he or she is intent on obtaining information and sharing it with a lawyer to impeach the testimony of the witness." In May 2011, the San Diego County Bar Legal Ethics Committee adopted the Philadelphia Bar's heightened view. SDCBA Ethics Opinion 2011-2. In agreeing with the scope of the duty set forth in the Philadelphia Bar Association opinion, the committee explained that an "attorney should not send a [friend] request to someone involved in the matter for which he has been retained without disclosing his affiliation and the purpose for the request." Thus, an attorney attempting to access a

non-client's private social media without disclosing the motivation of the friend request violates California Rule of Professional Conduct 2-100 (prohibiting communication with a represented party unless the attorney has the consent of the other lawyer). Rules of Professional Conduct of the State Bar of California. (The opinion specifically explained that "high-ranking employees" of a represented corporate adversary are considered "parties" for purposes of the rule.) In other words, although one's motive is rarely, if ever, revealed when gaining access to private social media, "counsel's motive for making the contact with the represented party [is] at the heart of why the contact [is] prohibited. . . ."

Gaining access to private social media through deception is not always unethical, however. For example, the New York County Bar Association approved in "narrow" circumstances the use of an undercover investigator by non-government lawyers to mislead a party about the investigator's identity and purpose in gathering evidence of an alleged violation of civil rights or intellectual-property rights. NYCLA Comm. On Prof. Ethics Formal Op. 737, p.1. According to the committee, the type of deception of which it was approving "is commonly associated with discrimination and trademark/copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or job seekers while negotiating or engaging in a transaction that is not by itself lawful." Thus, some jurisdictions recognize the use of deceptive "friending" as a narrow exception when investigating social media.

Although the New York City Bar and Philadelphia Bar opinions are in disagreement, both views offer well-supported policies. Undoubtedly, the New York City Bar's opinion permits greater use of informal discovery techniques by deeming truthful friend requests ethical with respect to ABA Model Rule 8.4. It places a certain level of accountability on the social-media user by requiring the user to be cognizant of who the user grants access to. Yet, the Philadelphia Bar's narrower view offers greater protection for the public by holding attorneys to a higher ethical standard but at the increased expense of time, money, and energy spent on filing formal discovery requests.

**Rule 4.1—Truthfulness in Statements to Others**
Rule 4.1 prohibits a lawyer, in the course of representing a client, from knowingly "mak[ing] a false statement of material fact or law to a third person." Model Rules of Prof'l Conduct Ann. R. 4.1 (2010). A fact is material "if it could have influenced the hearer." *Id*. The Philadelphia Committee concludes that the omission of intent is a false statement of material fact and "was therefore in violation of Rule 4.1." *Id*. In support of its heightened view, the committee cited *People v. Pautler*, 47 P. 3d 1175 (Colo. 2002) where the Colorado Supreme Court held that under Rule 8.4, "[p]urposeful deception by an attorney . . . is intolerable, even when undertaken as a part of attempting to secure the surrender of a murder suspect. . . ." The heightened view was adopted by the Oregon Supreme Court in *In Re Gatti*, holding that no deception at all was permissible under Rule 8.4, and even rejecting proposed carve-outs for government or civil-rights investigations. After subsequent amendment, however, Oregon's Rule 8.4 effectively rejects this view. Currently, lawyers can advise clients about or supervise lawful "covert activity," which means an effort to obtain information on unlawful activity though the use of misrepresentations of other subterfuge. Under either view, however, ABA Model Rule 5.3, "Responsibility Regarding Nonlawyer Assistants," holds a lawyer responsible for the proposed interaction that the third party undertakes with the witness. According to the Philadelphia opinion, the fact that the inquirer "is not a lawyer does not insulate the inquirer from ethical responsibility for the conduct."

The Rule 4.1 comments, however, state that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts." Model Rules of Prof'l Conduct Ann. R. 4.1 cmt 1 (2010). This supports the New York City Committee opinion, concluding that Rule 4.1 would not be implicated unless the investigator used a fake profile. Thus, depending upon jurisdiction, even if there is a strict prohibition on the lawyers themselves using subterfuge to gain access to a social-media user's account, the lawyer might be able to do so through a proxy, but only in limited circumstances. In Oregon, the lawyer could presumably gain access to a user's social-media account to obtain information on unlawful activity that might not encompass all claim-investigation activities.

**Rule 8.4—Misconduct**
ABA Model Rule 8.4, "Misconduct," prohibits "dishonesty, fraud, deceit or misrepresentation." The Philadelphia opinion concludes that an attorney who contacts a non-client over social media and fails to disclose his or intent when making the request is in violation of Rule 8.4 because it is deceptive. 28 Santa Clara Computer & High Tech. L.J. 31, 72 (2011). According to the committee, the "intent" of the investigator is that the third party is seeking to obtain information and share it with a lawyer to impeach his or her testimony as a witness. "The omission would purposefully conceal" the underlying purpose of "inducing the witness to allow access, when she may not do it if she knew the third person was associated with the inquirer and the true purpose of the access." *Id*. The fact that the user freely permitted access to other users requesting to be friends "does not remove the deception." *Id*. Therefore, the attorney should simply ask the witness forthrightly for access. "[E]xcusing the deceit on that basis would be improper. Deception is deception, regardless of the victim's wariness in her interactions on the internet and susceptibility to being deceived." *Id*.

On the other hand, the New York City opinion concludes that an attorney who contacts a non-client but omits the underlying purpose or intent does not violate Rule 8.4. In essence, failure to disclose the reason(s) for the friend request is not deception. In support, scholars argue that "friend requests do not explicitly express any intent" and merely symbolize a host of motives including wanting to be friends, establishing business connections, learning more about the person, romantic interests, or sending spam. *Id*.

**Rule 1.6— Confidentiality of Information**
Model Rule 1.6, "Confidentiality of Information," states: "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the

disclosure is permitted by paragraph (b)." Time and again, lawyers have violated Rule 1.6 when revealing information regarding clients through social media. For example, in *In The Matter of Peshek*, No. 6201779, an Illinois attorney was found in violation of Rule 1.6 and subsequently fired for comments contained on her blog regarding her work as a public defender. In the blog posts, Peshek allegedly "identified her client's jail identification number" and "identified a client by his first name and discussed how the client lied to the court about his drug use and blamed his positive results on his diabetes." 11 Loy. J. Pub. Int. L. 511, 515 (2010). "In addition to blogs, violations of Rule 1.6 can occur when attorneys write posts on social networking sites about their cases or communicate with their clients via these sites." *Id*.

Regardless of whether evidence was collected ethically, is it nevertheless admissible at trial? According to Jonathan Ezor, director of the Touro Law Center Institute for Business, Law and Technology, "[f]or governmental attorneys, such violations could fall under the general principles of the exclusionary rule and deny admissibility." Ezor, Jonathan, "False Friends: the Ethical Limits of Discovery via Social Media," Law Technology News. But for attorneys in private practice, "state law may permit use of the information gathered even if the lawyer violated ethics rules to do so. . . ." *Id*. Moreover, attorneys must remember the broad swath of social media activity that is considered "communication" for purposes of professional conduct. Communication is generally defined broadly so as to constitute a "deliberate action" such as a "tweet" or "poke." For example, in October 2009, Shannon Jackson of Hendersonville, Tennessee, violated a legal order of protection that had been previously filed against her by "poking" another woman on Facebook. Thus, "communication" is essentially any form of virtual contact asserted by the user.

**Keywords:** litigation, pretrial practice and discovery, Facebook, Twitter, ABA Model Rules

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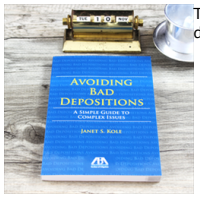


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# Program Submission Form

AMERICAN INNS of COURT®

Program Title: Ten Things I Wish I Knew Before My First Trial

Date Presented: March 3, 2015 Inn Year: 2015

Presenting Inn: Robert Van Pelt Inn Number: 30106

Inn City: Lincoln Inn State: Nebraska

Contact Person: Erin C. Duggan Pemberton Phone: 402-474-1507

E-mail Address: epemberton@wolfesnowden.com

Please consider this program for the Program Awards: ☐ Yes ☑ No This program is being submitted for Achieving Excellence: ☑ Yes ☐ No

## Program Summary:

*Indicate the legal focus and be concise and detailed in summarizing the content and setup of your program. Please attach additional sheets if necessary.*

To mentor younger, less experienced attorneys and law students in thinking through and preparing for ten (10) issues and situations that may arise in a trial that they may not have thought of during basic trial preparations. See attached list of ten (10) items covered by this presentation. The presentation includes a skit, with discussion and video clips. There is also an impeachment guide as a handout.

## Program Materials:

*The following materials checklist is intended to insure that all the materials that are required to restage the program are included in the materials submitted to the Foundation office.* ***Please check all that apply and include a copy of any of the existing materials with your program submission:***

☑ Script ☐ Articles ☐ Citations of Law ☐ Legal Documents ☐ Fact Pattern ☐ List of Questions ☑ Handouts

☑ PowerPoint Presentation ☐ CD ☑ DVD ☐ Other Media *(Please specify)* _____

## Specific Information Regarding the Program:

Number of participants required for the program: 5-6 Has this program been approved for CLE? ☑ Yes ☐ No

Which state's CLE? Nebraska How many hours? 1.0

## Recommended Physical Setup and Special Equipment:

i.e., VCR and TV, black board with chalk, easel for diagrams, etc. When submitting video, please indicate the length of all videos. i.e., 30 or 60 min.

If videos used, will need projector and screen - and a laptop.

## Comments:

Clarify the procedure, suggest additional ways of performing the same demonstration, or comment on Inn members' response regarding the demonstration.

There were two tables set up - 1 for the attorneys and 1 for the judge. The laptop was set up separated with the projector. We had another laptop at the attorney table as a prop. The Judge introduced the topic and Inn members and their roles. The narrator began the skit. At each of the 10 topics, there was some skit, video clip(s), and discussion. The program was well received. The video clips were focused more on how not to do each of the 10 things, but not all of them. Then, the discussion was an opportunity for experienced attorneys and judges to mentor on how each item should be done, such as being prepared, knowing your judge, speaking with jurors during voir dire, etc.

# Program Submission Form

## Roles:

List the exact roles used in the demonstration and indicate their membership category; *i.e.*, Pupil, Associate, Barrister or Master of the Bench.

| Role | Membership Category |
|---|---|
| Judge | Judge |
| Narrator | Master of Bench |
| Experienced Attorney | Master of Bench |
| Law Clerk | Law Student and Barrister |
| Discussion Points | Associate, Barrister, Law Student, Master of Bench |
| Technical Support | Barrister |
| | |

## Agenda of Program:

List the segments and scenes of the demonstration and the approximate time each step took; *i.e.*, "Introduction by judge (10 minutes)."

| Item | Time |
|---|---|
| Introduction by Judge | 2 minutes |
| Skit (without discussion) | 10 minutes |
| PowerPoint (with video clips) | 30 minutes |
| Discussion | 18-25 minutes |
| | |
| | |

## Program Awards: *Please complete this section only if the program is being submitted for consideration in the Program Awards.*

**Describe how your program fits the Program Awards Criteria:**

**Relevance:** How did the program promote or incorporate elements of our mission? *(Fostering Excellence in Professionalism, Ethics, Civility, and Legal Skills)*

_____

**Entertaining:** How was the program captivating or fun? _____

_____

**Creative and Innovative:** How did the program present legal issues in a new way? _____

_____

**Educational:** How was the program interesting and challenging to all members? _____

_____

**Easily Replicated:** Can the program be replicated easily by another Inn? ☐ Yes ☐ No This program is: ☐ Original ☐ Replicated

## Questions:

Please contact Christina Hartle at **(703) 684-3590 ext 105** or by e-mail at **chartle@innsofcourt.org**.

**Please include ALL program materials. The committee will not evaluate incomplete program submissions.**

Ten Things I Wish I Knew Before My First Trial

**Narrator:**

Erin, a wise, veteran attorney, sits patiently at the counsel table as she waits for her client's trial to begin. She has decided to retire early, even though she has enjoyed a rich professional experience, fame, and all fame's trappings. She expects this will be her last trial. She is thinking back to her first trial wistfully, remembering how nervous and excited she was.

Kelsey is Erin's law clerk. She has performed some work for Erin on the case, and in a sense this is her first trial--though she is not yet a licensed attorney. Sitting next to Erin, she is thinking ahead, daydreaming about what her own first "real" jury trial will be like.

Suddenly, and at the same time, Erin and Kelsey look at each other. [Erin and Kelsey do so dramatically.] Simultaneously, they each wonder what it would be like to be in the position of the other. [Erin and Kelsey can strike "thinking" poses.] In perfect synchronization, they each think to themselves, "I wonder what it would be like to be her." Seemingly out of nowhere, a pencil drops onto the table in front of them. [The narrator takes out a pencil, walks over to Erin and Kelsey, and places it in front of them.] They both reach for it, and as their fingers touch, their metaphysical essences leap from their respective mortal coils, trading places and settling in to each other's physical vessels. They take a moment to orient themselves. [Erin and Kelsey can look around, look at their hands, shoes, and each other.]

**Erin and Kelsey together:**

YES!

**Narrator:**

Just then, the Judge announces:

**Judge:**

Counsel, there will be a brief delay while I finish listening to this Podcast. Incidentally, I recommend you listen to "Serial" yourself sometime. [This podcast

bit could be changed to anything that you think would be fun.] We will begin the trial in 30 minutes. [The judge remains at the bench, in full view of the courtroom, with earbuds in and phone in hand.]

**Narrator:**

Suddenly panicked [Erin cries out], Erin, who is now really Kelsey in Erin's body (which we will note repeatedly for those stragglers who will show up late), exclaims,

**Erin:**

Oh my gosh! Everyone thinks I'm you - - but I can't do this trial! What are we going to do? Can you just take over?

**Kelsey:**

Not really. Everyone thinks I'm you. We didn't get you, I mean me, certified to practice in this court, did we?

**Erin:**

No.

**Kelsey:**

I think we need a letter from your law school to make that official. [Marc (who may be the Narrator) turns to the audience and nods.] Not an option given our timeframe here.

**Erin:**

Well, you can help me, right?

**Kelsey:**

Of course. You know the case. I'll help you. You will be fine.

**Erin:**

Well, what are some of the things you wish you knew before your first trial? Can you tell me?

**Kelsey:**

Sure.  There are really about 10 things that stand out in my memory that I wish I knew before my first trial.

**[DISPLAY TITLE SLIDE:  Ten Things I Wish I Knew Before My First Trial]**

First, you have to take care of yourself.  Eat healthy, try to get enough sleep, and get your exercise.  {Alcorn #1}

**Erin:**

But I was up all night working, reading for class, and taking selfies of me working and reading for class!  Is sleep and all that other stuff really so important?

**Kelsey:**

Did you ever see My Cousin Vinny?

**[RUN My Cousin Vinny clip]**

*DISCUSSION*

**Erin:**

OK, what else can you tell me?

**Kelsey:**

Next, I would say that it is really important to know your judge.  {Alcorn #10}

**Erin:**

Does it really make that much difference?

[The judge suddenly starts laughing and shaking his head, still listening to his podcast.]

Kelsey:  It does.  Have you ever seen "Nothing But Trouble"?

**[RUN Nothing But Trouble clip]**

**Erin:**

I've never seen that movie, actually. It sounds more like a circus train derailment than a trial.

**Kelsey**:

Well, you said you saw My Cousin Vinny, right? Remember when he showed up in court dressed in that ridiculous tuxedo?

[**RUN second Vinny clip]**

**Erin:**

Well, it's too late for me to change clothes now, and I don't have tuxedo.

**Kelsey**:

I think you're missing the point. Just be sure to be respectful and patient. One time our judge here went nuts and actually threw a beating on some Florida attorney. I wasn't there that day, but the security camera footage made it online. Let's see if I can pull it up . . .

[**RUN Florida Judge Punches clip]**

**Erin**:

Oh my goodness! Do you think he's going to want to fight me?

**Kelsey**:

Relax, Kelsey. You're looking whiter than an albino snowflake on the tip of Mike Fenner's beard. Just be respectful and patient, and you won't set him off. If he does try to fight you, you get to put an M&M on the "G" on your ridiculous judge BINGO card.

***[Briefly discuss important differences among judges; e.g., Federal District Court Judges post online some information about different ways they handle certain matters, perhaps ask for examples of times when attorneys have been surprised by a different way a judge routinely handled certain matters.]***

**Erin:**

OK, give me more!

**Kelsey**:

OK, well, it is of course essential that you be prepared. {Summerlin #22}

[**RUN Worst Attorney Ever clip]**

*DISCUSSION*

**Kelsey:**

Also, I definitely wish I knew the rules of evidence better before my first trial. {Alcorn #3}

**Erin**:

Is it embarrassing when you have an objection overruled?

**Kelsey**:

No, not usually.  But sometimes.

**[RUN Liar Liar Objection clip]**

**Kelsey:**

You shouldn't expect things to go as they do in the movies, of course, but sometimes your opponent will try to bog you down with objections, and knowing how to respond can help make sure you're evidence is received.

**[RUN Intolerable Cruelty clip]**

*DISCUSSION*

**Kelsey:**

Another thing that I wish I knew before my first trial is how to impeach a witness properly and effectively.

**Erin**:

I saw that on Boston Legal once!

**[RUN Boston Legal Impeachment Clip]**

**Kelsey**:

There's that scene in Legally Blonde too, remember that?

**[RUN Legally Blonde Clip - - perm impeachment]**

*DISCUSSION – I think we really need to put some time into describing proper impeachment here!*

**Kelsey**:

Jurors are watching you way more than you think {Alcorn #4}, and I wish I knew before my first jury trial just how much they were watching me.

**Erin**:

They watch your client too, don't they? Remember the beginning of A Civil Action?

**[RUN A Civil Action clip]**

**Kelsey:**

The "lawyering" on display in that movie by John Travolta is relentlessly terrible. I think that earned him a lifetime achievement award from the academy of unfortunate movies. But yes.

*DISCUSSION*

**Erin**:

What else can you tell me?

**Kelsey**:

I think you're going to find that since jurors are watching way more than you realize, you're going to wish that you could talk to them more. Just remember that they are going to tell you what they think you want to hear. {Alcorn #2}. That reminds me of a great scene from Young Mr. Lincoln.

**[Run Young Mr. Lincoln Clip- Voir Dire]**

**Erin**:

Did you see that movie in the theater? I guess I can see why you're thinking about retiring. Before long you'll be too old to get a rocking chair going.

**Kelsey**:

Do you want my advice or not?

**Erin**:

Yes! Of course. Sorry. Did I say that out loud?

*DISCUSSION*

**Kelsey**:

Next - - and this doesn't really help us here today -- but I wish that when I was starting out I double checked all of the law I cited in my written motions {Alcorn #6}

**[RUN OJ Simpson Trial clip]**

**Erin**:

I learned that in first year legal writing.

**Kelsey**:

Well then I guess you probably got a gold medal in the gunner Olympics too, right?

*DISCUSSION*

**Kelsey**:

I have two more points.

**Erin**:

I'm listening!

**Kelsey**:

The big problem in your case won't go away on its own. You have to address it. {Walters #6}

**Erin**:

What does that mean?

**Kelsey**:

Sometimes your client is a big problem.

**[RUN Man gets violent clip.]**

**Erin**:

There was about the same amount of intellectual content on display at my sister's divorce hearing, but that one sounds like it was way more exciting.

**Kelsey**:

Sometimes the big problem in your case is a particular issue. You have to try to turn it to your advantage, or at least deal with it. Other lawyers and sometimes "real people" can give you good advice about this.

*DISCUSSION*

**Kelsey**:

Finally, if I were you, I would learn to appreciate losses. {Summerlin #9}

**Erin**:

<Scoffs>

**[Run Devil's Advocate – I don't lose clip]**

**Erin:**

I'm more about celebrating victories, not matter how small.

**[RUN Courtroom Decorum clip**]

**Kelsey**:

Sometimes you have everything in your favor, and the jury will make a decision that seems like it was made with the surgical precision of a drunken shotgun blast. But more importantly, as our friend Gene Summerlin put it, your losses are what make you wiser—and also make you a better and stronger person.

*DISCUSSION*

**Narrator**:

If you are concerned, you should know that eventually, Erin and Kelsey had their trial, and they switched back into their original bodies just as mysteriously as they switched originally.  Thank you for the discussion today, and I hope that the Inn members who are just beginning their careers were able to glean some helpful advice from our more experienced members today.

# Steps for Impeachment with a Prior Inconsistent Statement

**<u>Commit</u> the witness to the in-court testimony you will impeach.**

"You just testified on direct that the light was red for my client, true?"

**<u>Challenge</u> the witness's story.**

"Sir, that wasn't always your position, was it?"

**Establish the existence of the prior statement.**

"You spoke to an investigator on the day of the accident, true?"

"He was writing down notes as you were talking, wasn't he?"

"He prepared a statement of what you said?"

**Establish the accuracy of the prior statement.**

"You signed that statement, didn't you?"

"You would never sign a statement that wasn't accurate, would you?"

**<u>Confront</u> the witness with the inconsistency.**

"I show you this document marked as Exhibit 1 for identification and ask you, isn't it true that on the date of the accident you said you didn't see the color of the light?"

"There is no question about that, right?"

Under Federal Rule 613, the cross-examiner does not need to show the witness an impeaching writing before using it; it must only be shown to opposing counsel if requested. It is usually more effective to show the witness his prior written statement so that his admission of having written or signed the document may be obtained.

COMMITTEE REPORT

# Formal Opinion 2010-02: Obtaining Evidence From Social Networking Websites

October 19, 2010

**TOPIC:** Lawyers obtaining information from social networking websites.

**DIGEST:** A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.

**RULES:** 4.1, 5.3(b)(1), 8.4(a) & (c)

**QUESTION:** May a lawyer, either directly or through an agent, contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation?

**OPINION**

Lawyers increasingly have turned to social networking sites, such as Facebook, Twitter and YouTube, as potential sources of evidence for use in litigation.[1] In light of the information regularly found on these sites, it is not difficult to envision a matrimonial matter in which allegations of infidelity may be substantiated in whole or part by postings on a Facebook wall.[2] Nor is it hard to imagine a copyright infringement case that turns largely on the postings of certain allegedly pirated videos on YouTube. The potential availability of helpful evidence on these internet-based sources makes them an attractive new weapon in a lawyer's arsenal of formal and informal discovery devices.[3] The prevalence of these and other social networking websites, and the potential benefits of accessing them to obtain evidence, present ethical challenges for attorneys navigating these virtual worlds.

In this opinion, we address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively "deceptive" behavior to "friend" potential witnesses. We do so in light of, among other things, the Court of Appeals' oft-cited policy in favor of informal discovery. See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493, 497 (1990) ("[T]he Appellate Division's blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."); Muriel, Siebert & Co. v. Intuit Inc., 8 N.Y.3d 506, 511, 836 N.Y.S.2d 527, 530

(2007) (“the importance of informal discovery underlies our holding here”). It would be inconsistent with this policy to flatly prohibit lawyers from engaging in any and all contact with users of social networking sites. Consistent with the policy, we conclude that an attorney or her agent may use her real name and profile to send a “friend request” to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request.[4] While there are ethical boundaries to such “friending,” in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. See, e.g., id., 8 N.Y.3d at 512, 836 N.Y.S.2d at 530 (“Counsel must still conform to all applicable ethical standards when conducting such [ex parte] interviews [with opposing party’s former employee].” (citations omitted)).

The potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web. In that connection, in seeking access to an individual's personal information, it may be easier to deceive an individual in the virtual world than in the real world. For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness’s home, view the witness's photographs and video files, learn the witness’s relationship status, religious views and date of birth, and review the witness’s personal diary, the witness almost certainly would slam the door shut and perhaps even call the police.

In contrast, in the “virtual” world, the same stranger is more likely to be able to gain admission to an individual’s personal webpage and have unfettered access to most, if not all, of the foregoing information. Using publicly-available information, an attorney or her investigator could easily create a false Facebook profile listing schools, hobbies, interests, or other background information likely to be of interest to a targeted witness. After creating the profile, the attorney or investigator could use it to make a “friend request” falsely portraying the attorney or investigator as the witness's long lost classmate, prospective employer, or friend of a friend. Many casual social network users might accept such a “friend request” or even one less tailored to the background and interests of the witness. Similarly, an investigator could e-mail a YouTube account holder, falsely touting a recent digital posting of potential interest as a hook to ask to subscribe to the account holder’s “channel” and view all of her digital postings. By making the “friend request” or a request for access to a YouTube “channel,” the investigator could obtain instant access to everything the user has posted and will post in the future. In each of these instances, the “virtual” inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions. The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to “open the door” to strangers, social networking users often do just that with a click of the mouse.

Under the New York Rules of Professional Conduct (the "Rules"), an attorney and those in her employ are prohibited from engaging in this type of conduct. The applicable restrictions are found in Rules 4.1 and 8.4(c). The latter provides that "[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." N.Y. Prof'l Conduct R. 8.4(c) (2010). And Rule 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Id. 4.1. We believe these Rules are violated whenever an attorney "friends" an individual under false pretenses to obtain evidence from a social networking website.

For purposes of this analysis, it does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse. As provided by Rule 8.4(a), "[a] lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Id. 8.4(a). Consequently, absent some exception to the Rules, a lawyer's investigator or other agent also may not use deception to obtain information from the user of a social networking website. Seeid. Rule 5.3(b)(1) ("A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if . . . the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it . . . .").

We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. See N.Y. County 737 (2007) (requiring, for use of dissemblance, that "the evidence sought is not reasonably and readily obtainable through other lawful means"); see also ABCNY Formal Op. 2003-02 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions -- a question we do not address here -- they are, at least in most situations, inapplicable to social networking websites. Because non-deceptive means of communication ordinarily are available to obtain information on a social networking page -- through ordinary discovery of the targeted individual or of the social networking sites themselves -- trickery cannot be justified as a necessary last resort.[5] For this reason we conclude that lawyers may not use or cause others to use deception in this context.

Rather than engage in "trickery," lawyers can -- and should -- seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful "friending" of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line.[6]

witness on-line.[6]

Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.

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[1] Social networks are internet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to "friends" – those who have specifically sent a computerized request to view their profile page which the user has accepted. Examples of currently popular social networks include Facebook, Twitter, MySpace and LinkedIn.

[2]See, e.g., Stephanie Chen, Divorce attorneys catching cheaters on Facebook, June 1, 2010, http://www.cnn.com/2010/TECH/social.media/06/01/facebook.divorce.lawyers/index.html?hpt=C2.

[3]See, e.g., Bass ex rel. Bass v. Miss Porter's School, No. 3:08cv01807, 2009 WL 3724968, at *1-2 (D. Conn. Oct. 27, 2009).

[4] The communications of a lawyer and her agents with parties known to be represented by counsel are governed by Rule 4.2, which prohibits such communications unless the prior consent of the party's lawyer is obtained or the conduct is authorized by law. N.Y. Prof'l Conduct R. 4.2. The term "party" is generally interpreted broadly to include "represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties." N.Y. State 735 (2001). Cf. N.Y. State 843 (2010)(lawyers may access public pages of social networking websites maintained by any person, including represented parties).

[5] Although a question of law beyond the scope of our reach, the Stored Communications Act, 18 U.S.C. § 2701(a)(1) etseq. and the Electronic Communications Privacy Act, 18 U.S.C. § 2510 etseq., among others, raise questions as to whether certain information is discoverable directly from third-party service providers such as Facebook. Counsel, of course, must ensure that her contemplated discovery comports with applicable law.

[6] While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an ethical line when she falsely identifies herself in a "friend request". See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 376, 559 N.Y.S.2d 493, 499 (1990)

(permitting ex parte communications with certain employees); Muriel Siebert, 8 N.Y.3d at 511, 836 N.Y.S.2d at 530 ("[T]he importance of informal discovery underlie[s] our holding here that, so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party's former employee.").



Author(s): Professional Ethics Committee

Subject Area(s): Ethics

**THE PHILADELPHIA BAR ASSOCIATION**
**PROFESSIONAL GUIDANCE COMMITTEE**
Opinion 2014-5
(July 2014)

## I. Introduction

The inquirer requests an opinion concerning the following issues relating to a client's Facebook account[1]:

(1) Whether a lawyer may advise a client to change the privacy settings on a Facebook page so that only the client or the client's "friends" may access the content. This question assumes that all information relevant or discoverable in the client's matter is retained.

(2) Whether a lawyer may instruct a client to remove a photo, link or other content that the lawyer believes is damaging to the client's case from the client's Facebook page.

(3) Whether a lawyer who receives a Request for Production of Documents must obtain and produce a copy of a photograph posted by the client, which the lawyer previously saw on the client's Facebook page, but which the lawyer did not previously print or download. For the purposes of this inquiry, we will assume that the request is not overly broad.

(4) Whether a lawyer who receives a Request for Production of Documents must obtain and produce a copy of a photograph posted by someone other than the client on the client's Facebook page, which the lawyer previously saw on the client's Facebook page, but which the lawyer did not previously print or download. For the purposes of this inquiry, we will assume that the request is not overly broad.

It is this Committee's opinion that, subject to the limitations described below[2]:

(1) A lawyer may advise a client to change the privacy settings on the client's Facebook Page.

(2) A lawyer may instruct a client to make information on the social media website "private," but may not not instruct or permit the client to delete/destroy a relevant photo, link, text or other content, so that it no longer exists.

[1] Although the inquiry focuses on Facebook (www.facebook.com), the response applies to all social media or other websites on which individuals or businesses post or otherwise disseminate information to friends, the public and others. The questions raised have been minimally reframed to address social media websites generally.

[2] The analyses for questions 1 and 2, and for questions 3 and 4, are merged into two discussions below.

(3) A lawyer must obtain a copy of a photograph, link or other content posted by the client on the client's Facebook page in order to comply with a Request for Production or other discovery request.

(4) A lawyer must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client.

## II. Analysis

### A. Introduction

"Social media" websites permit users to join online communities where they can share information, ideas, messages, and other content. There are thousands of these websites, which vary in form and content. Most of these sites, such as Facebook, Myspace and others, are designed to permit users to share information about personal and professional activities and interest. As of September 2013, an estimated 73 percent of adults age 18 and over use these sites.[3]

The issues raised by clients' use of social media websites, such as Facebook, raise ethical concerns. This opinion attempts to provide a broad overview of the issues, with the strong recommendation that you examine the Rules carefully and understand that, as social media evolves, so will the ethical issues related to it.

Moreover, the Committee reminds the inquirer that, at its most basic, this inquiry focuses on a party's and an attorney's duty to preserve evidence, and that this duty applies to information regardless of form, *i.e.,* discoverable information may not be concealed or destroyed regardless whether it is in paper, electronic or some other format. As noted by this Committee in Opinion 2000-5, "The procedure of the adversary system contemplates that the evidence in a case is to be marshaled 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 procedures, and the like."

### B. Relevant Pennsylvania Rules of Professional Conduct

Your inquiry implicates numerous Rules of Professional Conduct, including:

**Rule 1.1. Competence**

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

[3] http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/

**Rule 3.3. Candor Toward the Tribunal**

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

**Rule 3.4. Fairness to Opposing Party and Counsel**

A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act

**Rule 4.1. Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person

**Rule 8.4. Misconduct**

It is professional misconduct for a lawyer to:
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

## C. Discussion

As a general rule, in order to provide competent representation under Rule 1.1, a lawyer should advise clients about the content of their social media accounts, and their obligation to preserve information that may be relevant to specific proceedings. Comment (8) to Rule 1.1 further explains that, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology..." Thus, in order to provide competent representation in accordance with Rule 1.1, a lawyer should (1) have a basic knowledge of how social media websites work, and, (2) advise clients about the issues that may arise as a result of their use of these websites.

**(1.) A lawyer may advise a client to change the privacy settings on the client's Facebook page, but may not instruct or knowingly allow a client to delete/destroy a relevant photo, link, text or other content;**

A lawyer may advise a client about the privacy settings of the client's social media website, *i.e.*, a lawyer may counsel a client to restrict access to their social media information. Changing a client's profile to "private" simply restricts access to the content

of the page. While it may be more cumbersome for an opposing party to access the information, changing a client's settings does not violate the Rules of Professional Conduct.

Even though an opposing party may not be able to gain unrestricted access to a client's information after the privacy settings are changed, the opposing party may still obtain the information through discovery or subpoena. For example, in *McMillen v. Hummingbird Speedway, Inc.*[4], the Court of Common Pleas of Jefferson County, Pennsylvania approved a motion to compel discovery of the private portions of a litigant's Facebook profile after the opposing party produced evidence that the litigant may have misrepresented the extent of his injuries. In a New York case, *Romano v. Steelcase Inc.*[5], the Court similarly granted a defendant's request for access to a plaintiff's social media accounts because the Court believed, based on the public portions of plaintiff's account, that information therein might be inconsistent with plaintiff's claims of loss of enjoyment of life and physical injuries, thus making the social media accounts relevant.

Conversely, in *McCann v. Harleysville Insurance* Co.[6], a New York court refused to permit a defendant access to a plaintiff's social media account because there was no evidence on the public portion of the profile to suggest that there was relevant evidence on the private portion. The court characterized this request as a "fishing expedition" that was too broad to be granted. Similarly, in *Trail v. Lesko*[7], Judge Wettick of the Court of Common Pleas of Allegheny County denied a party access to a plaintiff's social media accounts, concluding that, under Pa. R.Civ.P. 4011(b), the defendant had not produced any relevant evidence to support its request; therefore, granting access to the plaintiff's Facebook profile would merely cause embarrassment, which is prohibited by the rule.

Recently, the Commercial and Federal Litigation Section of the New York State Bar Association released its "Social Media Guidelines," which concluded that a lawyer may advise a client about the content of the client's social media page, to wit:

- 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.

[4] *McMillen v. Hummingbird Speedway, Inc.*, No. 113 – 2010 CD (Pa.Ct.Com.Pl. Jefferson County 2010)
[5] *Romano v. Steelcase Inc.* (2010 NY Slip Op 20388)
[6] *McCann v. Harleysville Ins. Co. of N.Y.* (2010 NY Slip Op 08181)
[7] *Trail v. Lesko*, No. GD-10-017249 (Pa.Ct.Com.Pl. Allegheny County 2010)

- 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. [8]

This Committee agrees with and adopts these recommendations, which are consistent with Rule 3.4(a)'s prohibition against "unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value." Thus, a lawyer may not instruct a client to alter, destroy, or conceal any relevant information regardless whether that information is in paper or digital form. A lawyer may, however, instruct a client to delete information that may be damaging from the client's page, but must take appropriate action to preserve the information in the event it should prove to be relevant and discoverable.

A lawyer must also be mindful of Rule 3.3(b), which requires the lawyer to take reasonable remedial measures, "including, if necessary, disclosure to the tribunal" if the lawyer learns that a client has destroyed evidence.

In 2013, the Virginia State Bar Disciplinary Board[9] suspended an attorney for five years for (1) instructing his client to delete certain damaging photographs from his Facebook account, (2) withholding the photographs from opposing counsel, and (3) withholding from the trial court the emails discussing the plan to delete the information from the client's Facebook page. The Virginia State Bar Disciplinary Board based the suspension upon the attorney's violations of Virginia's rules on candor toward the tribunal (*see* Rule. 3.3), fairness to opposing counsel (*see* Rule. 3.4), and misconduct (*see* Rule. 8.4). In addition, the trial court imposed $722,000 in sanctions ($542,000 upon the lawyer and $180,000 upon his client) to compensate opposing counsel for their legal fees.[10]

**(2) A lawyer must obtain a copy of a photograph, link or other content posted by the client on the client's Facebook page in order to comply with a Request for Production, and must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client.**

In order to comply with a Request for Production of Documents, or any other discovery request, a lawyer must produce any social media content, such as photos and links, posted by the client, including posts that may be unfavorable to the client. Rule 4.1(a) provides that a lawyer shall not knowingly "make a false statement of material fact or law to a third person" while representing a client. When a lawyer provides another party

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[8] *Social Media Ethics Guidelines*, The Commercial and Federal Litigation Section of the New York State Bar Association, March 18, 2014 at 11 (footnote omitted)

[9] *In the Matter of Matthew B. Murray*, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013)

[10] *Lester v. Allied Concrete Co.*, Nos. CL08-150 and CL09-223 (Charlotte, Virginia Circuit Court, October 21, 2011)

with requested material, the lawyer is affirmatively representing that the information is full and complete to the best of his knowledge. If a lawyer purposefully omits information, or directs or countenances a client's destruction or omission of evidence, the lawyer has violated the Rules of Professional Conduct.

Consistent with this conclusion, under Rule 4.1, "a lawyer is required to be truthful when dealing with others on a client's behalf," which includes the obligation to produce relevant information in counsel's possession and to make good faith efforts to obtain any other relevant information from the client. Thus, if a lawyer knows or has a reasonable belief that a client possesses relevant information, the lawyer must make reasonable efforts to obtain it. The lawyer is not obligated, however, to obtain information that was neither in counsel's possession nor in the client's possession.

In addition, Rule 8.4(c) states that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Providing an opposing party with incomplete information, without so noting, violates the Rules of Professional Conduct and the lawyer's obligations under various Rules of Procedure. Under the facts presented, the lawyer must produce all of the requested photographs and other information from Facebook, regardless whether it was favorable to the client.

Finally, a lawyer must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware *if the lawyer knows or reasonably believes it has not been produced by the client*. If the items were never in the possession of either the client or counsel, and were instead under the control of a third party, then the Rules do not require the attorney to take affirmative steps to obtain the requested information. Once, and if, the information comes into counsel's possession, then the obligation to preserve and produce arises.

## III. Conclusion

When dealing with a client's use of social media, the Rules apply to electronic information in the same way that they apply to other forms of information. However, because social media websites change frequently, certain unique situations arise. A lawyer may advise a client about how to manage the content of the client's social media account, including the account's privacy settings. However, a lawyer may not advise a client to delete or destroy any information that has potential evidentiary value. Finally, in order to comply with a Request for Production of Documents, a lawyer must provide all information that the client has posted if the lawyer is aware that the information exists.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

# 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

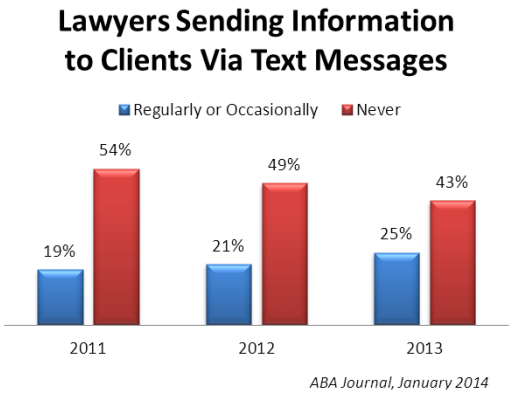
Oxford Dictionaries defines communication as: "The imparting or exchanging of information or news" or, alternatively, "The successful conveying or sharing of ideas and feelings."

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

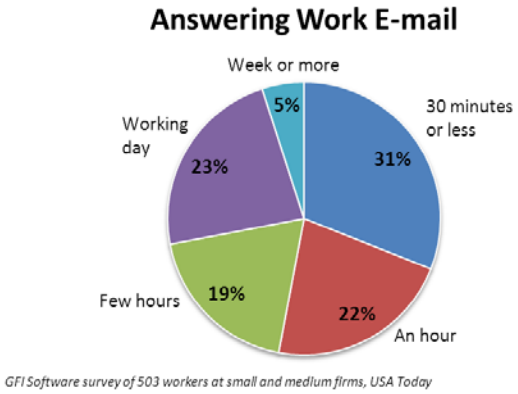
E-mail is a quick and convenient way to connect with clients, colleagues, the court system and opposing counsel. It is not a good substitute for face-to-face contact and telephone calls for interpersonal communication. E-mail messages may become part of a court record and may be subject to disclosure 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. 

## 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."

**IN THE SUPREME COURT OF FLORIDA**
**(Before a Referee)**

**THE FLORIDA BAR,** **CASE NO.**

**Complainant,** **TFB NO. 2009-10,487(13C)**

**v.**

**KURT D. MITCHELL,**

**Respondent.**
_____/

## COMPLAINT

The Florida Bar, Complainant, files this Complaint against Kurt D. Mitchell, Respondent, pursuant to Rule 3-3.2(b), Rules Regulating The Florida Bar, and alleges:

1. Respondent is, and at all times mentioned herein was, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida.

2. Respondent and Nicholas F. Mooney, hereinafter referred to as Mooney, were opposing counsel in several litigation cases.

3. Respondent had knowledge that Mooney has a special needs child.

4. During the course of litigation, Respondent and Mooney engaged in a series of email exchanges that became increasingly hostile and unprofessional.

5. In the emails, Respondent commented about Mooney, his wife and his special needs child, which comments were meant to disparage, humiliate and discriminate against Mooney. The emails included the following:

a. Email trail dated May 7, 2008 3:48 PM, copy attached as **Exhibit A.**

b. Email trail dated August 14, 2008 9:48 PM, copy attached as **Exhibit B.**

c. Email trail dated October 9, 2008 2:59 PM, copy attached as **Exhibit C.**

d. Email trail dated October 14, 2008 3:51 PM, copy attached as **Exhibit D.**

e. Email trail dated October 15, 2008 6:00 PM, copy attached as **Exhibit E.**

6. A majority of these email exchanges were copied to multiple persons in both Respondent's law firm and Mooney's law firm, including Mooney's legal assistant, Tina Harris, Respondent's legal assistant, Jessica Affortunato, and Respondent's law partner, Aldo Bolliger.

7. On or about December 19, 2008, Respondent conducted the deposition of a defense witness in the Craig case wherein Mooney is opposing counsel. During the deposition, Respondent engaged in a hostile verbal exchange with Mooney in the presence of the deponent and the court reporter meant to disparage, humiliate and discriminate against Mooney. See copy of deposition transcript dated December 19, 2008, attached as **Exhibit F**, pgs. 55-57.

8. Respondent filed "Plaintiff's Motion for Protection and Objection to Notice of Deposition and Request for Documents" dated March 10, 2009 in the Craig case wherein Mooney is opposing counsel, wherein Respondent made comments about Mooney which were meant to disparage, humiliate and

discriminate against Mooney. See copy of Plaintiff's Motion for Protection and Objection to Notice of Deposition and Request for Documents dated March 10, 2009, attached as **Exhibit G**.

9. The ongoing hostility demonstrated between Respondent and Mooney has served to prohibit them from effectively resolving scheduling matters and conducting the litigation in a professional manner, which conduct is contrary to honesty and justice and is prejudicial to the administration of justice and to our system of justice as a whole.

10. On August 26, 2009, the Thirteenth Judicial Circuit Grievance Committee "C" found probable cause for further disciplinary proceedings, and the presiding member of the grievance committee has approved the instant complaint.

11. By reason of the foregoing, the Respondent has violated the following Rules Regulating The Florida Bar: **Rule 3-4.3** (commission of any act that is unlawful or contrary to honesty and justice); and **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, including, but not

limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic).

WHEREFORE, The Florida Bar respectfully requests that the Respondent be appropriately disciplined.

**Kenneth Lawrence Marvin**
Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 200999

**Lisa Buzzetti Hurley**
Bar Counsel
The Florida Bar
4200 George J. Bean Pkwy.
Suite 2580
Tampa, Florida 33607
(813)875-9821
Florida Bar No. 164216

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that the original of this **Complaint** has been furnished by regular U. S. mail to **The Honorable Thomas D. Hall, Clerk**, the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1925; a true and correct copy by U.S. Certified Mail No. 7009 2250 0001 4002 7001, Return Receipt Requested, and by regular U.S. mail to **Kurt D. Mitchell, Esq., Respondent,** at his record Bar address of Mitchell Law Group, 186 Blaney Road, Suite D, Kittanning, PA 16201-3568; a copy to **Lisa Buzzetti Hurley, Bar Counsel,** The Florida Bar, 4200 George J. Bean Pkwy., Suite 2580, Tampa, Florida 33607; and a copy to **Lansing C. Scriven, Designated Reviewer,** at 442 West Kennedy Blvd., Suite 280, Tampa Florida 33606-1464; all this 7th day of April, 2010.

**Kenneth Lawrence Marvin**
Staff Counsel

## NOTICE OF TRIAL COUNSEL

**PLEASE TAKE NOTICE** that the trial counsel in this matter is Lisa Buzzetti Hurley, Bar Counsel, whose address is The Florida Bar, 4200 George J. Bean Parkway, Suite 2580, Tampa, Florida 33607. Respondent need not address pleadings, correspondence, etc. in this matter to anyone other than trial counsel and to Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300.

**Kurt D. Mitchell J.D.**

**From:** Nick Mooney [nick.mooney@bromagenlaw com]
**Sent:** Wednesday, May 07, 2008 3:48 PM
**To:** 'Kurt D. Mitchell J D '
**Cc:** 'Mike Siegel'
**Subject:** Craig v VW

Thanks for the compliment its nice to hear from a 4 year junior lawyer with little or no trial experience nfm

---

**From:** Kurt D. Mitchell J.D [mailto:kmitchell@mblawgroup com]
**Sent:** Wednesday, May 07, 2008 3:34 PM
**To:** 'Nick Mooney'
**Subject:** RE: Craig v. VW

Old Hack:

Your unprofessional and otherwise asinine behavior is not necessary Learn to litigate professionally and these issues will be avoided After all my email was in response to your asinine email insisting on setting a hearing even though there is not enough time Have a nice day

Kurt D Mitchell J D
licensed in Fl, Pa and D C

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201 S Westland Ave
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813 425 2824
fax 813 425 2832

Mitchell & Bolliger PLLC (Pennsylvania)
186 Blaney Rd Ste D
Kittannning PA 16201
724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw com]
**Sent:** Wednesday, May 07, 2008 3:03 PM
**To:** 'Kurt D Mitchell J.D '
**Cc:** 'William Bromagen'; 'Mike Siegel'
**Subject:** RE: Craig v. VW

Junior

Please do not send me any more of these absurd emails . While I am happy to know that you are also the judge in this case, your continued unprofessional & juvenile behavior is not necessary

nfm

---



EXHIBIT A
PAGE 1 OF 5

**From:** Kurt D Mitchell J.D. [mailto:kmitchell@mblawgroup.com]
**Sent:** Wednesday, May 07, 2008 2:06 PM
**To:** 'Nick Mooney'
**Subject:** RE: Craig v VW

Mr Mooney:

I will file an objection and the motion will not be heard I will also file several other motions I have been meaning to file Have a great day and I know I will be seeing you soon By the way five minutes? That is all you need? Somebody only read head notes to cases and really did not do his homework It would seem to me you would need 15 minutes to attempt to explain away the waiver issue alone, but again that is why I like practicing against the law firm of Bromagen & Rathet You seem to fit in perfectly

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186 Blaney Rd Ste D
Kittannning PA 16201
724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw com]
**Sent:** Wednesday, May 07, 2008 1:10 PM
**To:** 'Kurt D. Mitchell J.D '; 'Mike Siegel'
**Cc:** 'Aldo Bolliger'; 'Tina Harris'
**Subject:** RE: Craig v. VW

Mr Mitchell,

You are correct, you are not "Noticing the court", we are and we have already done so I do not anticipate needing more than 5 – 10 minutes of total time, and I am sure that Mr Siegel will only need 5 – 10 minutes of total time as well thus, even if you take as long as you think to respond to the simple / straight forward motions, we should have plenty of time If not, then we will need to re-schedule the motions / issues that have not been addressed accordingly

Additionally, as you were previously informed, I am not available on the 20th I have depositions in another claim scheduled all day on the 20th

Thanks see you the 19th

nfm

---

**From:** Kurt D Mitchell J.D. [mailto:kmitchell@mblawgroup.com]
**Sent:** Wednesday, May 07, 2008 12:56 PM
**To:** 'Nick Mooney'; 'Mike Siegel'
**Cc:** 'Aldo Bolliger'; 'Tina Harris'
**Subject:** RE: Craig v. VW



EXHIBIT A
PAGE 2 OF 5

No we are not noticing all of these issues and overwhelming the Court each of the current motions will take the full 30 minutes and if you attempt to notice the matter I will file objections The court has time on the 20th and if you wish to notice the Plaintiff's motion you can do so that day I need 15 minutes to respond to your motion, 15 minutes to respond to Siegel's motion and at least 15 minutes to present the plaintiff's motion thus clearly 1 hour is not enough time

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**From:** Nick Mooney [mailto:nick mooney@bromagenlaw.com]
**Sent:** Wednesday, May 07, 2008 12:47 PM
**To:** 'Mike Siegel'; 'Kurt D. Mitchell J.D.'
**Cc:** 'Aldo Bolliger'; 'Tina Harris'
**Subject:** Craig v VW

Mike,

Thanks for your professionalism in the setting of your hearing Please be advised that in addition to our Motion for Protective Order Re 5/27/08 Deposition of VW Corporate Representative, we have also noticed the Plaintiff's pending discovery motions / motion for case management conference One hour is plenty of time to handle all of these inter-related issues

NFM

---

**From:** Mike Siegel [mailto:Mike@Dalan-Katz.com]
**Sent:** Wednesday, May 07, 2008 12:15 PM
**To:** Kurt D. Mitchell J.D
**Cc:** Aldo Bolliger; Nick Mooney
**Subject:** RE: Craig v. VW ..and not Crown

The judge's assistant made an additional 30 minutes available so we have an entire hour on the 19th starting at 3 30 She did this when we called to get hrg time for the 20th Therefore we are issuing a notice for our motion to be heard on the 19th after the other motions are heard or in whatever order the judge wants the matters to be heard

---

**From:** Kurt D Mitchell J D [mailto:kmitchell@mblawgroup com]
**Sent:** Wednesday, May 07, 2008 10:54 AM
**To:** Mike Siegel
**Cc:** 'Aldo Bolliger'
**Subject:** RE: Craig v VW . and not Crown



EXHIBIT A
PAGE 3 OF 5

No, there is only 30 minutes available and this hearing will likely take that long so there is simply not enough time.

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186 Blaney Rd Ste D
Kittanning PA 16201
724 954 3087
fax 724 954 3107

**From:** Mike Siegel [mailto:Mike@Dalan-Katz.com]
**Sent:** Wednesday, May 07, 2008 10:47 AM
**To:** Kurt D. Mitchell J D
**Subject:** RE: Craig v VW ..and not Crown

Are you willing to have our hearing on the 19th?

---

**From:** Kurt D Mitchell J D [mailto:kmitchell@mblawgroup com]
**Sent:** Tuesday, May 06, 2008 6:59 PM
**To:** Mike Siegel
**Cc:** 'Aldo Bolliger'
**Subject:** RE: Craig v VW and not Crown

Because of the limited time so if you do not secure the 20th then we will do it on the 27th As for the 20th as of yesterday afternoon the court had the date available so if you act quickly you may be able to secure the date

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724 954 3087
fax 724 954 3107

**From:** Mike Siegel [mailto:Mike@Dalan-Katz com]
**Sent:** Tuesday, May 06, 2008 6:22 PM
**To:** Kurt D Mitchell J.D.

EXHIBIT A
PAGE 4 OF 5

**Cc:** Aldo Bolliger
**Subject:** RE: Craig v VW . and not Crown

I don't know anything about the 20th Why don t we just do them together on the 19th when we are all there already That makes sense to me

---

**From:** Kurt D Mitchell J D [mailto:kmitchell@mblawgroup com]
**Sent:** Tuesday, May 06, 2008 6:25 PM
**To:** Mike Siegel
**Cc:** 'Aldo Bolliger'
**Subject:** RE: Craig v VW .and not Crown

Well apparently the court has the 20th available which seems to be a more appropriate date than the 27th So why don't you secure that date and notice Crown Audi's motion accordingly

Kurt D Mitchell J D
licensed in Fl, Pa and D C

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813 425 2824
fax 813 425 2832

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724 954 3087
fax 724 954 3107

**From:** Mike Siegel [mailto:Mike@Dalan-Katz com]
**Sent:** Tuesday, May 06, 2008 6:14 PM
**To:** Kurt D Mitchell J D
**Cc:** Nick Mooney; Aldo Bolliger; Mary Jo McCombs
**Subject:** RE: Craig v VW and not Crown

It was VW's motion that was noticed for the 19th I am willing to change our hearing to the same day if this is your way of requesting that Please let me know right away so nothing else gets scheduled Did you receive the recusal order and the copies of the deal file and service files I sent you?
Please fax and/or email the notice so I can see it right away in the event it is different that the previous notice
Since I haven't received a return call from you Aldo am I to assume you will not be calling me back?

---

**From:** Kurt D Mitchell J D [mailto:kmitchell@mblawgroup com]
**Sent:** Tuesday, May 06, 2008 6:00 PM
**To:** Mike Siegel
**Cc:** 'Nick Mooney'; Tina.harris@bromagenlaw com
**Subject:** RE: Craig v VW ..and not Crown

No the hearing is on the 19th so the notice will be going out tomorrow

Kurt D Mitchell J D
licensed in Fl, Pa and D C

Mitchell & Bolliger PLLC (Florida)



EXHIBIT A
PAGE 5 OF 5

**Kurt D. Mitchell J.D.**

**From:** Nick Mooney [nick mooney@bromagenlaw com]
**Sent:** Thursday, August 14, 2008 9:48 PM
**To:** 'Kurt D Mitchell J D '
**Cc:** tina@bromagenlaw com; 'Aldo Bolliger'
**Subject:** RE: Craig v VW

This is the most horrifying email I have ever read – the fact that you are married means that there truly is someone for everyone, even a short / hairless jerk !!! Moreover, the fact that you have pro-created is further proof for the need of forced sterilization !!!

Nicholas F Mooney, Esquire
Bromagen & Rathet, P A
201 E. Kennedy Blvd
Suite 500
Tampa, FL 33602
813/261-3870 Office
813/261-3874 Fax

**From:** Kurt D. Mitchell J.D [mailto:kmitchell@mblawgroup com]
**Sent:** Wednesday, August 13, 2008 2:55 PM
**To:** 'Nick Mooney'
**Cc:** tina@bromagenlaw.com; 'Aldo Bolliger'
**Subject:** RE: Craig v VW

Yes, Mr Mooney I am very impressed by your email it really reflects an attorney who has been practicing high powered law for the past 20 years As a matter of fact that is the very first impression I got from it Like I said Mr Mooney glass houses glass houses Oh yea, I will get right on calling Patrick Cousins and while I am at it I will just go ahead and quit the practice of law I mean after all you beat Patrick Cousins in a trial clearly, there is no hope for me I mean because we both know in law you either win every single case or lose every single case No brainer right? No such thing as winning and losing your fair share Does not happen

Oh and by the way the reason you, Bromagen & Rathet hate me is not because I am a "scum sucking" "loser attorney" but because I am the exact opposite I am a very competent, hard working attorney who gives my clients vigorous representation and does not get "bullied" by high powered 20 year defense attorneys who practice with form pleadings Finally, God has blessed me with a great life: I work when I want to, I travel when I want to, I ride my dirt bikes and atvs with my kids when I want to, I ride my motorcycle when I want to, etc See the secret is obey the bar rules i e only take as many cases as you can diligently and competently handle so I can guarantee you I work far less than you So you keep on "handling" your heavy caseloads and I will go on obeying the bar rules and limiting myself to the number of cases I can diligently and competently handle and living the good life enjoying my kids, wife & toys

As for the date request; get the dates or choose to ignore the bar's guidelines for professionalism either way the depo will be set, so it does not matter to me Take it easy do not work too hard

Kurt D Mitchell J D
licensed in Fl, Pa and D C

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EXHIBIT B
PAGE 1 OF 5

Mitchell & Bolliger PLLC (Pennsylvania)
186 Blaney Rd. Ste D
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724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw.com]
**Sent:** Tuesday, August 12, 2008 5:10 PM
**To:** 'Kurt D. Mitchell J.D.'
**Cc:** tina@bromagenlaw.com; 'Aldo Bolliger'
**Subject:** RE: Craig v. VW

Hey Junior,

Wow, you are delusional !!!! What kind of drugs are you on ??? I can handle ANYTHING a little punk like you can dish out . remember, I have been doing this for 20+ years and have not had a single heart attack as a prosecutor for 15 years, I have handled case loads in excess of 200 cases, many of which were more important / significant than these little Mag Moss claims that are handled by bottom feeding / scum sucking / loser lawyers like yourself . . . . I have actually done a jury trial and am looking forward to teaching you a lesson (please call Patrick Cousins he is still hurting from the ass whooping I gave him more than 1 year ago ) while I know that you have a NOTHING life, other people do have more important thing to worry about than little Kurtie Boy file what you want – does not matter to me . I will get you MORE dates as I see fit otherwise, go back to your single wide trailer in the dumps of Pennsylvania and get a life !!!

nfm

Nicholas F Mooney, Esquire
Bromagen & Rathet, P A
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Suite 500
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813/261-3870 Office
813/261-3874 Fax

**From:** Kurt D. Mitchell J.D. [mailto:kmitchell@mblawgroup.com]
**Sent:** Tuesday, August 12, 2008 1:57 PM
**To:** 'Nick Mooney'
**Cc:** tina@bromagenlaw.com; 'Aldo Bolliger'
**Subject:** RE: Craig v. VW

Mr Mooney:

It is clear you cannot deal with the pressure of litigating (I am sure your client's are on your ass (let me guess Mr. Kelly does not want to be deposed; Bill is cracking the whip; volume practice has you down) but I really do not care, if you cannot take the heat then get out of the kitchen. I told you on multiple occasions what time frame I was looking to conduct the deposition. Otherwise, how would you know to be checking for dates in late September or early October. So you better get your client under control and learn to pick up a phone and call somebody or we will be doing a lot of motion practice We can do it the easy or we can do the hard way the choice is yours.

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EXHIBIT B
PAGE 2 OF 5

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**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw com]
**Sent:** Tuesday, August 12, 2008 11:04 AM
**To:** 'Kurt D. Mitchell J.D '
**Cc:** tina@bromagenlaw.com
**Subject:** Craig v VW

You make me laugh we provided you dates and you were not available and did not provide us with any other dates I have checked with the witness for other dates in late September / early October as you know I will be out of the office for the next few days to attend a funeral and visit my Dad in the hospital thus, while I know that this is your LIFE and that you have nothing else to do, this is only my JOB My family comes first maybe you need to re-think your priorities we only have a short time on this planet (and yours will likely be even shorter) enjoy life while it lasts

nfm

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---

**From:** Kurt D. Mitchell J.D [mailto:kmitchell@mblawgroup com]
**Sent:** Friday, August 01, 2008 9:44 AM
**To:** 'Nick Mooney'
**Subject:** RE: Craig v VW

Cannot, I will be in trial Whiddon v Ford Motor Company

Kurt D Mitchell J D
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**From:** Nick Mooney [mailto:nick mooney@bromagenlaw.com]
**Sent:** Friday, August 01, 2008 8:01 AM
**To:** 'Kurt D. Mitchell J.D '



EXHIBIT B
PAGE 3 OF 5

**Cc:** 'Aldo Bolliger'; tina@bromagenlaw.com
**Subject:** RE: Craig v VW

How about 9/16 or 9/17 ??? I will check back with him for the first week of October

nfm

Nicholas F Mooney, Esquire
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---

**From:** Kurt D Mitchell J D. [mailto:kmitchell@mblawgroup com]
**Sent:** Thursday, July 31, 2008 11:59 AM
**To:** 'Nick Mooney'
**Cc:** 'Aldo Bolliger'; tina@bromagenlaw com
**Subject:** RE: Craig v VW

Mr Mooney

I would prefer to conduct the deposition in late September or Early October as August is very busy for me and the few dates I have available I wish to leave open to handle events for a case that is going to trial in September To that end I suggest any date during the first week in October to conduct the deposition of Mr Kelly Please advise if you and your client are agreeable

Kurt D Mitchell J D
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**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw com]
**Sent:** Thursday, July 31, 2008 10:18 AM
**To:** 'Kurt D. Mitchell J D '
**Cc:** 'Aldo Bolliger'; tina@bromagenlaw com
**Subject:** Craig v VW

Mr Kelly provided me with dates of 8/19, 8/27 or 8/28 Are those available for you ??? Please advise If not, I will get other dates from him and let you know

nfm

Nicholas F Mooney, Esquire
Bromagen & Rathet, P A



EXHIBIT B
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---

**From:** Kurt D Mitchell J.D. [mailto:kmitchell@mblawgroup.com]
**Sent:** Wednesday, July 30, 2008 4:36 PM
**To:** 'Nick Mooney'
**Cc:** 'Aldo Bolliger'
**Subject:** RE: Craig v. VW

Mr Mooney:

I believe I stated I would move the depo of Mr Kelly to a date in late September or early October and withdraw the notice of Mr Fischer Further, I stated we could cross the bridge of Mr Fischer's deposition when and if I determined if I needed it As the Florida rules are very broad providing for the deposition of any person, I do not wish to place myself in a position of compelling a deposition if I determine I need it just to take a deposition of an individual I am entitled to Please, advise if VW is agreeable to holding Mr Kelly's deposition in late September or early October and crossing the bridge with Mr Fischer's deposition when and if we need to Thank you for your time and attention to this matter

Kurt D Mitchell J D
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**From:** Nick Mooney [mailto:nick mooney@bromagenlaw com]
**Sent:** Wednesday, July 30, 2008 3:17 PM
**To:** 'Kurt D. Mitchell J.D.'
**Cc:** 'Aldo Bolliger'; tina@bromagenlaw.com
**Subject:** Craig v. VW

Mr Mitchell,

Per our discussions with respect to the depositions of Brian Kelly & Reinhard Fischer, may this email serve to outline a good faith effort to resolve the issues without court intervention Accordingly, VWoA hereby agrees to produce Brian Kelly for deposition in Virginia at a date & time agreed to by the parties (I will get dates from Mr. Kelly . I think you suggested late September or early October 2008) Based upon the production of Mr Kelly for deposition, Plaintiff agrees that it will not seek to take the deposition of Reinhard Fischer, unless the Court enters an Order requiring the deposition of Mr Fischer Please advise if this is acceptable -- let me know if any problems or concerns

nfm

Nicholas F Mooney, Esquire
Bromagen & Rathet, P A
201 E Kennedy Blvd



EXHIBIT B
PAGE 5 OF 5

**Nick Mooney**

**From:** Kurt D. Mitchell J.D. [kmitchell@mblawgroup.com]
**Sent:** Thursday, October 09, 2008 2:59 PM
**To:** 'Nick Mooney'; 'Tina Harris'; 'Jessica Affortunato'
**Cc:** nick@bromagenlaw.com; lroberts@mblawgroup.com; 'Aldo Bolliger'
**Subject:** RE: BROWNELL V VW

Three things Corky:

(1) While I am sorry to hear about your disabled child; that sort of thing is to be expected when a retard reproduces, it is a crap shoot sometimes retards can produce normal kids, sometimes they produce F***** up kids. Do not hate me, hate your genetics. However, I would look at the bright side at least you definitely know the kid is yours.
(2) You are confusing realities again the retard love story you describe taking place in a pinto and trailer is your story. You remember the other lifetime movie about your life: "Special Love" the Corky and Marie story; a heartwarming tale of a retard fighting for his love, children, pinto and trailer and hoping to prove to the world that a retard can live a normal life (well kinda).
(3) Finally, I am done communicating with you; your language skills, wit and overall skill level is at a level my nine-year could successfully combat; so for me it is like taking candy from well a retard and I am now bored. So run along and resume your normal activity of attempting to put a square peg into a round hole and come back when science progresses to a level that it can successfully add 50, 75 or 100 points to your I.Q.

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**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw.com]
**Sent:** Thursday, October 09, 2008 1:39 PM
**To:** kmitchell@mblawgroup.com; 'Tina Harris'; 'Jessica Affortunato'
**Cc:** nick@bromagenlaw.com; lroberts@mblawgroup.com; 'Aldo Bolliger'
**Subject:** RE: BROWNELL V VW

Thanks Sparky ... more evidence of the jerk you are .... the fact that I have a son with a birth defect really shows what type of a weak minded, coward you truly are .... I am sure your parents, if you even know who they are, are very proud of the development of their sperm cells .... if you need to find the indications of "retardism" you seek, I suggest that you look into a mirror, then look at your wife – she has to be a retard to marry such a loser like you .... Then check your children (if they are even yours .... Better check the garbage man that comes by your trailer to make sure they don't look like him) .... Unfortunately, it looks the better part of you was the sperm cells left on the back seat of the Ford Pinto ... too bad they didn't have a rear end impact / explosion before you were born .... that would have made the world a better place ...

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PAGE 1 OF 4

See you soon .... If you don't wimp out again !!!

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---

**From:** Kurt D. Mitchell J.D. [mailto:kmitchell@mblawgroup.com]
**Sent:** Thursday, October 09, 2008 11:55 AM
**To:** 'Nick Mooney'; 'Tina Harris'; 'Jessica Affortunato'
**Cc:** nick@bromagenlaw.com; lroberts@mblawgroup.com; 'Aldo Bolliger'
**Subject:** RE: BROWNELL V VW

You should already have my response a notice of hearing for November 13, 2008. Moreover, anticipating dilatory conduct on your part; you know I am sure you will come up with something like my 4 cousin twice removed is having an ultra –sound that day and needs my emotional support. I will be filing a motion and setting for UMC to enforce the hearing date. Ahh, yes the joys of working with a lying, dilatory mentally handicapped person. By the way, I do not think I deserve the jerk comment, I was actually on the internet trying to find out what type of retardism you have by checking your symptoms e.g. closely spaced eyes, dull blank stare, bulbous head, lying and inability to tell fiction from reality so I could donate money for research for a cure. However, apparently those symptoms are indicative of numerous types of retardism and so my search was unsuccessful. Have a great day Corky I mean; Mr. Mooney.

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**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw.com]
**Sent:** Thursday, October 09, 2008 11:41 AM
**To:** 'Tina Harris'; 'Jessica Affortunato'
**Cc:** nick@bromagenlaw.com; 'Kurt D. Mitchell J.D.'
**Subject:** RE: BROWNELL V VW

Ahhhh yes, the continuing saga of scheduling with Sparky ....my expert and my schedule are not open on those dates in November .... If 12/16 or 12/17 don't work for you, then get some dates in January and let me know . . Consistent with Sparky's sharp practices, confirm availability by 12:00 noon ... if we don't hear from you, we will rely upon your lack of response as being available .. .

nfm

Nicholas F. Mooney, Esquire

EXHIBIT C
PAGE 2 OF 4

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813/261-3874 Fax

**From:** Tina Harris [mailto:tina.harris@bromagenlaw.com]
**Sent:** Thursday, October 09, 2008 11:32 AM
**To:** 'Jessica Affortunato'
**Cc:** nick@bromagenlaw.com; 'Kurt D. Mitchell J.D.'
**Subject:** RE: BROWNELL V VW

They may be available on JACS, but, as I stated previously, they are NOT available to Mr. Mooney or our Expert.

Please advise as to your availability for December 16 or December 17 so that we can get alternative dates in January, 2009 if necessary.

Tina Marie Harris, FRP
Paralegal to Nicholas F. Mooney, Esquire
BROMAGEN & RATHET, P.A.
201 E. Kennedy Blvd.
Suite 500
Tampa, FL 33602
813/261-3870 office
813/261-3874 fax
tina@bromagenlaw.com

**From:** Jessica Affortunato [mailto:jaffortunato@mblawgroup.com]
**Sent:** Thursday, October 09, 2008 11:24 AM
**To:** 'Tina Harris'
**Subject:** RE: BROWNELL V VW

The dates that I gave you are all available on the JACS. Please pick one by noon today.

Jessica Affortunato
Legal Assistant

Mitchell & Bolliger, PLLC
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FL OFFICE - 813-425-2824
FL FAX - 813-425-2832

Mitchell & Bolliger, PLLC
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Kittanning, PA 16201
PA OFFICE - 724-954-3087
PA FAX - 724-954-3107

**From:** Tina Harris [mailto:tina.harris@bromagenlaw.com]
**Sent:** Thursday, October 09, 2008 10:48 AM
**To:** 'Jessica Affortunato'
**Subject:** RE: BROWNELL V VW

Unfortunately, those dates are already booked. I did send Mr. Mitchell alternative dates earlier today for two

EXHIBIT C
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December dates. Please check those and advise.

Tina Marie Harris, FRP
Paralegal to Nicholas F. Mooney, Esquire
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Tampa, FL 33602
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tina@bromagenlaw.com

---

**From:** Jessica Affortunato [mailto:jaffortunato@mblawgroup.com]
**Sent:** Thursday, October 09, 2008 10:38 AM
**To:** tina@bromagenlaw.com
**Subject:** BROWNELL V VW

Ms. Harris

We would like to schedule a hearing for the continuance for attorney fees and Judge Nicholas has these dates available on his calendar for one hour and 30 minutes:

November 13
November 24
November 26

Please respond by noon today or we will be taking the first available date. Thank you for your time and attention to this matter.

Jessica Affortunato
Legal Assistant

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EXHIBIT C
TAGL 4 OF 4

**Nick Mooney**

**From:** Kurt D. Mitchell J.D. [kmitchell@mblawgroup.com]
**Sent:** Tuesday, October 14, 2008 3:51 PM
**To:** 'Nick Mooney'; 'Aldo Bolliger'
**Cc:** 'Jessica Affortunato', lroberts@mblawgroup.com
**Subject:** RE. Brownell v. VW

Aldo:

This guy is an absolute ass clown and what he is not going to use his retarded son with 300+ surgeries (must look just like Mooney so they must be all plastic surgeries) to get out of the trial? I can see already your Honor my retarded son is having surgery for the 301st time so there is no way I can try the case I need a continuance. Absolute joke and ass clown. If this is what a 20 year attorney looks like, then I feel sorry for the profession. Yea, that is exactly what I want to do go watch a jester perform at the Court. How pathetic of a life must you have to run around every day talking about how great a trial attorney you are. Especially. when everybody can see you are an ass clown. After all if I am running around to hearings after 20 years lying to courts and using my time to send childish emails to a third-year attorney. the last thing I am going to do is run around saying what a great attorney I am. This guy has to go home every night and get absolutely plastered to keep from blowing his huge bulbous head off. Alright, enough about the ass clown. Later.

Kurt D. Mitchell J.D.
licensed in Fl. Pa and D.C.

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Kittannning PA 16201
724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw.com]
**Sent:** Tuesday, October 14, 2008 1:39 PM
**To:** 'Nick Mooney'; 'Aldo Bolliger'
**Cc:** 'Tina Harris'; 'Jessica Affortunato'; kmitchell@mblawgroup.com; lroberts@mblawgroup.com
**Subject:** RE: Brownell v. VW

P.S. After reading the Lemon Law Heanng transcnpt in Murphy v Ford, maybe you & Junior need to learn some habits – good or bad .

Nicholas F. Mooney, Esquire
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EXHIBIT D
PAGE 1 OF 1

**Nick Mooney**

**From:** Kurt D. Mitchell J.D [kmitchell@mblawgroup com]
**Sent:** Wednesday, October 15, 2008 6:00 PM
**To:** 'Nick Mooney'; 'Tina Harris'; 'Jessica Affortunato'
**Cc:** 'Aldo Bolliger'; 'William Bromagen'
**Subject:** RE. BROWNELL

You are an ass clown absolutely and completely an ass clown. Shouldn't you be tending to your retarded son and his 600th surgery or something instead of sending useless emails. In fact. I think I hear the little retards monosyllabic grunts now; Yep. I can make just barely make it out; he is calling for his ass clown. How sweet.

Kurt D. Mitchell J.D.
licensed in Fl, Pa and D.C.

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Kittannning PA 16201
724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw.com]
**Sent:** Wednesday, October 15, 2008 5:15 PM
**To:** kmitchell@mblawgroup.com; 'Tina Harris'; 'Jessica Affortunato'
**Cc:** 'Aldo Bolliger'; 'William Bromagen'
**Subject:** RE: BROWNELL

Ok, Sparky – looking forward to it . Hope that you have the courage to attend the hearing this time ...

nfm

Nicholas F. Mooney, Esquire
Bromagen & Rathet, P.A.
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813/261-3874 Fax

**From:** Kurt D. Mitchell J.D. [mailto:kmitchell@mblawgroup.com]
**Sent:** Wednesday, October 15, 2008 2:28 PM
**To:** 'Tina Harris'; 'Jessica Affortunato'; nick.mooney@bromagenlaw.com
**Cc:** 'Aldo Bolliger'; 'William Bromagen'
**Subject:** RE: BROWNELL

Well. after providing your office with approximately 10 dates. it is clear your office is continuing with its

EXHIBIT E
PAGE 1 OF 1

CERTIFIED COPY

IN THE CIRCUIT COURT OF THE

SIXTH JUDICIAL CIRCUIT

IN AND FOR PINELLAS COUNTY, FLORIDA

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| | | |
|---|---|---|
| BRETT CRAIG, | x | |
| | : | |
| Plaintiff, | : | |
| vs. | : | Civil Action No. |
| | : | |
| VOLKSWAGEN OF AMERICA, INC., | : | 07-7823-CI7 |
| | : | |
| Defendant. | x | |

---

Herndon, Virginia

Friday, December 19, 2008

DEPOSITION OF:

BRIAN D. KELLY,

a witness, was called for examination by counsel for the plaintiff, pursuant to Notice and agreement of the parties as to time and date, beginning at approximately 10:05 o'clock, a.m.

APPEARANCE OF COUNSEL:

For the Plaintiff:

MITCHELL & BOLLINGER, ESQUIRES
BY: KURT D. MITCHELL, ESQUIRE
201 South Westland Avenue
Tampa, Florida 33606
(813) 425-2824
E-mail: Kmitchell@mblawgroup.com

For the Defendant:

BROMAGEN & RATHET, ESQUIRES
BY: NICHOLAS F. MOONEY, ESQUIRE
201 East Kennedy Boulevard, Suite 500
Tampa, Florida 33602
(813) 261-3870
E-mail: Nick.mooney@bromagenlaw.com

- 0 -

I-N-D-E-X



- 0 -

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THE WITNESS: In most basic terms, Audi of America makes money based on the sale of vehicles to dealers and the sale of parts to dealers.

BY MR. MITCHELL:

Q. To dealers?

A. Yes.

Q. That's not accurate.

MR. MOONEY: Okay, Mr. Mitchell.

MR. MITCHELL: Mr. Mooney, if you have an objection, make it. I'm not going to listen to your long diatribes today. I'm not in the mood for it. Make your objection.

MR. MOONEY: You can choose to listen, if you'd like, but when you sit there and say that's not accurate, you're accusing the witness of lying.

MR. MITCHELL: I'm allowed to question his veracity. That's what it's called, cross-examination.

MR. MOONEY: No. Actually, Mr. Mitchell, you noticed the deposition, so it's your direct examination --

MR. MITCHELL: He's a hostile witness.

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MR. MOONEY: When has he been hostile? The only person who has been hostile is you.

MR. MITCHELL: He's here testifying on behalf of his employer.

MR. MOONEY: No. He's here in response to your request for a deposition of this witness as an employee.

MR. MITCHELL: Mr. Mooney, make your objection, or I'm going to shut off the deposition and we can all go down to Florida and we'll redo it there, because I'm not going to deal with your behavior, your inappropriate behavior.

MR. MOONEY: Mr. Mitchell, you can do whatever you like for as long as you like and as long as you have your license. I don't care. You do what you want. You do not sit there and look at this man, a professional, and say that's just not true.

MR. MITCHELL: I'm allowed to test his veracity.

MR. MOONEY: No. You're not allowed to accuse somebody of lying to you.

MR. MITCHELL: I'm not?

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MR. MOONEY: No, you're not.

MR. MITCHELL: Okay. Whatever.

MR. MOONEY: So you can ask a question, but don't sit there and argue with the gentleman.

MR. MITCHELL: That's a 20-year attorney, a 20-year attorney.

MR. MOONEY: And the point would be, Junior?

MR. MITCHELL: Second time you called me Junior on the record in a deposition.

MR. MOONEY: No problem. Like I care.

MR. MITCHELL: No problem. Like you care?

MR. MOONEY: No problem. Just like you calling my special-needs child a retard, Junior, so you go right ahead.

MR. MITCHELL: Third time, Mr. Mooney, on the record at a deposition.

MR. MOONEY: Mr. Mitchell, do you have a question? Ask a question. If you don't have a question, the deposition is done. I don't care.

MR. MITCHELL: Okay.

BY MR. MITCHELL:

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**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA**

Case No.: 07-7823 CI 7

Brett Craig,
Plaintiff,
vs.

Volkswagen Of America Inc. a Corporation,

Defendant.
_____/

**PLAINTIFF'S MOTION FOR PROTECTION AND OBJECTION TO NOTICE OF DEPOSITION AND REQUEST FOR DOCUMENTS**

Plaintiff, Brett Craig, files this motion for protection and objection and alleges the following:

1. Throughout this litigation Mr. Mooney despite his 23 years of experience as an attorney has proven himself to be incompetent as a civil litigator, ignorant of the rules of civil procedure, willing to lie to the Court and otherwise conduct himself in a manner not befitting an attorney. His behavior is an embarrassment to the legal profession and should not be tolerated by this Court.

2. Mr. Mooney has unilaterally noticed Mr. Craig's deposition in the wrong county and with an oppressive request for documents solely out of bad-faith and for the purpose of harassment.

3. It is axiomatic that the Plaintiff is deposed in the county where the litigation is pending. Moreover, a party cannot request documents without providing the requisite time required under Fla. R. Civ. P. 1.350.[1]

[1] Contemporaneously with serving the notice of deposition and document request, Mr. Mooney served a notice of vehicle inspection that purported to give approximately 12 hours notice. Then when the Plaintiff did not appear Mr. Mooney threatened a motion sanctions for not responding to the vehicle



EXHIBIT G
PAGE 1 OF 3
"A"

4. As such the notice of deposition and request for documents should be quashed.

5. No attempt to set this matter for hearing was made because the Court previously informed Plaintiff's Counsel that no hearing times were available until May, 2009. Such time is well after the, date for the deposition and scheduled trial date.

6. Moreover, no good faith attempt has been with Mr. Mooney because it is clear Mr. Mooney's ignorance of civil litigation impedes his ability to understand the gravity of his actions. Further, Mr. Mooney has ignored all good faith attempts made throughout this litigation, I believe based on his ignorance of the rules of civil procedure and his belief that no court will hold him accountable for truly repugnant behavior.

WHEREFORE, the Plaintiff prays for an order:

(1) Quashing the notice of deposition and request for documents;

(2) Awarding fees and costs;

(3) Requiring that Mr. Mooney take a basic level Florida Civil Procedure Continuing Legal Education course.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing was supplied via facsimile and U.S. Mail to: Nicholas Mooney, 201 East Kennedy Blvd., Tampa, FL 33606 Facsimile 813 261 3874 this 10th day of March, 2009.

inspection even though Fla. R. Civ. P. 1.350 gives the Plaintiff 30 days to respond to requests. The Plaintiff will obviously file an appropriate response to the request for inspection within the time allowed by the rules of civil procedure.



EXHIBIT G
PAGE 2 OF 3

Mitchell & Bolliger
KURT D MITCHELL J.D.
FLA. BAR NO.: 12860
201 S. Westland Ave.
Tampa FL 33606
813 425 2824
813 425 2832
kmitchell@mblawgroup.com



EXHIBIT G
PAGE 3 OF 3

**IN THE SUPREME COURT OF FLORIDA**
**(Before a Referee)**

**THE FLORIDA BAR,**

**Complainant,**

**v.**

**NICHOLAS FRANCIS MOONEY,**

**Respondent.**
_____/

**CASE NO.**

**TFB NO. 2009-10,745 (13C)**

## COMPLAINT

**THE FLORIDA BAR**, Complainant, files this Complaint against Nicholas Francis Mooney, Respondent, pursuant to Rule 3-3.2(b), Rules Regulating The Florida Bar, and alleges:

1. Respondent is, and at all times mentioned herein was, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida.

2. Respondent and Kurt D. Mitchell were opposing counsel in several cases.

3. During the course of litigation, Respondent and Mitchell engaged in a series of email exchanges that became increasingly hostile and unprofessional.

4. In the emails, Respondent commented about Mitchell and his family, which comments were meant to disparage, humiliate and discriminate against Mitchell. The emails included the following:

a. Email trail dated May 7, 2008 3:48 PM, copy attached as **Exhibit A.**

b. Email trail dated August 14, 2008 9:48 PM, copy attached as **Exhibit B.**

c. Email trail dated September 19, 2008 11:45 AM, copy attached as **Exhibit C.**

d. Email trail dated October 9, 2008 2:59 PM, copy attached as **Exhibit D**.

5. A majority of these email exchanges were copied to multiple persons in both Respondent's law firm and Mitchell's law firm, including Respondent's legal assistant, Tina Harris, Mitchell's legal assistant, Jessica Affortunato, and Mitchell's law partner, Aldo Bolliger.

6. On or about December 19, 2008, Mitchell conducted the deposition of a defense witness in the Craig case wherein Respondent is opposing counsel. During the deposition, Respondent engaged in a hostile verbal exchange with Mitchell in the presence of the deponent and the court reporter meant to disparage, humiliate and discriminate against Mitchell. See copy of deposition transcript dated December 19, 2008, attached as **Exhibit E**, pgs. 55-57.

7. The ongoing hostility demonstrated between Respondent and Mitchell has served to prohibit them from effectively resolving scheduling matters and conducting the litigation in a professional manner, which conduct is contrary to honesty and justice and is prejudicial to the administration of justice and to our system of justice as a whole.

8. On August 26, 2009, the Thirteenth Judicial Circuit Grievance Committee "C" found probable cause for further disciplinary proceedings, and the presiding member of the grievance committee has approved the instant complaint.

9. By reason of the foregoing, the Respondent has violated the following Rules Regulating The Florida Bar: Rule 3-4.3 (commission of any act that is unlawful or contrary to honesty and justice); and 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, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic).

WHEREFORE, The Florida Bar respectfully requests that the Respondent be appropriately disciplined.

**Kenneth Lawrence Marvin**
Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 200999

**Lisa Buzzetti Hurley**
Bar Counsel
The Florida Bar
4200 George J. Bean Parkway,
Suite 2580
Tampa, Florida 33607
(813)875-9821
Florida Bar No. 164216

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that the original of this **Complaint** has been furnished by regular U. S. mail to **The Honorable Thomas D. Hall, Clerk**, the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1925; a true and correct copy by Regular and U.S. Certified Mail No. 7010 2250 0001 4002 7018, Return Receipt Requested, to **Nicholas Francis Mooney, Esq., Respondent,** at his record Bar address of Bromagen & Rathet, P.A., 201 E. Kennedy Boulevard, Suite 500, Tampa, Florida 33602-5824; a copy to **Lisa Buzzetti Hurley, Bar Counsel,** The Florida Bar, 4200 George J. Bean Parkway, Suite 2580, Tampa, Florida 33607; and a copy to **Lansing C. Scriven,** Designated Reviewer, at 442 West Kennedy Blvd., Suite 280, Tampa Florida 33606-1464; all this 7th day of April, 2010.

**Kenneth Lawrence Marvin**
Staff Counsel

## NOTICE OF TRIAL COUNSEL

**PLEASE TAKE NOTICE** that the trial counsel in this matter is Lisa Buzzetti Hurley, Bar Counsel, whose address is The Florida Bar, 4200 George J. Bean Parkway, Suite 2580, Tampa, Florida 33607. Respondent need not address pleadings, correspondence, etc. in this matter to anyone other than trial counsel and to Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300.

**Kurt D. Mitchell J.D.**

**From:** Nick Mooney [nick.mooney@bromagenlaw com]
**Sent:** Wednesday, May 07, 2008 3:48 PM
**To:** 'Kurt D. Mitchell J D '
**Cc:** 'Mike Siegel'
**Subject:** Craig v VW

Thanks for the compliment its nice to hear from a 4 year junior lawyer with little or no trial experience nfm

---

**From:** Kurt D. Mitchell J.D [mailto:kmitchell@mblawgroup com]
**Sent:** Wednesday, May 07, 2008 3:34 PM
**To:** 'Nick Mooney'
**Subject:** RE: Craig v VW

Old Hack:

Your unprofessional and otherwise asinine behavior is not necessary Learn to litigate professionally and these issues will be avoided After all my email was in response to your asinine email insisting on setting a hearing even though there is not enough time Have a nice day

Kurt D Mitchell J D
licensed in Fl, Pa and D C

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201 S Westland Ave
Tampa Fl 33606
813 425 2824
fax 813 425-2832

Mitchell & Bolliger PLLC (Pennsylvania)
186 Blaney Rd Ste D
Kittannning PA 16201
724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw com]
**Sent:** Wednesday, May 07, 2008 3:03 PM
**To:** 'Kurt D Mitchell J.D '
**Cc:** 'William Bromagen'; 'Mike Siegel'
**Subject:** RE: Craig v VW

Junior

Please do not send me any more of these absurd emails . While I am happy to know that you are also the judge in this case, your continued unprofessional & juvenile behavior is not necessary

nfm

---



EXHIBIT A
PAGE 1 OF 5

**From:** Kurt D Mitchell J.D. [mailto:kmitchell@mblawgroup.com]
**Sent:** Wednesday, May 07, 2008 2:06 PM
**To:** 'Nick Mooney'
**Subject:** RE: Craig v. VW

Mr Mooney:

I will file an objection and the motion will not be heard I will also file several other motions I have been meaning to file Have a great day and I know I will be seeing you soon By the way five minutes? That is all you need? Somebody only read head notes to cases and really did not do his homework It would seem to me you would need 15 minutes to attempt to explain away the waiver issue alone, but again that is why I like practicing against the law firm of Bromagen & Rathet You seem to fit in perfectly

Kurt D Mitchell J D
licensed in Fl, Pa and D C

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813 425 2824
fax 813 425 2832

Mitchell & Bolliger PLLC (Pennsylvania)
186 Blaney Rd Ste D
Kittannning PA 16201
724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw.com]
**Sent:** Wednesday, May 07, 2008 1:10 PM
**To:** 'Kurt D. Mitchell J.D.'; 'Mike Siegel'
**Cc:** 'Aldo Bolliger'; 'Tina Harris'
**Subject:** RE: Craig v. VW

Mr Mitchell,

You are correct, you are not "Noticing the court", we are and we have already done so I do not anticipate needing more than 5 – 10 minutes of total time, and I am sure that Mr Siegel will only need 5 – 10 minutes of total time as well thus, even if you take as long as you think to respond to the simple / straight forward motions, we should have plenty of time If not, then we will need to re-schedule the motions / issues that have not been addressed accordingly

Additionally, as you were previously informed, I am not available on the 20th I have depositions in another claim scheduled all day on the 20th

Thanks see you the 19th

nfm

---

**From:** Kurt D Mitchell J.D. [mailto:kmitchell@mblawgroup.com]
**Sent:** Wednesday, May 07, 2008 12:56 PM
**To:** 'Nick Mooney'; 'Mike Siegel'
**Cc:** 'Aldo Bolliger'; 'Tina Harris'
**Subject:** RE: Craig v. VW



EXHIBIT A
PAGE 2 OF 5

No we are not noticing all of these issues and overwhelming the Court each of the current motions will take the full 30 minutes and if you attempt to notice the matter I will file objections The court has time on the 20th and if you wish to notice the Plaintiff's motion you can do so that day I need 15 minutes to respond to your motion, 15 minutes to respond to Siegel's motion and at least 15 minutes to present the plaintiff's motion thus clearly 1 hour is not enough time

Kurt D Mitchell J D
licensed in Fl, Pa and D C

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813 425 2824
fax 813 425 2832

Mitchell & Bolliger PLLC (Pennsylvania)
186 Blaney Rd Ste D
Kittanning PA 16201
724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick mooney@bromagenlaw.com]
**Sent:** Wednesday, May 07, 2008 12:47 PM
**To:** 'Mike Siegel'; 'Kurt D. Mitchell J.D.'
**Cc:** 'Aldo Bolliger'; 'Tina Harris'
**Subject:** Craig v VW

Mike,

Thanks for your professionalism in the setting of your hearing Please be advised that in addition to our Motion for Protective Order Re 5/27/08 Deposition of VW Corporate Representative, we have also noticed the Plaintiff's pending discovery motions / motion for case management conference One hour is plenty of time to handle all of these inter-related issues

NFM

---

**From:** Mike Siegel [mailto:Mike@Dalan-Katz.com]
**Sent:** Wednesday, May 07, 2008 12:15 PM
**To:** Kurt D. Mitchell J.D
**Cc:** Aldo Bolliger; Nick Mooney
**Subject:** RE: Craig v. VW ..and not Crown

The judge's assistant made an additional 30 minutes available so we have an entire hour on the 19th starting at 3 30 She did this when we called to get hrg time for the 20th Therefore we are issuing a notice for our motion to be heard on the 19th after the other motions are heard or in whatever order the judge wants the matters to be heard

---

**From:** Kurt D Mitchell J D [mailto:kmitchell@mblawgroup com]
**Sent:** Wednesday, May 07, 2008 10:54 AM
**To:** Mike Siegel
**Cc:** 'Aldo Bolliger'
**Subject:** RE: Craig v. VW . and not Crown



EXHIBIT A
PAGE 3 OF 5

No, there is only 30 minutes available and this hearing will likely take that long so there is simply not enough time.

Kurt D Mitchell J D
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186 Blaney Rd Ste D
Kittanning PA 16201
724 954 3087
fax 724 954 3107

**From:** Mike Siegel [mailto:Mike@Dalan-Katz.com]
**Sent:** Wednesday, May 07, 2008 10:47 AM
**To:** Kurt D. Mitchell J D
**Subject:** RE: Craig v VW ..and not Crown

Are you willing to have our hearing on the 19th?

---

**From:** Kurt D Mitchell J D [mailto:kmitchell@mblawgroup com]
**Sent:** Tuesday, May 06, 2008 6:59 PM
**To:** Mike Siegel
**Cc:** 'Aldo Bolliger'
**Subject:** RE: Craig v VW and not Crown

Because of the limited time so if you do not secure the 20th then we will do it on the 27th As for the 20th as of yesterday afternoon the court had the date available so if you act quickly you may be able to secure the date

Kurt D Mitchell J D
licensed in Fl, Pa and D C

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724 954 3087
fax 724 954 3107

**From:** Mike Siegel [mailto:Mike@Dalan-Katz com]
**Sent:** Tuesday, May 06, 2008 6:22 PM
**To:** Kurt D Mitchell J.D.

EXHIBIT A
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**Cc:** Aldo Bolliger
**Subject:** RE: Craig v VW . and not Crown

I don't know anything about the 20th Why don t we just do them together on the 19th when we are all there already That makes sense to me

---

**From:** Kurt D Mitchell J D [mailto:kmitchell@mblawgroup com]
**Sent:** Tuesday, May 06, 2008 6:25 PM
**To:** Mike Siegel
**Cc:** 'Aldo Bolliger'
**Subject:** RE: Craig v VW .and not Crown

Well apparently the court has the 20th available which seems to be a more appropriate date than the 27th So why don't you secure that date and notice Crown Audi's motion accordingly

Kurt D Mitchell J D
licensed in Fl, Pa and D C

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813 425 2824
fax 813 425 2832

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Kittanning PA 16201
724 954 3087
fax 724 954 3107

**From:** Mike Siegel [mailto:Mike@Dalan-Katz com]
**Sent:** Tuesday, May 06, 2008 6:14 PM
**To:** Kurt D Mitchell J D
**Cc:** Nick Mooney; Aldo Bolliger; Mary Jo McCombs
**Subject:** RE: Craig v VW and not Crown

It was VW's motion that was noticed for the 19th I am willing to change our hearing to the same day if this is your way of requesting that Please let me know right away so nothing else gets scheduled Did you receive the recusal order and the copies of the deal file and service files I sent you?
Please fax and/or email the notice so I can see it right away in the event it is different that the previous notice
Since I haven't received a return call from you Aldo am I to assume you will not be calling me back?

---

**From:** Kurt D Mitchell J D [mailto:kmitchell@mblawgroup com]
**Sent:** Tuesday, May 06, 2008 6:00 PM
**To:** Mike Siegel
**Cc:** 'Nick Mooney'; Tina.harris@bromagenlaw com
**Subject:** RE: Craig v VW ..and not Crown

No the hearing is on the 19th so the notice will be going out tomorrow

Kurt D Mitchell J D
licensed in Fl, Pa and D C

Mitchell & Bolliger PLLC (Florida)



EXHIBIT A
PAGE 5 OF 5

**Kurt D. Mitchell J.D.**

**From:** Nick Mooney [nick mooney@bromagenlaw com]
**Sent:** Thursday, August 14, 2008 9:48 PM
**To:** 'Kurt D Mitchell J D '
**Cc:** tina@bromagenlaw com; 'Aldo Bolliger'
**Subject:** RE: Craig v VW

This is the most horrifying email I have ever read -- the fact that you are married means that there truly is someone for everyone, even a short / hairless jerk !!! Moreover, the fact that you have pro-created is further proof for the need of forced sterilization !!!

Nicholas F Mooney, Esquire
Bromagen & Rathet, P A
201 E. Kennedy Blvd
Suite 500
Tampa, FL 33602
813/261-3870 Office
813/261-3874 Fax

**From:** Kurt D. Mitchell J.D [mailto:kmitchell@mblawgroup com]
**Sent:** Wednesday, August 13, 2008 2:55 PM
**To:** 'Nick Mooney'
**Cc:** tina@bromagenlaw.com; 'Aldo Bolliger'
**Subject:** RE: Craig v VW

Yes, Mr Mooney I am very impressed by your email it really reflects an attorney who has been practicing high powered law for the past 20 years As a matter of fact that is the very first impression I got from it Like I said Mr Mooney glass houses glass houses Oh yea, I will get right on calling Patrick Cousins and while I am at it I will just go ahead and quit the practice of law I mean after all you beat Patrick Cousins in a trial clearly, there is no hope for me I mean because we both know in law you either win every single case or lose every single case No brainer right? No such thing as winning and losing your fair share Does not happen

Oh and by the way the reason you, Bromagen & Rathet hate me is not because I am a "scum sucking" "loser attorney" but because I am the exact opposite I am a very competent, hard working attorney who gives my clients vigorous representation and does not get "bullied" by high powered 20 year defense attorneys who practice with form pleadings Finally, God has blessed me with a great life: I work when I want to, I travel when I want to, I ride my dirt bikes and atvs with my kids when I want to, I ride my motorcycle when I want to, etc See the secret is obey the bar rules i e only take as many cases as you can diligently and competently handle so I can guarantee you I work far less than you So you keep on "handling" your heavy caseloads and I will go on obeying the bar rules and limiting myself to the number of cases I can diligently and competently handle and living the good life enjoying my kids, wife & toys

As for the date request; get the dates or choose to ignore the bar's guidelines for professionalism either way the depo will be set, so it does not matter to me Take it easy do not work too hard

Kurt D Mitchell J D
licensed in Fl, Pa and D C

Mitchell & Bolliger PLLC (Florida)
201 S Westland Ave
Tampa FL 33606
813 425 2824
fax 813 425 2832



EXHIBIT B
PAGE 1 OF 5

Mitchell & Bolliger PLLC (Pennsylvania)
186 Blaney Rd. Ste D
Kittannning PA 16201
724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw.com]
**Sent:** Tuesday, August 12, 2008 5:10 PM
**To:** 'Kurt D. Mitchell J.D.'
**Cc:** tina@bromagenlaw.com; 'Aldo Bolliger'
**Subject:** RE: Craig v. VW

Hey Junior,

Wow, you are delusional !!!! What kind of drugs are you on ??? I can handle ANYTHING a little punk like you can dish out . remember, I have been doing this for 20+ years and have not had a single heart attack as a prosecutor for 15 years, I have handled case loads in excess of 200 cases, many of which were more important / significant than these little Mag Moss claims that are handled by bottom feeding / scum sucking / loser lawyers like yourself ... . I have actually done a jury trial and am looking forward to teaching you a lesson (please call Patrick Cousins he is still hurting from the ass whooping I gave him more than 1 year ago ) while I know that you have a NOTHING life, other people do have more important thing to worry about than little Kurtie Boy file what you want – does not matter to me . I will get you MORE dates as I see fit otherwise, go back to your single wide trailer in the dumps of Pennsylvania and get a life !!!

nfm

Nicholas F Mooney, Esquire
Bromagen & Rathet, P A
201 E. Kennedy Blvd
Suite 500
Tampa, FL 33602
813/261-3870 Office
813/261-3874 Fax

**From:** Kurt D. Mitchell J.D. [mailto:kmitchell@mblawgroup.com]
**Sent:** Tuesday, August 12, 2008 1:57 PM
**To:** 'Nick Mooney'
**Cc:** tina@bromagenlaw.com; 'Aldo Bolliger'
**Subject:** RE: Craig v. VW

Mr Mooney:

It is clear you cannot deal with the pressure of litigating (I am sure your client's are on your ass (let me guess Mr. Kelly does not want to be deposed; Bill is cracking the whip; volume practice has you down) but I really do not care, if you cannot take the heat then get out of the kitchen. I told you on multiple occasions what time frame I was looking to conduct the deposition. Otherwise, how would you know to be checking for dates in late September or early October. So you better get your client under control and learn to pick up a phone and call somebody or we will be doing a lot of motion practice We can do it the easy or we can do the hard way the choice is yours.

Kurt D Mitchell J.D.
licensed in Fl, Pa and D.C

Mitchell & Bolliger PLLC (Florida)
201 S. Westland Ave
Tampa FL 33606
813 425 2824



EXHIBIT B
PAGE 2 OF 5

fax 813 425 2832

Mitchell & Bolliger PLLC (Pennsylvania)
186 Blaney Rd Ste D
Kittannning PA 16201
724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw com]
**Sent:** Tuesday, August 12, 2008 11:04 AM
**To:** 'Kurt D. Mitchell J.D '
**Cc:** tina@bromagenlaw.com
**Subject:** Craig v VW

You make me laugh we provided you dates and you were not available and did not provide us with any other dates I have checked with the witness for other dates in late September / early October as you know I will be out of the office for the next few days to attend a funeral and visit my Dad in the hospital thus, while I know that this is your LIFE and that you have nothing else to do, this is only my JOB My family comes first maybe you need to re-think your priorities we only have a short time on this planet (and yours will likely be even shorter) enjoy life while it lasts

nfm

Nicholas F Mooney, Esquire
Bromagen & Rathet, P A
201 E Kennedy Blvd
Suite 500
Tampa, FL 33602
813/261-3870 Office
813/261-3874 Fax

---

**From:** Kurt D. Mitchell J.D [mailto:kmitchell@mblawgroup com]
**Sent:** Friday, August 01, 2008 9:44 AM
**To:** 'Nick Mooney'
**Subject:** RE: Craig v VW

Cannot, I will be in trial Whiddon v Ford Motor Company

Kurt D Mitchell J D
licensed in Fl, Pa and D C

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186 Blaney Rd Ste D
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724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick mooney@bromagenlaw.com]
**Sent:** Friday, August 01, 2008 8:01 AM
**To:** 'Kurt D. Mitchell J.D '



EXHIBIT B
PAGE 3 OF 5

**Cc:** 'Aldo Bolliger'; tina@bromagenlaw.com
**Subject:** RE: Craig v VW

How about 9/16 or 9/17 ??? I will check back with him for the first week of October

nfm

Nicholas F Mooney, Esquire
Bromagen & Rathet, P A
201 E Kennedy Blvd
Suite 500
Tampa, FL 33602
813/261-3870 Office
813/261-3874 Fax

---

**From:** Kurt D Mitchell J D. [mailto:kmitchell@mblawgroup com]
**Sent:** Thursday, July 31, 2008 11:59 AM
**To:** 'Nick Mooney'
**Cc:** 'Aldo Bolliger'; tina@bromagenlaw com
**Subject:** RE: Craig v VW

Mr Mooney

I would prefer to conduct the deposition in late September or Early October as August is very busy for me and the few dates I have available I wish to leave open to handle events for a case that is going to trial in September To that end I suggest any date during the first week in October to conduct the deposition of Mr Kelly Please advise if you and your client are agreeable

Kurt D Mitchell J D
licensed in Fl, Pa and D C

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813 425 2824
fax 813 425 2832

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186 Blaney Rd Ste D
Kittanning PA 16201
724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw com]
**Sent:** Thursday, July 31, 2008 10:18 AM
**To:** 'Kurt D. Mitchell J D '
**Cc:** 'Aldo Bolliger'; tina@bromagenlaw com
**Subject:** Craig v VW

Mr Kelly provided me with dates of 8/19, 8/27 or 8/28 Are those available for you ??? Please advise If not, I will get other dates from him and let you know

nfm

Nicholas F Mooney, Esquire
Bromagen & Rathet, P A



EXHIBIT B
PAGE 4 OF 5

201 E. Kennedy Blvd
Suite 500
Tampa, FL 33602
813/261-3870 Office
813/261-3874 Fax

**From:** Kurt D Mitchell J.D. [mailto:kmitchell@mblawgroup.com]
**Sent:** Wednesday, July 30, 2008 4:36 PM
**To:** 'Nick Mooney'
**Cc:** 'Aldo Bolliger'
**Subject:** RE: Craig v. VW

Mr Mooney:

I believe I stated I would move the depo of Mr Kelly to a date in late September or early October and withdraw the notice of Mr Fischer Further, I stated we could cross the bridge of Mr Fischer's deposition when and if I determined if I needed it As the Florida rules are very broad providing for the deposition of any person, I do not wish to place myself in a position of compelling a deposition if I determine I need it just to take a deposition of an individual I am entitled to Please, advise if VW is agreeable to holding Mr Kelly's deposition in late September or early October and crossing the bridge with Mr Fischer's deposition when and if we need to Thank you for your time and attention to this matter

Kurt D Mitchell J D
licensed in Fl, Pa and D C

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813 425 2824
fax 813 425 2832

Mitchell & Bolliger PLLC (Pennsylvania)
186 Blaney Rd Ste D
Kittannning PA 16201
724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick mooney@bromagenlaw com]
**Sent:** Wednesday, July 30, 2008 3:17 PM
**To:** 'Kurt D. Mitchell J.D '
**Cc:** 'Aldo Bolliger'; tina@bromagenlaw.com
**Subject:** Craig v. VW

Mr Mitchell,

Per our discussions with respect to the depositions of Brian Kelly & Reinhard Fischer, may this email serve to outline a good faith effort to resolve the issues without court intervention Accordingly, VWoA hereby agrees to produce Brian Kelly for deposition in Virginia at a date & time agreed to by the parties (I will get dates from Mr. Kelly . I think you suggested late September or early October 2008) Based upon the production of Mr Kelly for deposition, Plaintiff agrees that it will not seek to take the deposition of Reinhard Fischer, unless the Court enters an Order requiring the deposition of Mr Fischer Please advise if this is acceptable – let me know if any problems or concerns

nfm

Nicholas F Mooney, Esquire
Bromagen & Rathet, P A
201 E Kennedy Blvd



EXHIBIT B
PAGE 5 OF 5

**Kurt D. Mitchell J.D.**

**From:** Kurt D. Mitchell J.D. [kmitchell@mblawgroup.com]
**Sent:** Friday, September 19, 2008 11:45 AM
**To:** 'Nick Mooney'
**Cc:** 'Tina Harris'; 'William Bromagen'; 'abolliger@mblawgroup.com'
**Subject:** RE: Craig v. VW

I am sorry you have sent this email this email to the wrong recipient. I never heard of the name "Sparky" please check your addressee and resend for everybody's convenience I have deleted the email communication from my computer. If this email was intended for me then I suggest you use my proper name when addressing communications to me. Thank you for your time and attention to this matter and have a nice day.

Kurt D. Mitchell J.D.
licensed in Fl, Pa and D.C.

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Mitchell & Bolliger PLLC (Pennsylvania)
186 Blaney Rd. Ste. D
Kittannning PA 16201
724 954 3087
fax 724 954 3107

**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw.com]
**Sent:** Friday, September 19, 2008 9:55 AM
**To:** kmitchell@mblawgroup.com
**Cc:** 'Tina Harris'; 'William Bromagen'; abolliger@mblawgroup.com
**Subject:** RE: Craig v. VW

No, Sparky, that is not what I am telling you .... He will voluntarily appear – he is just not available on that date .... If you attempt to serve him, we will simply move to quash the subpoena ... since you "fancy yourself as chess player" perhaps you can figure out the "two moves ahead" -- reschedule the motion to a date he is available and then you can present your "motions" to the court .....

See ya soon !!!

nfm

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**From:** Kurt D. Mitchell J.D. [mailto:kmitchell@mblawgroup.com]
**Sent:** Friday, September 19, 2008 8:44 AM
**To:** 'Nick Mooney'

EXHIBIT C
PAGE 1 OF 2

**Cc:** 'Tina Harris'; 'William Bromagen'; abolliger@mblawgroup.com
**Subject:** RE: Craig v. VW

Well that is when the hearing is, so what you are telling me is that he will not voluntarily appear. So I will serve a subpoena on him and he will have no choice but to make himself available on 10/2 or face a plaintiff's motion for writ of bodily attachment. Thank you for your time and attention to this matter.

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**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw.com]
**Sent:** Friday, September 19, 2008 6:30 AM
**To:** kmitchell@mblawgroup.com
**Cc:** 'Tina Harris'; 'William Bromagen'
**Subject:** Craig v. VW

Be advised that Joe Houseman will voluntarily appear for a hearing, HOWEVER, he is not available on 10/2.

nfm

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EXHIBIT C
PAGE 2 OF 2

**Nick Mooney**

**From:** Kurt D. Mitchell J.D. [kmitchell@mblawgroup.com]
**Sent:** Thursday, October 09, 2008 2:59 PM
**To:** 'Nick Mooney'; 'Tina Harris'; 'Jessica Affortunato'
**Cc:** nick@bromagenlaw.com; lroberts@mblawgroup.com; 'Aldo Bolliger'
**Subject:** RE: BROWNELL V VW

Three things Corky:

(1) While I am sorry to hear about your disabled child; that sort of thing is to be expected when a retard reproduces, it is a crap shoot sometimes retards can produce normal kids, sometimes they produce F***** up kids. Do not hate me, hate your genetics. However, I would look at the bright side at least you definitely know the kid is yours.
(2) You are confusing realities again the retard love story you describe taking place in a pinto and trailer is your story. You remember the other lifetime movie about your life: "Special Love" the Corky and Marie story; a heartwarming tale of a retard fighting for his love, children, pinto and trailer and hoping to prove to the world that a retard can live a normal life (well kinda).
(3) Finally, I am done communicating with you; your language skills, wit and overall skill level is at a level my nine-year could successfully combat; so for me it is like taking candy from well a retard and I am now bored. So run along and resume your normal activity of attempting to put a square peg into a round hole and come back when science progresses to a level that it can successfully add 50, 75 or 100 points to your I.Q.

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fax 724 954 3107

**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw.com]
**Sent:** Thursday, October 09, 2008 1:39 PM
**To:** kmitchell@mblawgroup.com; 'Tina Harris'; 'Jessica Affortunato'
**Cc:** nick@bromagenlaw.com; lroberts@mblawgroup.com; 'Aldo Bolliger'
**Subject:** RE: BROWNELL V VW

Thanks Sparky ... more evidence of the jerk you are .... the fact that I have a son with a birth defect really shows what type of a weak minded, coward you truly are .... I am sure your parents, if you even know who they are, are very proud of the development of their sperm cells .... if you need to find the indications of "retardism" you seek, I suggest that you look into a mirror, then look at your wife – she has to be a retard to marry such a loser like you .... Then check your children (if they are even yours .... Better check the garbage man that comes by your trailer to make sure they don't look like him) .... Unfortunately, it looks the better part of you was the sperm cells left on the back seat of the Ford Pinto ... too bad they didn't have a rear end impact / explosion before you were born .... that would have made the world a better place ....



EXHIBIT D
PAGE 1 OF 4

See you soon .... If you don't wimp out again !!!

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---

**From:** Kurt D. Mitchell J.D. [mailto:kmitchell@mblawgroup.com]
**Sent:** Thursday, October 09, 2008 11:55 AM
**To:** 'Nick Mooney'; 'Tina Harris'; 'Jessica Affortunato'
**Cc:** nick@bromagenlaw.com; lroberts@mblawgroup.com; 'Aldo Bolliger'
**Subject:** RE: BROWNELL V VW

You should already have my response a notice of hearing for November 13, 2008. Moreover, anticipating dilatory conduct on your part; you know I am sure you will come up with something like my 4 cousin twice removed is having an ultra –sound that day and needs my emotional support. I will be filing a motion and setting for UMC to enforce the hearing date. Ahh, yes the joys of working with a lying, dilatory mentally handicapped person. By the way, I do not think I deserve the jerk comment, t was actually on the internet trying to find out what type of retardism you have by checking your symptoms e.g. closely spaced eyes. dull blank stare, bulbous head, lying and inability to tell fiction from reality so I could donate money for research for a cure. However, apparently those symptoms are indicative of numerous types of retardism and so my search was unsuccessful. Have a great day Corky I mean; Mr. Mooney.

Kurt D. Mitchell J.D.
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**From:** Nick Mooney [mailto:nick.mooney@bromagenlaw.com]
**Sent:** Thursday, October 09, 2008 11:41 AM
**To:** 'Tina Harris'; 'Jessica Affortunato'
**Cc:** nick@bromagenlaw.com; 'Kurt D. Mitchell J.D.'
**Subject:** RE: BROWNELL V VW

Ahhhh yes, the continuing saga of scheduling with Sparky ....my expert and my schedule are not open on those dates in November .... If 12/16 or 12/17 don't work for you, then get some dates in January and let me know . . Consistent with Sparky's sharp practices, confirm availability by 12:00 noon ... if we don't hear from you, we will rely upon your lack of response as being available .. .

nfm

Nicholas F. Mooney, Esquire



EXHIBIT D
PAGE 2 OF 4

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**From:** Tina Harris [mailto:tina.harris@bromagenlaw.com]
**Sent:** Thursday, October 09, 2008 11:32 AM
**To:** 'Jessica Affortunato'
**Cc:** nick@bromagenlaw.com; 'Kurt D. Mitchell J.D.'
**Subject:** RE: BROWNELL V VW

They may be available on JACS, but, as I stated previously, they are NOT available to Mr. Mooney or our Expert.

Please advise as to your availability for December 16 or December 17 so that we can get alternative dates in January, 2009 if necessary.

Tina Marie Harris, FRP
Paralegal to Nicholas F. Mooney, Esquire
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tina@bromagenlaw.com

**From:** Jessica Affortunato [mailto:jaffortunato@mblawgroup.com]
**Sent:** Thursday, October 09, 2008 11:24 AM
**To:** 'Tina Harris'
**Subject:** RE: BROWNELL V VW

The dates that I gave you are all available on the JACS. Please pick one by noon today.

Jessica Affortunato
Legal Assistant

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**From:** Tina Harris [mailto:tina.harris@bromagenlaw.com]
**Sent:** Thursday, October 09, 2008 10:48 AM
**To:** 'Jessica Affortunato'
**Subject:** RE: BROWNELL V VW

Unfortunately, those dates are already booked. I did send Mr. Mitchell alternative dates earlier today for two



EXHIBIT D
PAGE 3 OF 4

December dates. Please check those and advise.

Tina Marie Harris, FRP
Paralegal to Nicholas F. Mooney, Esquire
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**From:** Jessica Affortunato [mailto:jaffortunato@mblawgroup.com]
**Sent:** Thursday, October 09, 2008 10:38 AM
**To:** tina@bromagenlaw.com
**Subject:** BROWNELL V VW

Ms. Harris

We would like to schedule a hearing for the continuance for attorney fees and Judge Nicholas has these dates available on his calendar for one hour and 30 minutes:

November 13
November 24
November 26

Please respond by noon today or we will be taking the first available date. Thank you for your time and attention to this matter.

Jessica Affortunato
Legal Assistant

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EXHIBIT D
PAGE 4 OF 4

CERTIFIED COPY

IN THE CIRCUIT COURT OF THE

SIXTH JUDICIAL CIRCUIT

IN AND FOR PINELLAS COUNTY, FLORIDA

---

| | | |
|---|---|---|
| BRETT CRAIG, | x | |
| | : | |
| Plaintiff, | : | |
| vs. | : | Civil Action No. |
| | : | |
| VOLKSWAGEN OF AMERICA, INC., | : | 07-7823-CI7 |
| | : | |
| Defendant. | x | |

---

Herndon, Virginia

Friday, December 19, 2008

DEPOSITION OF:

BRIAN D. KELLY,

a witness, was called for examination by counsel for the plaintiff, pursuant to Notice and agreement of the parties as to time and date, beginning at approximately 10:05 o'clock, a.m.

APPEARANCE OF COUNSEL:

For the Plaintiff:

MITCHELL & BOLLINGER, ESQUIRES
BY: KURT D. MITCHELL, ESQUIRE
201 South Westland Avenue
Tampa, Florida 33606
(813) 425-2824
E-mail: Kmitchell@mblawgroup.com

For the Defendant:

BROMAGEN & RATHET, ESQUIRES
BY: NICHOLAS F. MOONEY, ESQUIRE
201 East Kennedy Boulevard, Suite 500
Tampa, Florida 33602
(813) 261-3870
E-mail: Nick.mooney@bromagenlaw.com

- 0 -

I-N-D-E-X



- 0 -

EXHIBIT E
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THE WITNESS: In most basic terms, Audi of America makes money based on the sale of vehicles to dealers and the sale of parts to dealers.

BY MR. MITCHELL:

Q. To dealers?

A. Yes.

Q. That's not accurate.

MR. MOONEY: Okay, Mr. Mitchell.

MR. MITCHELL: Mr. Mooney, if you have an objection, make it. I'm not going to listen to your long diatribes today. I'm not in the mood for it. Make your objection.

MR. MOONEY: You can choose to listen, if you'd like, but when you sit there and say that's not accurate, you're accusing the witness of lying.

MR. MITCHELL: I'm allowed to question his veracity. That's what it's called, cross-examination.

MR. MOONEY: No. Actually, Mr. Mitchell, you noticed the deposition, so it's your direct examination --

MR. MITCHELL: He's a hostile witness.

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PAGE 3 OF 3

MR. MOONEY: When has he been hostile? The only person who has been hostile is you.

MR. MITCHELL: He's here testifying on behalf of his employer.

MR. MOONEY: No. He's here in response to your request for a deposition of this witness as an employee.

MR. MITCHELL: Mr. Mooney, make your objection, or I'm going to shut off the deposition and we can all go down to Florida and we'll redo it there, because I'm not going to deal with your behavior, your inappropriate behavior.

MR. MOONEY: Mr. Mitchell, you can do whatever you like for as long as you like and as long as you have your license. I don't care. You do what you want. You do not sit there and look at this man, a professional, and say that's just not true.

MR. MITCHELL: I'm allowed to test his veracity.

MR. MOONEY: No. You're not allowed to accuse somebody of lying to you.

MR. MITCHELL: I'm not?

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PAGE 4 OF 5

MR. MOONEY: No, you're not.

MR. MITCHELL: Okay. Whatever.

MR. MOONEY: So you can ask a question, but don't sit there and argue with the gentleman.

MR. MITCHELL: That's a 20-year attorney, a 20-year attorney.

MR. MOONEY: And the point would be, Junior?

MR. MITCHELL: Second time you called me Junior on the record in a deposition.

MR. MOONEY: No problem. Like I care.

MR. MITCHELL: No problem. Like you care?

MR. MOONEY: No problem. Just like you calling my special-needs child a retard, Junior, so you go right ahead.

MR. MITCHELL: Third time, Mr. Mooney, on the record at a deposition.

MR. MOONEY: Mr. Mitchell, do you have a question? Ask a question. If you don't have a question, the deposition is done. I don't care.

MR. MITCHELL: Okay.

BY MR. MITCHELL:

EXHIBIT E
PAGE 5 OF 5

**COPIA BLAKE and PETER BIRZON, Appellants, v. ANN-MARIE GIUSTIBELLI, P.A., and ANN-MARIE GIUSTIBELLI, individually, Appellees.**

**No. 4D14-3231**

**COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT**

***182 So. 3d 881*; *2016 Fla. App. LEXIS 244*; *41 Fla. L. Weekly D 122***

**January 6, 2016, Decided**

**SUBSEQUENT HISTORY:** Review denied by *Blake v. Ann-Marie Giustibelli, P.A., 2016 Fla. LEXIS 469 (Fla., Mar. 7, 2016)*
US Supreme Court certiorari denied by *Blake v. Giustibelli, 2016 U.S. LEXIS 5404 (U.S., Oct. 3, 2016)*

**PRIOR HISTORY:** [**1] Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michael L. Gates, Judge; L.T. Case No. 12-22244 (12).

**COUNSEL:** Copia Blake, Kansas City, MO, and Peter Birzon, Weston, Pro se.

Ann-Marie Giustibelli, Plantation, for appellees.

**JUDGES:** CIKLIN, C.J. MAY and FORST, JJ., concur.

**OPINION BY:** CIKLIN

**OPINION**

[*882] CIKLIN, C.J.

After a non-jury trial, the trial court awarded the appellee, attorney Ann-Marie Giustibelli, damages in this libel and breach of contract case. In their initial brief on appeal, the appellants, Copia Blake and Peter Birzon, raised five issues. After briefs were filed and the court spent considerable time entertaining the issues raised, Birzon filed a notice that he and the appellee had settled the matter and that he was withdrawing his appeal. Blake did not join in the notice. We note that even if she had, we would not have dismissed the appeal. One issue Blake and Birzon raised involves the application of free speech protections to reviews of professional services posted on the internet. [*883] We affirm in all respects, but this issue merits discussion as it presents a scenario that will likely recur, and the public will benefit from an opinion on the matter. *See Caiazzo v. Am. Royal Arts Corp., 73 So. 3d 245, 248-49 (Fla. 4th DCA 2011)* (recognizing that appellate [**2] court has discretion to retain jurisdiction over an appeal after it has been voluntarily dismissed, particularly where "the case presents a question of public importance and substantial judicial labor has been expended" (quoting *State v. Schopp, 653 So. 2d 1016, 1018 (Fla. 1995)))*.

Attorney Giustibelli represented Copia Blake in a dissolution of marriage proceeding brought against Peter Birzon. After a breakdown in the attorney-client relationship between Giustibelli and her client, Blake and oddly, Birzon as well, took to the internet to post defamatory reviews of Giustibelli. In response, Giustibelli brought suit, pleading a count for libel. She also brought counts for breach of contract and for attorney's fees, alleging that Blake still owed her money related to the divorce representation.

Blake's and Birzon's posted internet reviews contained the following statements:

> This lawyer represented me in my divorce. She was combative and explosive and took my divorce to a level of anger which caused major suffering of my minor children. She insisted I was an emotionally abused wife who couldn't make rational decisions which caused my case to drag on in the system for a year and a half so her FEES would continue to mul-

tiply!! She misrepresented [**3] her fees with regards to the contract I initially signed. The contract she submitted to the courts for her fees were 4 times her original quote and pages of the original had been exchanged to support her claims, only the signature page was the same. Shame on me that I did not have an original copy, but like an idiot . . . I trusted my lawyer. Don't mistake sincerity for honesty because I assure you, that in this attorney's case, they are NOT the same thing. She absolutely perpetuates the horrible image of attorneys who are only out for the money and themselves. Although I know this isn't the case and there are some very good honest lawyers out there, Mrs. Giustibelli is simply not one of the "good ones[.]" Horrible horrible experience. Use anyone else, it would have to be a better result.

****

No integrity. Will say one thing and do another. Her fees outweigh the truth. Altered her charges to 4 times the original quote with no explanation. Do not use her. Don't mistake sincerity for honesty. In her case, they're not at all the same. Will literally lie to your face if it means more money for her. Get someone else. . . . Anyone else would do a superior effort for you.

****

I accepted an [**4] initial VERY fair offer from my ex. Mrs. Giustibelli convinced me to "crush" him and that I could have permanent etc. Spent over a year (and 4 times her original estimate) to arrive at the same place we started at. Caused unnecessary chaos and fear with my kids, convinced me that my ex cheated (which he didn't), that he was hiding money (which he wasn't), and was mad at ME when I realized her fee circus had gone on long enough and finally said "stop[.]" Altered her fee structures, actually replaced original documents with others to support her charges and generally gave the kind of poor service you only hear about. I'm not a disgruntled ex-wife. I'm just the foolish person who believes that a person's word should be backed by integrity. Not even remotely true in this case. I've had 2 prior attorneys [*884] and never ever have I seen ego and monies be so blatantly out of control.

Both Blake and Birzon admitted to posting the reviews on various internet sites. The evidence showed that Blake had agreed to pay her attorney the amount reflected on the written retainer agreement--$300 an hour. Blake and Birzon both admitted at trial that Giustibelli had not charged Blake four times more than what [**5] was quoted in the agreement. The court entered judgment in favor of Giustibelli and awarded punitive damages of $350,000.

On appeal, Blake and Birzon argue that their internet reviews constituted statements of opinion and thus were protected by the *First Amendment* and not actionable as defamation. We disagree. "[A]n action for libel will lie for a 'false and unprivileged publication by letter, or otherwise, which exposes a person to distrust, hatred, contempt, ridicule or obloquy or which causes such person to be avoided, or which has a tendency to injure such person in [their] office, occupation, business or employment.'" *LRX, Inc. v. Horizon Assocs. Joint Venture ex rel. Horizon-ANF, Inc., 842 So. 2d 881, 885 (Fla. 4th DCA 2003)* (quoting *Thomas v. Jacksonville Television, Inc., 699 So. 2d 800, 803 (Fla. 1st DCA 1997))*.[1]

1 Statements of pure opinion are not actionable. *Morse v. Ripken, 707 So. 2d 921, 922 (Fla. 4th DCA 1998)*. However, "there is no constitutional value in false statements of fact." *Id.* (quoting *Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974))*. If a factfinder "were to conclude that any of the [assertions of fact] in the [publication] were false, [this] would allow the [factfinder] to disregard the pure opinion defense." *LRX, 842 So. 2d at 886*.

Here, all the reviews contained allegations that Giustibelli lied to Blake regarding the attorney's fee. Two of the reviews contained the allegation that Giustibelli falsified a contract. These are factual allegations, and the evidence showed they were false.

[**6] As part of their "free speech" claim, Blake and Birzon point out that the judgment references defamation "per se." They argue that libel per se no longer exists as a legal concept after the decision by the United States Supreme Court in *Gertz, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)*. "[A] publication is libelous per se, or actionable per se, if, when considered alone without innuendo: (1) it charges that a person has committed an infamous crime; (2) it charges a person

with having an infectious disease; (3) it tends to subject one to hatred, distrust, ridicule, contempt, or disgrace; or (4) it tends to injure one in his trade or profession." *Richard v. Gray, 62 So. 2d 597, 598 (Fla. 1953)*; *see also Shafran v. Parrish, 787 So. 2d 177, 179 (Fla. 2d DCA 2001)* ("When a statement charges a person with committing a crime, the statement is considered defamatory *per se*." (citation omitted)). In *Gertz*, the Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz, 418 U.S. at 347*. After *Gertz*, the Florida Supreme Court recognized that, with respect to a libel action *against the media*, it is no longer accurate to say that "'[w]ords amounting to a libel per se necessarily import damage and [**7] malice in legal contemplation, so these elements need not be pleaded or proved, as they are conclusively presumed as a matter of law.'" *Mid-Fla. Television Corp. v. Boyles, 467 So. 2d 282, 283 (Fla. 1985)* (quoting *Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933)*). Thus, after *Gertz*, in libel cases involving media defendants, [*885] fault and proof of damages must always be established.

Notably, the instant case does not involve a media defendant. Libel per se otherwise still exists in Florida. *See Lawnwood Med. Ctr., Inc. v. Sadow, 43 So. 3d 710, 727-29 (Fla. 4th DCA 2010)* (containing discussion of the presumption of damages that applies in defamation per se cases); *Perry v. Cosgrove, 464 So. 2d 664, 666 (Fla. 2d DCA 1985)* (reversing trial court's grant of a motion to dismiss a libel per se action brought by a former editor of a newspaper against his supervisor, who had written a letter to a reader suggesting that the editor was fired for reasons that were shameful); *Owner's Adjustment Bureau, Inc. v. Ott, 402 So. 2d 466, 470 (Fla. 3d DCA 1981)* (concluding that statements in a letter amounted to libel per se as a matter of law).

As to the remaining arguments raised on appeal, we decline to address them as they are not sufficiently briefed, not preserved, or lack merit.

*Affirmed*.

MAY and FORST, JJ., concur.

********** Print Completed **********

Time of Request: Sunday, October 16, 2016  20:34:41 EST

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Number of Pages:

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WELDON & ROTHMAN, PL
7935 AIRPORT PULLING RD N STE 205
NAPLES, FL 34109-1747

FL Eth. Op. 14-1 (Fla.St.Bar Assn.), 2015 WL 9581259

Florida State Bar Association
Committee on Professional Ethics


Opinion Number 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 oot 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.

***1 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 np" 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 informatioo 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;

*2 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).

*3 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.

***4** 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 or data is preserved.

FL Eth. Op. 14-1 (Fla.St.Bar Assn.), 2015 WL 9581259

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KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Chace v. Loisel, Fla.App. 5 Dist., January 24, 2014

103 So.3d 184
District Court of Appeal of Florida,
Fourth District.

Pierre DOMVILLE, Petitioner,
v.
STATE of Florida, Respondent.

No. 4D12–556.
Sept. 5, 2012.
Rehearing Denied Jan. 16, 2013.

**Synopsis**
**Background:** Defendant filed motion to disqualify trial judge, alleging that the judge was a social networking website "friend" of the prosecutor assigned to his case. The Seventeenth Judicial Circuit Court, Broward County, Andrew L. Siegel, J., denied motion. Defendant filed petition for writ of prohibition.

**[Holding:]** The District Court of Appeal held that defendant's motion was legally sufficient to require disqualification.

Petition granted.

West Headnotes (5)

[1] **Criminal Law**
Review De Novo

In determining the legal sufficiency of a motion to disqualify the trial judge, the District Court of Appeal reviews the motion's allegations under a de novo standard. West's F.S.A. R.Jud.Admin.Rule 2.330(f).

Cases that cite this headnote

[2] **Judges**
Sufficiency of objection, affidavit, or motion

A motion to disqualify the trial judge is legally sufficient if the facts alleged, which must be taken as true, would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial. West's F.S.A. R.Jud.Admin.Rule 2.330(f).

1 Cases that cite this headnote

[3] **Judges**
Bias and Prejudice

A mere subjective fear of bias is not legally sufficient reason to grant disqualification of a trial judge; rather, the fear must be objectively reasonable. West's F.S.A. R.Jud.Admin.Rule 2.330(f).

Cases that cite this headnote

[4] **Judges**
Sufficiency of objection, affidavit, or motion

Allegations in defendant's motion to disqualify trial judge, that the judge was a social networking website "friend" of the prosecutor assigned to his case, were sufficient to create impression in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial, and thus, motion was legally sufficient to require disqualification. West's F.S.A. R.Jud.Admin.Rule 2.330(f); West's F.S.A. Code of Jud.Conduct, Canon 2(B).

2 Cases that cite this headnote

[5] **Judges**
Standards, canons, or codes of conduct, in general

Judges must be vigilant in monitoring their public conduct so as to avoid situations that will compromise the appearance of impartiality. West's F.S.A. Code of Jud.Conduct, Canon 2(B).

Cases that cite this headnote

**Attorneys and Law Firms**

*184 Denzle G. Latty, Fort Lauderdale, for petitioner.

Pamela Jo Bondi, Attorney General, Tallahassee, and Georgina Jimenez–Orosa, Assistant Attorney General, West Palm Beach, for respondent.

**Opinion**

*185 PER CURIAM.

In this case we consider a criminal defendant's effort to disqualify a judge whom the defendant alleges is a Facebook friend of the prosecutor assigned to his case. Finding that grounds for disqualification exist, we grant the petition for writ of prohibition.

Petitioner Pierre Domville moved to disqualify the trial judge. The motion was supported by an affidavit averring that the prosecutor handling the case and the trial judge are Facebook "friends." This relationship caused Domville to believe that the judge could not "be fair and impartial." Domville explained that he was a Facebook user and that his "friends" consisted "only of [his] closest friends and associates, persons whom [he] could not perceive with anything but favor, loyalty and partiality." The affidavit attributed adverse rulings to the judge's Facebook relationship with the prosecutor. The trial judge denied the motion as "legally insufficient."

[1] [2] [3] In determining the legal sufficiency of a motion to disqualify the trial judge, this court reviews the motion's allegations under a de novo standard. See Peterson v. Asklipious, 833 So.2d 262, 263 (Fla. 4th DCA 2002). Florida Rule of Judicial Administration 2.330(f) requires a judge to grant disqualification if the motion to disqualify is "legally sufficient." A motion is legally sufficient if " 'the facts alleged (which must be taken as true) would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial.' " Brofman v. Fla. Hearing Care Ctr., Inc., 703 So.2d 1191, 1192 (Fla. 4th DCA 1997) (quoting Hayslip v. Douglas, 400 So.2d 553, 556 (Fla. 4th DCA 1981)). A mere "subjective fear [ ]" of bias will not be legally sufficient; rather, the fear must be objectively reasonable. Fischer v. Knuck, 497 So.2d 240, 242 (Fla.1986).

[4] [5] We find an opinion of the Judicial Ethics Advisory Committee to be instructive. See Fla. JEAC Op.2009–20 (Nov. 17, 2009). There, the Committee concluded that the Florida Code of Judicial Conduct precludes a judge from both adding lawyers who appear before the judge as "friends" on a social networking site and allowing such lawyers to add the judge as their "friend." The Committee determined that a judge's listing of a lawyer as a "friend" on the judge's social networking page—"[t]o the extent that such identification is available for any other person to view"—would violate Florida Code of Judicial Conduct Canon 2B ("A judge shall not ... convey or permit others to convey the impression that they are in a special position to influence the judge."). See Fla. JEAC Op. 2009–20. The committee found that three elements are necessary in order to fall within the prohibition of Canon 2B:

1. The judge must establish the social networking page.
2. The site must afford the judge the right to accept or reject contacts or "friends" on the judge's page, or denominate the judge as a "friend" on another member's page.
3. The identity of the "friends" or contacts selected by the judge, and the judge's having denominated himself or herself as a "friend" on another's page must then be communicated to others.

Id. The committee noted that:

> Typically, [the] third element is fulfilled because each of a judge's "friends" may see on the judge's page who the judge's other "friends" are. Similarly, all "friends" of another user may see that the judge is also a "friend" of that user. It is this selection and communication process, the Committee believes, that violates Canon 2B, because the judge, by *186 so doing, conveys or permits others to convey the impression that they are in a special position to influence the judge.

Id. Further, the Committee concluded that when a judge lists a lawyer who appears before him as a "friend" on his social networking page this "reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge." Id. See also Fla. Code Jud. Conduct, Canon 5A.

> The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence the judge. The Committee concludes that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted.

Fla. JEAC Op. 2009–20. Thus, as the Committee recognized, a judge's activity on a social networking site may undermine confidence in the judge's neutrality. Judges must be vigilant in monitoring their public conduct so as to avoid situations that will compromise the appearance of impartiality. The Commentary to Canon 2A explains that being a judge necessarily limits a judge's personal freedom:

> A judge must avoid all impropriety and the appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Fla. Code Jud. Conduct, Canon 2A, cmt.

Because Domville has alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial, we quash the order denying disqualification of the trial judge and remand to the circuit court for further proceedings consistent with this opinion.

GROSS, GERBER and LEVINE, JJ., concur.

**All Citations**

103 So.3d 184, 37 Fla. L. Weekly D2126

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170 So.3d 802
District Court of Appeal of Florida,
Fifth District.

Sandra CHACE, Petitioner,
v.
Robert LOISEL, Jr., Respondent.

No. 5D13–4449.
|
Jan. 24, 2014.

**Synopsis**

**Background:** Wife filed petition for writ of prohibition to quash the order of the trial court, Linda D. Schoonover, Respondent Judge, denying her motion to disqualify the trial judge presiding over her dissolution of marriage case.

**[Holding:]** The District Court of Appeal, Cohen, J., held that trial judge's ex parte communication with wife presented a legally sufficient claim for disqualification of judge, particularly since wife's failure to respond to judge's social media "friend" request created a reasonable fear of offending judge.

Petition granted.

West Headnotes (6)

**[1] Judges**
Sufficiency of objection, affidavit, or motion

If the grounds asserted in a motion for disqualification of judge are legally sufficient to create a well-founded fear in the mind of a party that he or she will not receive a fair trial, it is incumbent upon a judge to disqualify herself.

Cases that cite this headnote

**[2] Judges**
Sufficiency of objection, affidavit, or motion

To determine whether the motion for disqualification of judge is legally sufficient, appellate court must resolve whether the alleged facts, which, accepted as true, would prompt a reasonably prudent person to fear that she could not get a fair and impartial trial before that judge.

Cases that cite this headnote

**[3] Judges**
Sufficiency of objection, affidavit, or motion

Affiant's mere subjective fear is insufficient to form the basis for disqualification of judge.

Cases that cite this headnote

**[4] Judges**
Bias and Prejudice

Judge's ex parte communication with a party presents a legally sufficient claim for disqualification.

1 Cases that cite this headnote

**[5] Judges**
Bias and Prejudice

Trial judge's ex parte communication with wife presented a legally sufficient claim for disqualification of judge in divorce case, particularly since wife's failure to respond to judge's social media "friend" request created a reasonable fear of offending judge; the "friend" request placed wife between the proverbial rock and a hard place, either engage in improper ex parte communications with the judge presiding over the case or risk offending the judge by not accepting the "friend" request.

3 Cases that cite this headnote

**[6] Judges**

  

⇨ Standards, canons, or codes of conduct, in general

**Judges**

⇨ Bias and Prejudice

Trial judge's efforts to initiate ex parte communications with a litigant is prohibited by the Code of Judicial Conduct and has the ability to undermine the confidence in a judge's neutrality, and appearance of partiality must be avoided.

1 Cases that cite this headnote

**Attorneys and Law Firms**

***802** Damon A. Chase of Chase Freeman, P.A., Lake Mary, for Petitioner.

Christopher M. Sprysenski of Salfi Sprysenski, P.A., Altamonte Springs, for Respondent.

**Opinion**

COHEN, J.

Petitioner, Sandra Chace, seeks a writ of prohibition to quash the trial court's order denying her motion to disqualify the trial judge presiding over her and Respondent ***803** Robert Loisel, Jr.'s dissolution of marriage case. Upon review, we conclude that the trial court erred in denying Petitioner's motion.

The following allegations formed the basis for Petitioner's motion to disqualify. Prior to entry of final judgment, the trial jndge reached out to Petitioner, ex parte, in the form of a Facebook "friend" request. Upon advice of counsel, Petitioner decided not to respond to that invitation. Thereafter, the trial court entered a final judgment of dissolution, allegedly attributing most of the marital debt to Petitioner and providing Respondent with a disproportionately excessive alimony award. Following entry of the final judgment, Petitioner filed a formal complaint against the trial judge, alleging that the judge sent her a Facebook "friend" request and then retaliated against Petitioner after she did not accept the request. Respondent later filed a motion for clarification of certain provisions in tbe final judgment, which is currently pending below. In the meantime, Petitioner had learned of other cases involving similar ex parte social media communications by the judge that resulted in her disqualification. Subsequently, the subject motion to disqualify was filed, a hearing was held on that motion, and the motion was denied as legally insufficient. The instant petition was then filed in this Court. [1]

[1] [2] [3] If the grounds asserted in a motion for disqualification are legally sufficient to create a well-founded fear in the mind of a party that he or she will not receive a fair trial, it is incumbent upon a judge to disqualify herself. See Fischer v. Knuck, 497 So.2d 240, 242 (Fla.1986). To determine whether the motion is "legally sufficient," this Court must resolve whether the alleged facts, which, accepted as true, would prompt a reasonably prudent person to fear that she could not get a fair and impartial trial before that judge. An affiant's mere subjective fear is insufficient to form the basis for disqualification. Id.

[4] [5] It seems clear that a judge's ex parte communication with a party presents a legally sufficient claim for disqualification, particularly in the case where the party's failure to respond to a Facebook "friend" request creates a reasonable fear of offending the solicitor. The "friend" request placed the litigant between the proverbial rock and a hard place: either engage in improper ex parte communications with the judge presiding over the case or risk offending the judge by not accepting the "friend" request.

In Domville v. State, 103 So.3d 184 (Fla. 4th DCA 2012), rev. denied, State v. Domville, 110 So.3d 441 (Fla.2013), the Fourth District addressed a Facebook issue with regard to judges "friending" attorneys through social media. That court determined that a judge's social networking "friendship" with the prosecutor of the underlying criminal case was sufficient to create a well-founded fear of not receiving a fair and impartial trial in a reasonably prudent person. Id.

We have serions reservations about the court's rationale in Domville. The word "friend" on Facebook is a term of art. A number of words or phrases could more aptly describe the concept, including acquaintance and, sometimes, virtual stranger. ***804** A Facebook friendship does not necessarily signify the existence of a close relationship. Other than the public nature of the internet, there is no difference between a Facebook "friend" and

any other friendship a judge might have. Domville 's logic would require disqualification in cases involving an acquaintance of a judge. Particularly in smaller counties, where everyone in the legal community knows each other, this requirement is unworkable and unnecessary.[2] Requiring disqualification in such cases does not reflect the true nature of a Facebook friendship and casts a large net in an effort to catch a minnow.

That said, Domville was the only Florida case that discussed the impact of a judge's social network activity and, as such, was binding upon the trial judge in this case. See Pardo v. State, 596 So.2d 665, 666 (Fla.1992) (explaining that "in the absence of interdistrict conflict, district court decisions bind all Florida trial courts"). Although this case involves the "friending" of a party, rather than an attorney representing a party, for purpose of ruling on the motion to disqualify we find that the difference is inconsequential. In our view, the "friending" of a party in a pending case raises far more concern than a judge's Facebook friendship with a lawyer.

[6] Beyond the fact that Domville required the trial court to grant the motion to disqualify, the motion to disqualify was sufficient on its face to warrant disqualification. The trial judge's efforts to initiate ex parte communications with a litigant is prohibited by the Code of Judicial Conduct and has the ability to undermine the confidence in a judge's neutrality. The appearance of partiality must be avoided. It is incumbent upon judges to place boundaries on their conduct in order to avoid situations such as the one presented in this case.

Because Petitioner has alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial, we quash the order denying the motion to disqualify and remand to the trial court for further proceedings consistent with this opinion. We trust that the issuance of a formal writ will be unnecessary.

PETITION GRANTED.

SAWAYA and PALMER, JJ., concur.

**All Citations**

170 So.3d 802, 39 Fla. L. Weekly D221

Footnotes

1 On appeal, Respondent argues that the motion to disqualify was untimely under Florida Rule of Judicial Administration 2.330(e). However, the trial court based its denial of the motion on its legal insufficiency, not its untimeliness. Thus, the issue of timeliness is not before this Court. *See Santa Catalina Townhomes, Inc. v. Mirza*, 942 So.2d 462 (Fla. 4th DCA 2006). Rather, this Court must determine only whether the motion to disqualify is legally sufficient.

2 Of course, there are situations in which a relationship between a judge and a litigant or attorney is so close that a judge should recuse himself or herself. Most judges have standing orders of recusal in such circumstances, or absent such an order, can be subject to a motion to disqualify.

**RULE 4-5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER**

(a) Sharing Fees with Nonlawyers. A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to 1 or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, in accordance with the provisions of rule 4-1.17, pay to the estate or other legally authorized representative of that lawyer the agreed upon purchase price;

(4) bonuses may be paid to nonlawyer employees for work performed, and may be based on their extraordinary efforts on a particular case or over a specified time period. Bonus payments shall not be based on cases or clients brought to the lawyer or law firm by the actions of the nonlawyer. A lawyer shall not provide a bonus payment that is calculated as a percentage of legal fees received by the lawyer or law firm; and

(5) a lawyer may share court-awarded fees with a nonprofit, pro bono legal services organization that employed, retained, or recommended employment of the lawyer in the matter.

(b) Qualified Pension Plans. A lawyer or law firm may include nonlawyer employees in a qualified pension, profit-sharing, or retirement plan, even though the lawyer's or law firm's contribution to the plan is based in whole or in part on a profit-sharing arrangement.

(c) Partnership with Nonlawyer. A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(d) Exercise of Independent Professional Judgment. A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(e) Nonlawyer Ownership of Authorized Business Entity. A lawyer shall not practice with or in the form of a business entity authorized to practice law for a profit if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

**Comment**

The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in subdivision (d), such arrangements should not interfere with the lawyer's professional judgment.

This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also rule 4-1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

The prohibition against sharing legal fees with nonlawyer employees is not intended to prohibit profit-sharing arrangements that are part of a qualified pension, profit-sharing, or retirement plan. Compensation plans, as opposed to retirement plans, may not be based on legal fees.

Amended: June 8, 1989 (544 So.2d 193); July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); Oct. 20, 1994 (644 So.2d 282); June 27, 1996, effective July 1, 1996 (677 So.2d 272); October 6, 2005, effective January 1, 2006 (SC05-206) (2005 WL 2456201) (916 So.2d 655); March 23, 2006, effective May 22, 2006 (SC04-2246), (933 So.2d 417).