PROGRAM MATERIALS
Program #30206
August 25, 2020

All PR Isn't Good: How to Stay Out of the News and Out of Ethics Hot Water

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All PR Isn't Good: How to Stay Out of the News and Out of Ethics Hot Water

Presented by:

Daniel J. Siegel, Esquire

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About
Daniel J. Siegel, Esquire

- Chair, Pennsylvania Bar Association Committee On Legal Ethics & Professional Responsibility
- Providing Ethical and Techno-Ethical Guidance To Attorneys & Law Firms
- Email dan@danieljsiegel.com

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Today's Program

This program will provide practical guidance about avoiding the types of negative publicity that does not make "good news"

Today's Program

This program will highlight the underlying ethical considerations relating to publicity


Are You a
Cybersecurity
Expert?
P A S S W O R D

Are You a Cybersecurity Expert?

- Hackers
- IP Spoofing
- Social engineering
- Man-in-the-middle spoofing
- DNS Poisoning
- Trojan
- Cracks
- Viruses
- Eavesdropping
- Spam
- Spyware
- Malware
- Ransomware
- Password Cracking
- Network sniffing
- Back door/trap door
- Tunneling
- Website defacement
- Phishing
- TCP/IP hijacking
- Replay Attacks
- System tampering
- System penetration

Are You a Cybersecurity Expert?

- Did you?

Are You a Cybersecurity Expert?

- Did you?

What Is Techno-Ethics?

- Techno-ethics is an emerging area of law focusing on:
  - Analyzing issues technology creates
  - Analyzing ethical issues technology creates
  - Predicting concerns arising from the use of technology
  - Recommending solutions
  - Addressing ethical and practice-related issues arising from the use of technology
  - Advising attorneys and law firms how to deal with the ethical and practice-related issues arising the use of technology

What Is Techno-Ethics?

- Emerging technologies have altered the practice of law in unprecedented ways
- These innovations pose both risks and benefits
- The greatest risk is not remaining current on technological change relevant to a given attorney's practice area
- The legal terrain will shift as technological changes occur – even as the law struggles to adapt to and create appropriate rules governing the ethical implications of these developments

Not All Publicity Is Good

- Mistakes that place lawyers and their clients in the news for the wrong reasons

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The Atlantic Popular Latest Sections Magazine More Sub

POLITICS

Manafort's Own Lawyers May Have Hastened His Downfall

The initial failure to redact a sensitive document was the latest in a series of missteps by Paul Manafort's lawyers.

NATASHA BERTRAND JAN 9, 2019

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future tense

Manafort Left an Incriminating Paper Trail Because He Couldn't Figure Out How to Convert PDFs to Word Files

By JACOB BROGAN

FEB 23, 2018 • 10:15 AM

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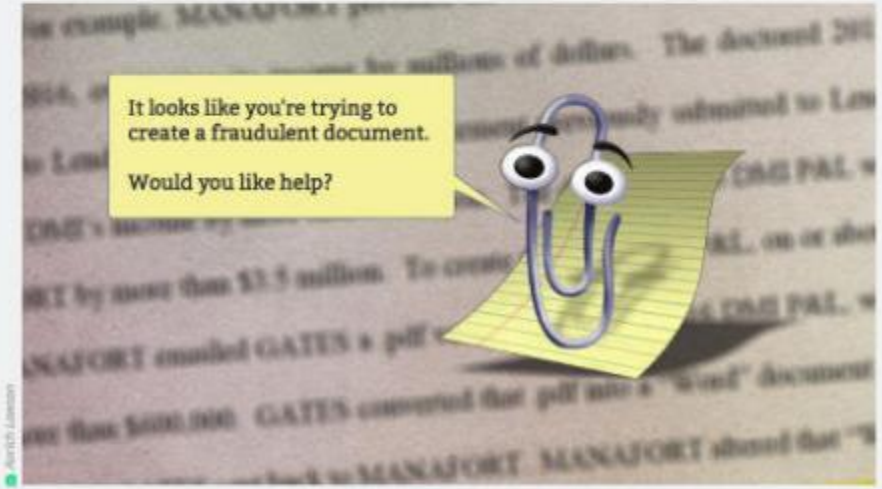
RUSSIA INVESTIGATION —

How Manafort's inability to convert a PDF file to Word helped prosecutors

Former Trump campaign manager allegedly emailed doctored docs to his assistant.

TIMOTHY B. LEE - 2/23/2018, 12:15 PM



Enlarge

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The indictment also suggests that Manafort's lack of technology savvy helped prosecutors build a case against Manafort and Gates. The pair allegedly submitted a variety of fraudulent documents to lenders in order to borrow money against properties purchased with overseas funds—funds that were never reported to the IRS. One reason prosecutors were able to build a paper trail against the pair: Manafort needed Gates's help to convert a PDF document to Word format and back again.

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ABOVE THE LAW

BENCHSLAPS, LITIGATORS

Boutique Firm Gets Benchslapped For Trying To Sneakily Evade Court's Double-Spacing Requirements

When you break the rules, you should expect to be fined.

By STACI ZARETSKY

Apr 5, 2017 at 12:12 PM

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GM Bryan Colangelo accused of criticizing 76ers from secret Twitter accounts

May 29, 2018 by Larry Brown Leave a Comment

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FOR IMMEDIATE RELEASE — Thursday, March 5, 2020

Montgomery County Personal Injury Attorney Sentenced to Five Years in Prison and Ordered to Pay $3.4 Million in Restitution for Stealing Clients and Collecting Bogus Referral Fees and Costs

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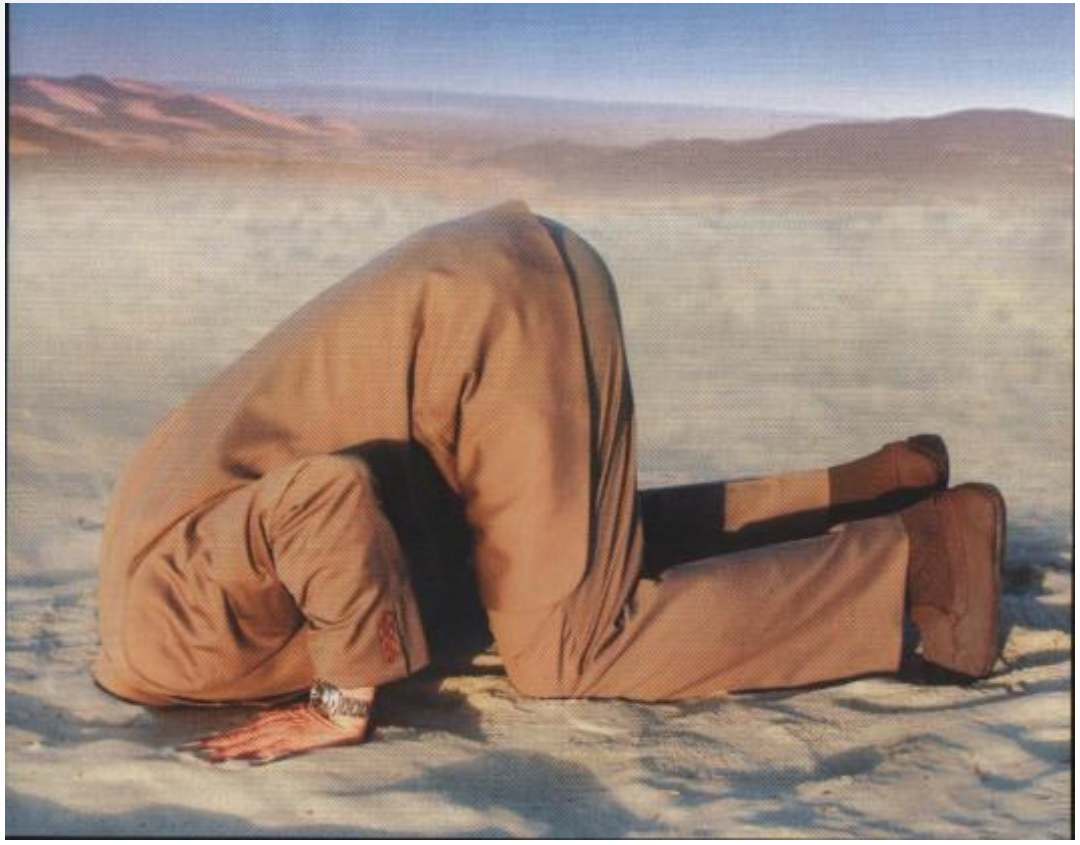
Why Attorneys Need Encryption

Lawyers Can No Longer Stick Their Heads In The Sand



Lawyers Can No Longer Stick Their Heads In The Sand

"The Cloud ate my homework."

So, Why Do I Care About the Model Rules?

Every state's Rules of Professional Conduct are based on the Model Rules promulgated by the ABA

So, Why Do I Care About the Model Rules?

They set forth the standard of conduct applicable to all attorneys

So, Why Do I Care About the Model Rules?

States may adopt the Model Rules as written, or adopt parts of the Rules, or revise them as necessary

So, Why Do I Care About the Model Rules?

Always verify if your jurisdiction has adopted the relevant Model Rule(s)

Lawyers Can No Longer Stick Their Heads In The Sand

- **The Rules of Professional Conduct now require lawyers to *recognize and understand the ethical issues that arise in a variety of subjects, including technology***

Lawyers Can No Longer Stick Their Heads In The Sand

- **Model R.P.C. 1.1 (Competence)**
- **Comment 8: (8) 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…**

Lawyers Can No Longer Stick Their Heads In The Sand

- **Model R.P.C. 1.4 (Client-Lawyer Relationship)**
- **(a) A lawyer shall:**

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

Lawyers Can No Longer Stick Their Heads In The Sand

- **Model R.P.C. 1.6(d) (Confidentiality)**

> **"A lawyer shall make reasonable efforts to prevent the unintended disclosure of, or unauthorized access to, information relating to the representation of a client."**

Lawyers Can No Longer Stick Their Heads In The Sand

- **Model R.P.C. 3.3 (Candor Toward Tribunal)**
- **(a) A lawyer shall not knowingly:**

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

Lawyers Can No Longer Stick Their Heads In The Sand

- **Model R.P.C. 3.3 (Candor Toward Tribunal)**
- **(a) A lawyer shall not knowingly:**

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

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- **Model R.P.C. 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. A lawyer shall not counsel or assist another person to do any such act;

Lawyers Can No Longer Stick Their Heads In The Sand

- **Model R.P.C. 3.6 (Trial Publicity)**
- **(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.**

Lawyers Can No Longer Stick Their Heads In The Sand

- **Model R.P.C. 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; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Lawyers Can No Longer Stick Their Heads In The Sand

➢Model R.P.C. 8.4 (Misconduct)

➢ It is professional misconduct for a lawyer to:

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

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

Lawyers Can No Longer Stick Their Heads In The Sand

- **Model R.P.C. 8.4 (Misconduct)**
  - **It is professional misconduct for a lawyer to:**

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

Most Of These “Errors” Are Avoidable

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- **Ethical obligations**
- **Improved delivery of client services**
- **Constant changes in threat landscape**

Thanks to https://www.trushieldinc.com/top-3-reasons-you-need-cyber-security-awareness-training/

Let's look at some examples…

and how to avoid "mistakes"

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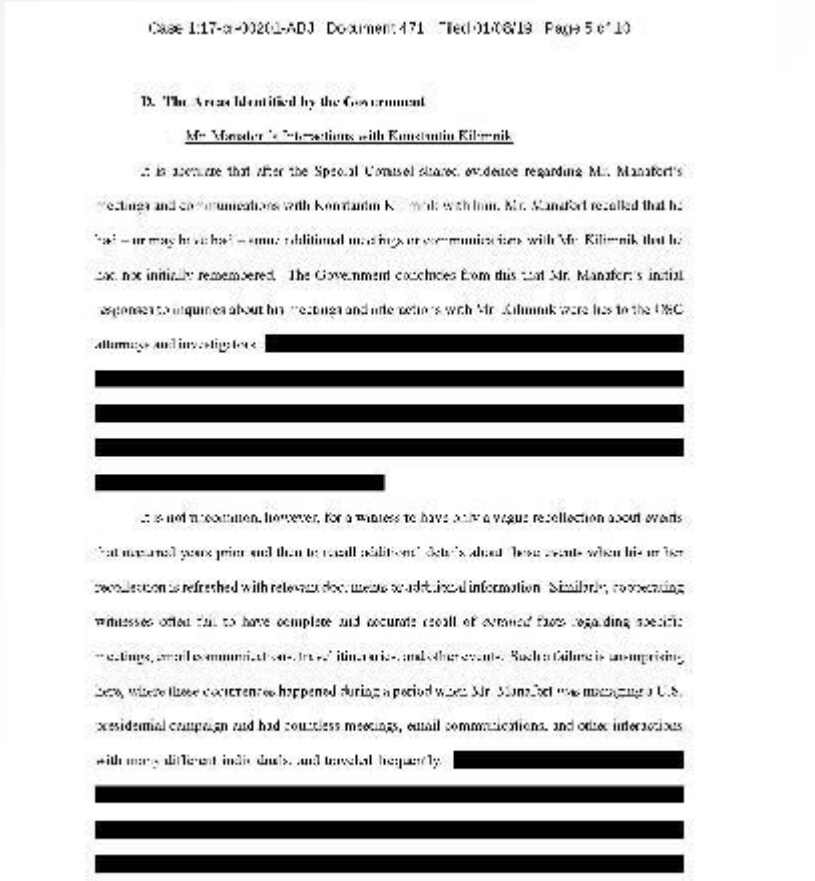

Case 1:17-cr-00201-ABJ Document 471 Filed 01/08/19 Page 5 of 10

B. The Areas Identified by the Government

Mr. Manafort's Interactions with Konstantin Kilimnik

It is accurate that after the Special Counsel shared evidence regarding Mr. Manafort's meetings and communications with Konstantin Kilimnik with him, Mr. Manafort recalled that he had – or may have had – some additional meetings or communications with Mr. Kilimnik that he had not initially remembered. The Government cocherries from this that Mr. Manafort's initial responses to inquiries about his meetings and interactions with Mr. Kilimnik were lies to the OSC attorneys and investigators. [redacted]

It is not uncommon, however, for a witness to have only a vague recollection about events that occurred years prior and then to recall additional details about those events when his or her recollection is refreshed with relevant documents or additional information. Similarly, recounting witnesses often fail to have complete and accurate recall of events from regarding specific meetings, email communications, travel itineraries, and other events. Such a failure is unsurprising here, where those occurrences happened during a period when Mr. Manafort was managing a U.S. presidential campaign and had countless meetings, email communications, and other interactions with many different individuals and traveled frequently. [redacted]

5

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D. The Areas Identified by the Government

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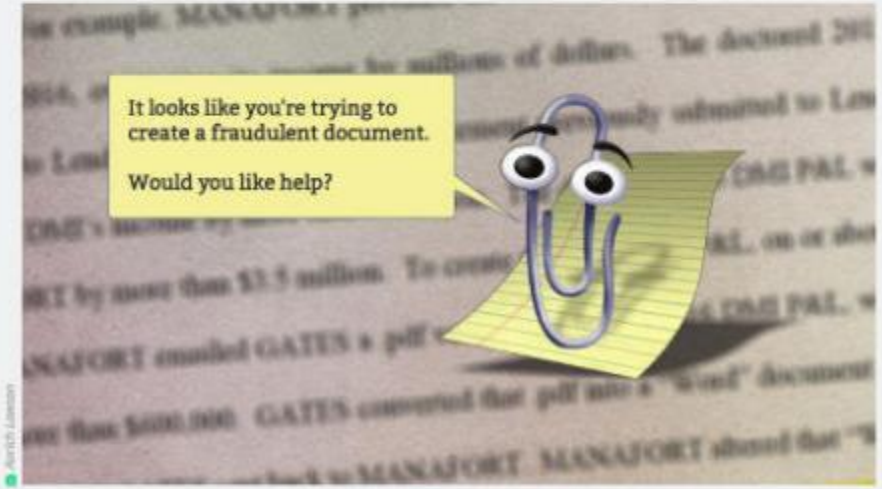

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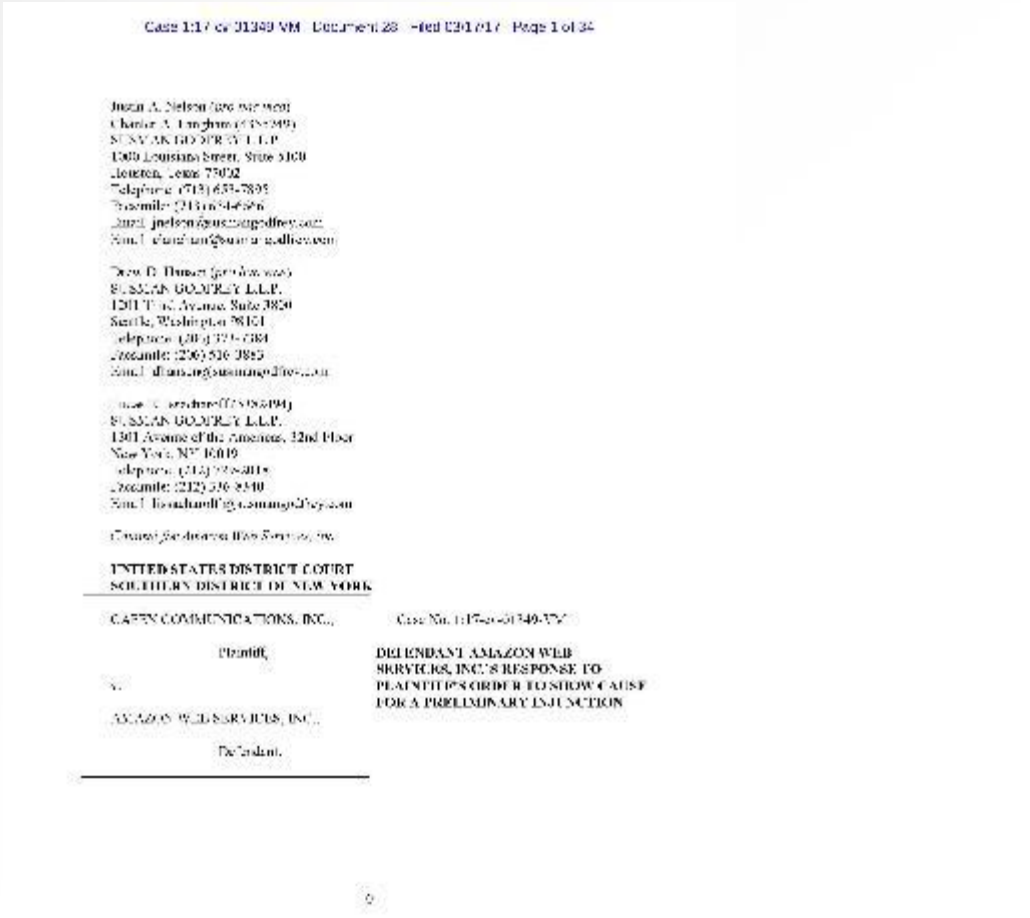

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Counsel for defendant Web Services, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAPITOL COMMUNICATIONS, INC.,

Plaintiff,

v.

AMAZON WEB SERVICES, INC.,

Defendant.

Case No. 1:17-cv-01349-VM

DEFENDANT AMAZON WEB SERVICES, INC.'S RESPONSE TO PLAINTIFF'S ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION

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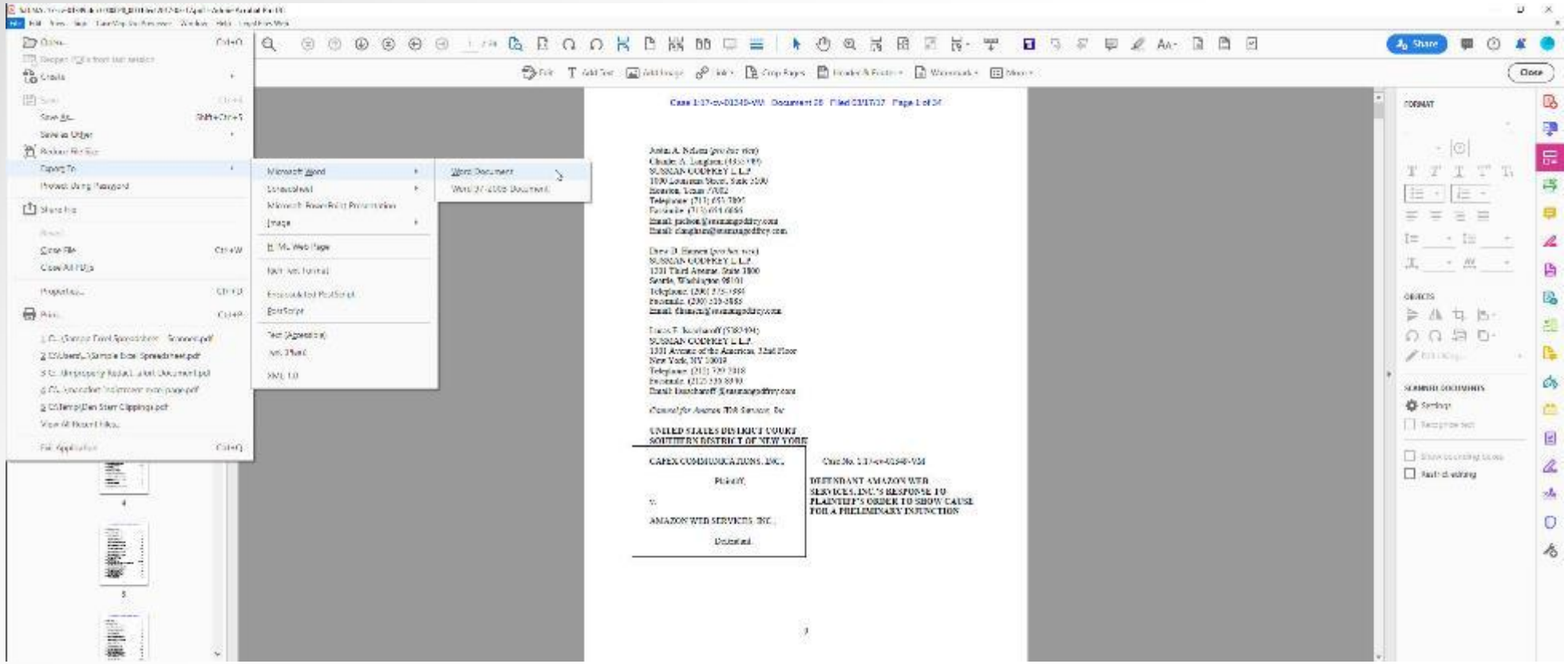

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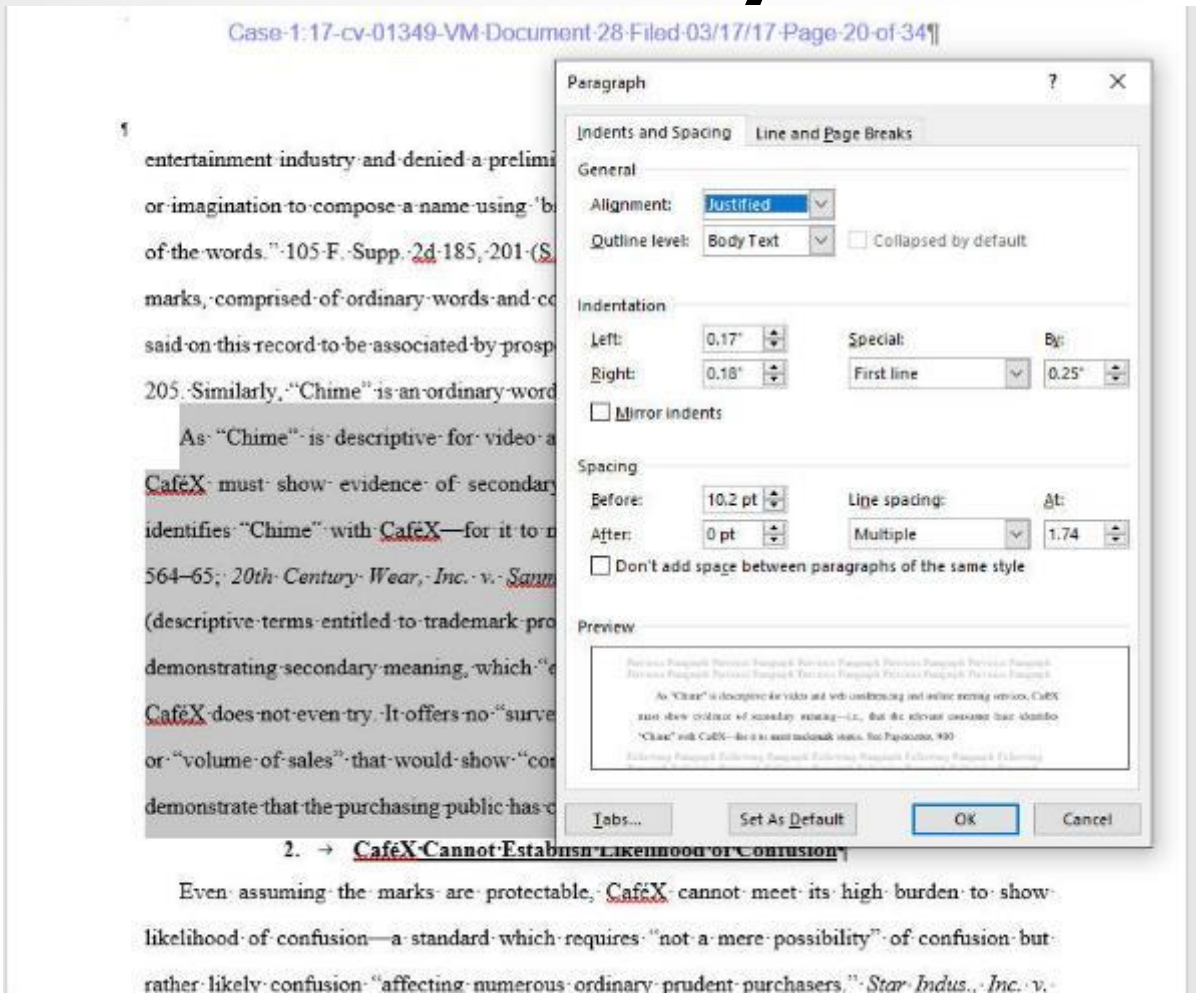

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entertainment industry and denied a preli
or imagination to compose a name using 'b
of the words." 105 F. Supp. 2d 185, 201 (S
marks, comprised of ordinary words and c
said on this record to be associated by prosp
205. Similarly, "Chime" is an ordinary word
As "Chime" is descriptive for video a
CaféX must show evidence of secondary
identifies "Chime" with CaféX—for it to
564–65; *20th Century Wear, Inc.* v. *Sann*
(descriptive terms entitled to trademark pro
demonstrating secondary meaning, which "
CaféX does not even try. It offers no "surve
or "volume of sales" that would show "co
demonstrate that the purchasing public has

2. → **CaféX Cannot Establish Likelihood of Confusion**

Even assuming the marks are protectable, CaféX cannot meet its high burden to show likelihood of confusion—a standard which requires "not a mere possibility" of confusion but rather likely confusion "affecting numerous ordinary prudent purchasers." *Star Indus., Inc.* v.

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Indents and Spacing | Line and Page Breaks

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Alignment: Justified
Outline level: Body Text
Collapsed by default

Indentation
Left: 0.17"
Right: 0.18"
Special: First line
By: 0.25"
Mirror indents

Spacing
Before: 10.2 pt
After: 0 pt
Line spacing: Multiple
At: 1.74
Don't add space between paragraphs of the same style

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Sunday, April 21, 2019

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May 29, 2018 by Larry Brown Leave a Comment

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FOR IMMEDIATE RELEASE — Thursday, March 5, 2020

Montgomery County Personal Injury Attorney Sentenced to Five Years in Prison and Ordered to Pay $3.4 Million in Restitution for Stealing Clients and Collecting Bogus Referral Fees and Costs

Our Public Awareness Campaign:

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Facebook

Watch Now: July 23, 2020

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Montgomery County Personal Injury Attorney Charged with Mail Fraud

PHILADELPHIA – United States Attorney William M. McSwain announced that Neil I. Mittin, age 64, of Huntingdon Valley, Pennsylvania was charged by Information with one count of mail fraud. The defendant was an attorney who worked for approximately 38 years as an associate for a Philadelphia, Pennsylvania law firm ("the Law Firm"). The Law Firm specialized in representing plaintiffs in personal injury matters while also representing individuals in other types of legal matters.

As detailed in the Information, over the course of approximately a decade, from 2008 through 2018, Mittin engaged in a scheme to steal numerous personal injury and other legal matters from the Law Firm by removing them from the Law Firm and referring them to outside attorneys. The clients of the Law Firm whose matters Mittin stole did not ask him to refer their matters to outside attorneys, and often did not know or understand that Mittin was referring their matters to outside attorneys. The defendant concealed his conduct from the Law Firm by closing the files for those matters and making it appear in the records of the Law Firm that there was no settlement or resolution and that the cases were not viable.

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Presented by:

Daniel J. Siegel, Esquire

LAW OFFICES OF
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CafeX Communications, Inc.,

Plaintiff,

- against -

Amazon Web Services, Inc.,

Defendant.

17 Civ. 1349 (VM)

ORDER

VICTOR MARRERO, United States District Judge.

At the March 24, 2017 hearing regarding plaintiff CafeX Communications's ("CafeX") Motion for a Preliminary Injunction ("Motion," Dkt. No. 8.) the Court found that defendant Amazon Web Services, Inc. ("Amazon") violated this Court's Individual Rules of Practice ("Individual Rules") which require that all memoranda "be double-spaced and in 12-point font with 1-inch margins." Individual Rules, Section II.D. (See Dkt. Minute Entry dated March 24, 2017.) Amazon's memorandum of law opposing CafeX's Motion was 24-point spaced, not double spaced, and allowed Amazon to submit a substantially longer memorandum than the 25 pages provided by this Court's Individual Rules.

The flouting of this Court's Individual Rules was a deliberate choice by counsel for Amazon to gain some slight advantage in this litigation. As such, this Court ordered Amazon to replace its memorandum with a compliant memorandum

and submit a declaration stating the cost of filing the revised memorandum. (See Dkt. Minute Entry dated March 24, 2017.) Amazon subsequently filed a compliant memorandum of law (see Dkt. No. 39) and counsel for Amazon submitted a declaration stating that the cost of preparing the compliant memorandum was $1,048.09. (See Dkt. No. 40.)

As counsel for Amazon's conduct in subverting this Court's Individual Rules was deliberate, the Court finds that sanctions in the amount of the cost to prepare a compliant memorandum of law is appropriate to deter similar conduct in the future.

As such, it is hereby

ORDERED that counsel for defendant Amazon Web Services, Inc. ("Amazon") shall pay a monetary sanction via check in the amount of $1,048.09. The check shall be made payable to the Clerk of Court of the Southern District of New York to be paid within thirty days of the issuance of this order. Counsel for defendant Amazon is directed that if they mail the payment, they must also submit a copy of this Order.

SO ORDERED.

Dated: New York, New York
30 March 2017

Victor Marrero
U.S.D.J.

What Will It Take to Finally Get Lawyers Into the Tech Age?

law.com/thelegalintelligencer/2019/02/21/what-will-it-take-to-finally-get-lawyers-into-the-tech-age

By Daniel J. Siegel | February 21, 2019 at 02:32 PM

Daniel J. Siegel.

Kicking and screaming. That's how many lawyers have proceeded into the age of technology. They know it's here, they know they should use it, they understand—but may not admit—that it makes them more efficient. But in the end, it seems that many lawyers are only adopting technology because they must. Not because they should.

Two recent studies confirm this trend. The first is the American Bar Association 2018 Legal Technology Survey Report, particularly Volume II, the "Law Office Technology" report. The second are two recent reports by Malwarebytes, one on the state of malware, the other on how little most people know about tracking.

Let's start with the ABA report, which is issued annually by the Law Practice Division's Legal Technology Resource Center. The report, which focuses exclusively on lawyers, shows that lawyers, particularly those practicing as solos or in small firms, tend to adopt technology in three ways. The first is that they "must." The second is that their practices "need" the technology. Finally, the third is that they "want" the technology.

Let's look at each of my categories. The "must" category is exemplified by PDFs and metadata. Because courts and other entities require lawyers to file documents, pleadings and other items electronically, lawyers must use PDF creation products such as Adobe Acrobat. On the other hand, there is metadata software. Although numerous bar association committees, including the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, have opined that lawyers have an ethical obligation to remove such data from files they produce to other attorneys, lawyers are not required to do so.

As a result, the survey reports that 96.6 percent of all lawyers responding have PDF creation software available at their firms, including 92.8 percent of solos, 97.2 percent of lawyers in firms with two to nine lawyers, 98.6 percent of lawyers in firms with 10 to 49 lawyers, and in 100 percent of lawyers in firms with 50 or more lawyers. Compare this with metadata software, which could reveal confidential client communications. The difference is staggering. Only 37 percent of solos have metadata analysis and removal software available, 41.1 percent of lawyers in firms with two to nine lawyers, 65.2 percent of lawyers in firms with 10 to 49 lawyers, 84.8 percent of lawyers in firms with 50 to 99 lawyers, and 97.2 percent of lawyers in firms with more than 100 lawyers use it. In addition, when I lecture about metadata software, it is always remarkable how many lawyers remain ignorant about it.

On the other hand, there are products law firms "need," but do not have to have to function. Two examples are case/matter management software and specialized practice software. Case or matter management software provide individual and firmwide calendars, individual case listings, document management and other features, all of which save attorneys significant time in handling their files. Specialized software is designed for a specific practice area, such as bankruptcy, real estate closing or estate administration.

The study revealed that the larger the firm, the greater likelihood such products were in use. Thus, only 30.8 percent of solos and 57.1 percent of lawyers in firms with two to nine attorneys had case management software available, whereas 68.1 percent of lawyers in firms with 100 to 499 lawyers, and 71.9 percent of lawyers in firms with more than 500 lawyers did. Similarly, only 23.4 percent of solos and 36.21 percent of lawyers in firms with two to nine attorneys had specialized practice-specific software available, whereas 52.2 percent of lawyers in firms with 100 to 499 lawyers, and 47.3 percent of lawyers in firms with more than 500 lawyers did.

Finally, we have the "want" category, software that is helpful but not necessary. This category includes software such as customer relationship manager products (CRM), designed to maintain relationships with clients and referral sources, etc. One would think that such software would be extremely valuable in smaller firms because so many such practices are dependent on the strength and length of these relationships. Despite this, only 23.1 percent of solos and 41.1 percent of lawyers in firms with two to nine attorneys had the software available, whereas 72.7 percent of lawyers in firms with 100 to 499 lawyers, and 68.9 percent of lawyers in firms with more than 500 lawyers had it.

Moving on to the reports from Malwarebytes Labs, the company that sells Malwarebytes, one of the leading malware removal productions. In the company's "State of Malware," it explained that in 2018 saw the advent of "information stealers … variants of malware [that] focused their energies on ensnaring businesses, gleaning the most profit from ultra-sensitive data that could be sold on the black market for re-targeting in future campaigns." What types of data were these cyberthieves seeking? Personal data such as Social Security numbers, credit card information and information that could be used to steal a person's identity, that is, the type of data that law firms often retain about clients and opposing parties.

Lawyers have an ethical obligation, however, to understand the risks and benefits of technology. This obligation also includes a duty to protect confidential client data and sensitive information. Because every law firm uses the Internet in some way, whether to access email or to store information in the cloud, the risks cited in the Malwarebytes report are real, and lawyers must be vigilant to protect their data. This includes installing the proper onsite protection, vetting offsite/cloud vendors, and perhaps purchasing cyberinsurance to provide additional protection in the event of an attack.

Similarly, in the January 29, 2019 report, "What does 'consent to tracking' really mean?" Malwarebytes opens many eyes to the dangers of simply clicking yes when a user is asked to consent to some form of tracking as a condition of using a web-based service. The report explains that "Most platforms that engage in user tracking do so in ways that raise concern, but are not overtly alarming." The report explained, however, that another potential harm "is the use of tracking tags on sensitive websites. … User tracking has progressed so far in sophistication that an average user most likely does not have the background necessary to imagine every possible use case for data collection prior to accepting a user agreement." In short, companies may be tracking far more than names, birthdays, trends in the hashtags we use, and our locations. Doing so raises privacy concerns, as well as concerns when third parties track an attorney's client-related online activities.

Everyone prefers to use the information and tools they are comfortable with. For lawyers, the ever-expanding world of technology presents benefits—such as case management software—and dangers, such as the risk of a ransomware attack that holds a law firm's data hostage until a ransom is paid. What recent studies confirm, however, is that lawyers do not take enough advantage of the tools that will help them, while also ignoring the ones that could render them subject to the whims of a cybercriminal.

Daniel J. Siegel, *principal of the Law Offices of Daniel J. Siegel, provides ethical guidance and Disciplinary Board representation for attorneys and law firms; he is the editor of "*Fee Agreements in Pennsylvania (6th Edition)" *and author of "*Leaving a Law Practice: Practical and Ethical Issues for Lawyers and Law Firms (Second Edition)," *published by the Pennsylvania Bar Institute. Contact him at dan@danieljsiegel.com.*

Is 2019 the Year Lawyers Finally Learn Their Lesson About Technology?

law.com/thelegalintelligencer/2019/01/03/is-2019-the-year-lawyers-finally-learn-their-lesson-about-technology

By Daniel J. Siegel | January 03, 2019 at 01:26 PM

Daniel J. Siegel.

Lawyers, as a group, just don't seem to "get it." Some do, others try, but many lawyers still seem oblivious to the ever-changing swirls of ethics and technology that apply to our profession. Based on the feedback from this column, I can only conclude that many lawyers still do not recognize, or do not want to recognize, the extent to which technology and ethics intersect every aspect of their lives (both professional and personal), and how their failure to address these issues can impact their clients and their practices.

With that in mind, here's my top-eight wish list of techno-ethics matters for which I hope lawyers will finally "get religion" in 2019.

Metadata

Recently, I received a document from opposing counsel containing a draft of a proposed agreement. Sent in Microsoft Word format, the agreement seemed reasonable, but I wondered if it would be beneficial to add some additional language more favorable to my client. Finding that language was easy; in fact, opposing counsel provided it to me.

How? He had failed to scrub the document of metadata, that is, "information about data" contained in electronic materials not ordinarily visible to those viewing the information. Most commonly found in documents created in Microsoft Word, metadata is also present in other formats, including spreadsheets, PowerPoint presentations and Corel WordPerfect documents.

Although metadata generally contains seemingly harmless information such as spelling or punctuation changes, it may also contain privileged and confidential information, such as previously deleted text, notes and tracked changes, which may provide information about legal

issues, legal theories and other information presumably not intended to be disclosed to opposing counsel.

In this instance, I opened my metadata scrubber software, told it to analyze the document and—voila—I could review information removed by opposing counsel from the version of the document visible to him when he sent the document.

The issue of metadata isn't new. 2019 marks one decade since the Pennsylvania Bar Committee on Legal Ethics and Professional Responsibility issued Formal Opinion 2009-100, which concluded that an attorney sending electronic documents that may contain metadata has a duty of reasonable care to remove unwanted metadata before sending them to another party or counsel. While the opinion states that an attorney receiving a document with metadata should disclose the information if he believes the disclosure was inadvertent, the time has long since passed for the "inadvertent defense" to be viable.

Although 2009 was a long time ago. It was the year Michael Jackson died, the top movie was "Harry Potter and the Half-Blood Prince," and President Barack Obama was beginning his first term. The ensuing 10 years were certainly sufficient time for lawyers to learn about their ethical obligation to remove metadata from electronically transmitted documents.

Social Media—Privacy and Ignorance

Social media is "social," which means that its goal is to share information, ideas, messages, photos and lots of personal information. As a result, clients use social media, including everyone from corporations to individuals. Social media is also rife with information that can serve as ammunition for a well-armed opponent in litigation of all types, not just the personal injury cases that receive most of the publicity.

Despite the realities that would be part of a Social Media 101 class, many lawyers claim that because they don't use social media, and "never will," they do not have to address it in their practices. This is akin to saying that a doctor doesn't have to know the latest medical techniques

because they weren't invented when she was in medical school. Plus, lawyers forget that even if they are not using social media, clients and others can leave reviews of the attorneys, many of which are less than flattering.

As a result, lawyers need to recognize the importance of discussing social media with clients, and then confirming that discussion in the fee agreements and engagement letters. They also need to recognize that social media is a potential source of information in all types of matters, and take steps to either learn how to mine it, or to have staff who can.

In addition, lawyers must be mindful that even if a client believes their social media accounts are "private," if such a setting is really possible, their accounts and their personal information are far more public than they want to admit. Just read the front page of the New York Times, which reported on Dec. 19, that "Facebook Offered Users Privacy Wall, Then Let Tech Giants Around It."

Law Firms Can Survive Without Technology

It is not uncommon the hear lawyers, particularly more "seasoned" ones, lament that they miss the days when secretaries took shorthand, and the arrival of the mailman was the highlight of the day. Those days are long gone. And they are not coming back, nor are other relics like carbon paper, onionskin paper, or IBM Selectric typewriters, which were discontinued in 1986.

Instead, we now have smartphones, that is, cellphones more technologically advanced than the Apollo rocket. In fact, you can read the surprisingly entertaining code for the Apollo rocket https://github.com/chrislgarry/Apollo-11.

Law firms must recognize that they too must advance and understand technology, not just for ethical reasons. Yes, as discussed elsewhere in this column, state Supreme Courts are now including technological competence as a component of the Rules of Professional Conduct, and some states are mandating that lawyers take technology-focused CLEs as part of their CLE requirements. But more importantly, technology improves the delivery of client services, allowing lawyers and staff to accomplish more in less time.

Despite what some naysayers preach, technology need not replace the personal touch. My office uses cutting edge technology from client intake to document assembly to matter management and for trial, yet clients meet with us at an old mahogany conference table in an old home that was converted into office space, where we take notes on paper. Why? The technology we use enables our office to complete its work more efficiently but does not convert our client interaction into an impersonal experience.

Email Privacy

Email is one of the least private forms of communication, a fact evidenced by the repeated headlines highlighting the email hacking of the rich and famous. As nolo.com explains, "Email might feel like a private, one-to-one conversation safe from prying eyes, but email is about as

confidential as whispering at the White House. Your messages can be intercepted and read anywhere in transit, or reconstructed and read off of backup devices, for a potentially infinite period of time."

Yet lawyers continue to attach confidential and sensitive information to emails, never considering how easily the information can get into the wrong hands. The American Bar Association warned attorneys in 2017 in Formal Opinion 477r ("Securing Communication of Protected Client Information") that "a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security." In other words, lawyers should not attach confidential and sensitive information to emails unless they take reasonable steps, such as encrypting the data (for example, password-protecting the file).

This common-sense advice is lost on many attorneys. Would they leave confidential information in their office lobby or allow anyone to rummage through the cabinets housing their clients' files? Of course not, yet they seem unconcerned with the disclosure of information in email.

The duty to protect confidential information is highlighted by the Pennsylvania Supreme Court's implementation in 2018 of a Public Access Policy, which requires attorneys and litigants to redact confidential information from court filings and to file confidential documents separately so that the public, that is, the "nosy neighbor" and others, cannot view information, such as tax returns, Social Security numbers, and medical records in court-filed documents.

Carbon Copies

So, do you know the difference between a carbon copy and a blind carbon copy (bcc) of an email? Do you know that a person who receives a blind carbon copy can "Reply to All" and that the reply is sent to everyone who was emailed or copied on the prior email?

Apparently, many lawyers and their support staff do not know this presumably basic piece of email procedure. Recently, there has been a surge in situations where persons who were blind carbon-copied replied to all, arguably waiving attorney-client privilege, and potentially disclosing their email address and other information to opposing counsel. As a result, state ethics committees are drafting opinions focused on whether it is permissible to carbon copy or bcc a client on email with opposing counsel, and if so, does such action waive confidentiality?

It seems that this problem can be eliminated if lawyers and staff would receive basic email training. (See Item 10.)

Advertising

The American Bar Association has adopted a revision to the Model Rules of Professional Conduct that would eliminate most of the ethics rules relating to advertising. Under the proposal approved by the House of Delegates in 2018, Model Rule 7.1 ("Communications Concerning a Lawyer's Services") would state: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

Although the Pennsylvania Supreme Court has not adopted this proposed revision, or changes to other advertising rules, it is time for the court to recognize that Disciplinary Counsel will not enforce any ethics rules about advertising. Consequently, the court should decide whether it should adopt this revision with the knowledge that, as with the current rules, not one lawyer is likely to be disciplined for a violation, or eliminate all such rules.

Training

It has been nearly six years since the Pennsylvania Supreme Court amended the Comment to Rule of Professional 1.1 to clarify that "competence" includes understanding "the benefits and risks associated with relevant technology." While this comment often is considered in light of cybersecurity dangers, the court did not limit it in scope. Lawyers must take 12 hours of continuing legal education courses annually, for example. They must also use technology in every practice regardless of age, practice area, etc. Yet many know little or nothing about how to use basic technology such as Microsoft Outlook or Adobe Acrobat or other programs used in most law firms. Worse yet, they don't require that their staff learn how to use the tools essential to performing their daily activities.

In December 2018, North Carolina became the second state to require lawyers to take a CLE in technology, mandating one hour per year of CLE devoted to technology training. A recommendation for a similar provision is currently pending before the Pennsylvania Supreme Court. The North Carolina Supreme Court defined "technology training" as "a program, or a segment of a program, devoted to education on information technology (IT) or cybersecurity … including education on an information technology product, device, platform, application or other tool, process, or methodology." Hopefully, the Pennsylvania Supreme Court will follow suit.

Cybersecurity

Law firms, like other businesses, are targets and victims of hacking. Our files contain the types of sensitive information that cybercriminals covet. In addition, there has been a recent increase in "spear phishing" attacks, in which emails are sent to clients, which look exactly like the ones they receive from their attorneys, instructing them to wire funds for payment of taxes, fees, etc., except that the emails are bogus and those who follow the instructions will be transferring their money to generally untrackable criminals.

The technology that drives law firms and other businesses can be vulnerable, and lawyers must take reasonable precautions to protect office technology and the mobile technology that we often take for granted. One common vulnerable situation is the type of free Wi-Fi available at many businesses. Norton, one of the world's most respected security software companies, notes that users of free Wi-Fi are particularly at risk for man-in-the-middle attacks (where a hacker accesses the information you send over the internet from one device to another location), malware (software that exploits holes or weaknesses in your devices) and more.

To avoid these and other dangers, Norton recommends using a virtual private network (VPN), which secures your connections. VPN programs are inexpensive, work seamlessly in most circumstances, and eliminate the risks of public Wi-Fi.

Cybersecurity is a danger for every law firm. Hopefully, in 2019, more attorneys will recognize and prepare to prevent the risks inherent to technology.

These items are just a few of the techno-ethical areas where lawyers can improve their delivery of services and reduce the risks attendant with technology, while also assuring that confidential and sensitive information stays that way.

Daniel J. Siegel, *principal of the Law Offices of Daniel J. Siegel, provides ethical guidance and Disciplinary Board representation for attorneys and law firms; he is the editor of "*Fee Agreements in Pennsylvania (6th Edition)" *and author of "*Leaving a Law Practice: Practical and Ethical Issues for Lawyers and Law Firms (Second Edition)," *published by the Pennsylvania Bar Institute. He can be reached at dan@danieljsiegel.com.*

The Legal Intelligencer

New Public Access Policy Coming Soon: Prepare Now to Be Competent

One dictionary defines “competence” as “the ability to do something successfully or efficiently.”

By Daniel J. Siegel | October 26, 2017

Daniel J. Siegel.

Competence. It’s a word whose meaning seems clear. One dictionary defines “competence” as “the ability to do something successfully or efficiently.” Rule of Professional Conduct 1.1 requires lawyers to “provide competent representation to a client,” explaining that “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Under prior Disciplinary Rule 6-101(A)(1), competence meant that lawyers should not handle legal matters that they were not competent to handle.

If we were to conduct a poll, it is likely that most lawyers would respond that competence means have current knowledge about the areas of law in which they practice so that they can properly analyze a client’s situation and provide appropriate advice. In other words, don’t handle matters they aren’t competent to handle.

Comment 1 to Rule 1.1 highlights this basic rule, stating that competence means that “a lawyer employs the requisite knowledge and skill in a particular matter.” This comment cites various factors, including “the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or

consult with, a lawyer of established competence in the field in question."

One judge summed up competence with the admonition, "Don't dabble."

The definition of competence under Rule 1.1 is broader than the judge's. For example, Comment 8 to the rule 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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

The Disciplinary Board has proposed broadening this comment further to include the following sentence, "to provide competent representation, a lawyer should be familiar with policies of the courts in which the lawyer practices, which include the Public Access Policy of the Unified Judicial System." This amendment would require attorneys to read and know the rules and procedures for any court or other entity before which they appear, and comply with the Public Access Policy that goes into effect on Jan. 6, 2018, and requires lawyers and unrepresented parties to redact confidential information and to file confidential documents separately from documents that do not contain confidential information.

In sum, Rule 1.1 and its comments define competence as having the appropriate knowledge to handle a client's matter, understanding the risks and benefits of technology, taking CLE courses relevant to an attorney's areas of practice, knowing the rules and procedures that apply to their areas of practice, and understanding and complying with the Public Access Policy.

Recent events highlight that some attorneys are lacking in the necessary competence in their areas of practice and that, perhaps, the CLE rules should be strengthened. My suggestion is to amend the CLE rules to require lawyers to take a specific number or percentage of credit hours in areas in which they practice or have an interest in practicing, and require lawyers to take a specific number or percentage of credit hours in technology-related subjects.

Why these changes? Because there is no obligation for attorneys to take courses in their practice areas, it is possible that they will instead take courses because they are offered at an exotic location or take courses merely because they need to obtain the relevant credit hours. In addition, technology pervades every aspect of the practice of law, and most attorneys are unfamiliar with many of the risks and benefits of technology. After all, would you be happy to know that the physician about to perform brain surgery on you has not taken a course in her medical field since she graduated from medical school 22 years ago? Of course not, and why should our clients feel any differently?

The first area to consider is competence to handle client matters. Everyone agrees that lawyers should stay abreast of the law and procedures that apply to their practices. But unless lawyers are certified specialists who are required to take a specific number or percentage of courses in their practice areas, the CLE rules do not require lawyers to take courses in an area in which they practice, or are interested in practicing. To the contrary, a lawyer who regularly handles contracts and never sets foot in a courtroom might take a four-hour CLE in criminal procedure because it was presented in Acapulco, or take a full day program on bankruptcy because it was offered the day before the compliance period ended.

These scenarios happen all the time. I regularly teach CLE courses, but my schedule is heaviest during late April, August and December, which are the months in which the Pennsylvania CLE compliance periods ends. While my courses are generally related to ethics, and apply to virtually every lawyer, I always peek into programs adjacent to mine and watch lawyers taking substantive CLEs who are reading their newspapers or texting because the subject matter of the program is irrelevant; they just must be "in the room."

Online CLE courses can be abused more easily. Numerous lawyers relate how they purchase an online CLE, turn off the volume, and don't watch the program. Rather, they take care of other business, and merely click on the "Please confirm you are alive" button that appears intermittently to verify that they are actually watching the program. In reality, they are merely verifying that they are still breathing.

And of course, when it comes to competence to handle matters, many lawyers need even more guidance. Recently, I served as an arbitrator in Common Pleas Court, and observed case after case in which lawyers did not provide their clients with the

most competent representation possible. Rather, their lack of competence made it difficult for the panel to rule in favor of their clients, even when we suspected we should. But without the proper evidence, the panel was constrained to finding against these people. One wonders why these attorneys have never taken one of the many CLEs on how to successfully arbitrate cases.

For example, in personal injury cases, CLE programs I attended taught me the need to include a summary page on any submissions that list the items being submitted into evidence, if the evidence includes medical records, list the names of each provider, dates of treatment and relevant diagnoses, insert tabs or dividers between the various sections to make it easy for the panel to find any desired records, highlight in the materials (and include the information on the summary page) which records are most relevant to the panel. To hand a panel a pile of 250 or more pages and expect them to "go fish" is asking a lot. And what if the panel fishes for a record that isn't helpful and never finds the one you believe is crucial to your client's case?

CLE programs have also taught me to ask the right questions and not get bogged down in minutiae. I have seen multiple attorneys ignore this maxim, and forget to ask a key question such as "How did the accident happen?"

I also learned that decorum matters, both in demeanor and in style. Thus, just because an arbitration panel is not comprised of judges does not mean that attorneys should walk into the hearing room chewing gum and take off their suit jackets. When these types of conduct happen, the panelists are rightly offended.

Competence in the practice is the seemingly easy part, even though it is possible for lawyers to be CLE-compliant without taking one credit hour in one of their practice areas.

When it comes to technology, many lawyers continue to have their heads miles deep in the sand. A variety of events brought this home. The first are discussions I have had with attorneys who believe that the technology comment is meaningless because they have no reason to know anything more about technology. After all, that's what their IT staff does.

Until, that is, they leave their iPad and smartphone in a cab, and realize that it contains all types of confidential information. Suddenly, it dawns on them that they never created a password for the device, never encrypted the SD card, and did not know that they could set up their devices to be remotely wiped if an unauthorized person accessed it.

Or, I ask if they have heard of any of the following: hackers, IP spoofing, social engineering, man-in-the-middle spoofing, DNS poisoning, trojans, cracks, worms, viruses, eavesdropping, spam, phishing, spyware, malware, ransomware, password cracking, network sniffing, back door/trap door, tunneling, website defacement, TCP/IP hijacking, replay attacks, system tampering and system penetration. These are just some of the ways computers and other devices can be attacked. Many lawyers believe, however, that attending a CLE to learn about these dangers is unnecessary.

These are often the same attorneys who won't attend a course about the new Public Access Policy. Come Jan. 6, 2018, if they fail to comply with the policy and a court imposes sanctions, perhaps then they will realize that attending a one or two-hour CLE on the topic would have been more productive than merely attending whatever course popped up during the final week of their compliance period.

Daniel J. Siegel, principal of the Law Offices of Daniel J. Siegel, provides ethical guidance and Disciplinary Board representation for attorneys and law firms; he is the editor of "Fee Agreements in Pennsylvania" (6th Edition) and author of "Leaving a Law Practice: Practical and Ethical Issues for Lawyers and Law Firms" (Second Edition), published by the Pennsylvania Bar Institute. He can be reached at dan@danieljsiegel.com.

The Legal Intelligencer

'L’Affaire Colangelo' and Its Lessons for Attorneys and Staff (Part I)

As a college student, I dreamed of becoming a sportswriter, a career that would serve as a diversion from the daily stress of the news. Eventually, I settled on law as a profession, and discovered that the world of sports rarely intersects with the world of law.

By **Daniel J. Siegel** | June 28, 2018

Daniel J. Siegel.

As a college student, I dreamed of becoming a sportswriter, a career that would serve as a diversion from the daily stress of the news. Eventually, I settled on law as a profession, and discovered that the world of sports rarely intersects with the world of law. There remain times, however, when sports intrude into the legal arena and offer valuable lessons for attorneys.

None perhaps more than what I call “L’Affaire Colangelo,” the recent social media-based soap opera involving Bryan Colangelo, who is now the former-president of Basketball Operations for the Philadelphia 76ers

professional basketball team. Colangelo's story offers many lessons for attorneys, none more important than its reminder that lawyers and their staff should never share confidential client information with family members or others because such "unguarded talk" can lead to serious consequences, often very serious consequences.

For those who aren't aware, Colangelo and the team mutually agreed to part ways after a website discovered five Twitter accounts linked to him, or so it seemed. The accounts defended Colangelo's actions, but also did far more. Therein lie the lessons for lawyers and their staffs.

The Twitter accounts disclosed confidential information about the team and specific players, including information unavailable to the public or other teams, that is, the 76ers' competition. In addition, the Twitter accounts disclosed confidential medical information about players on the teams, information that was also unavailable to the public or other teams, that is, the 76ers' competition.

Colangelo claimed to be aware of one of the accounts, but insisted that he knew nothing about the other four, which were the accounts that revealed the sensitive and confidential information. He had a difficult time explaining how all five accounts were de-activated (removed from public view) within minutes after the website called the team and reported that it was aware of two of the accounts and their presumed connection with Colangelo.

After the call, the website released its story, highlighting the Twitter accounts and its revelations. From there, the story became a media circus. The team, of course, hired a law firm to investigate the allegations. And every sportswriter and column in the world, or so it seemed, was investigating the story and offering their opinions on how the team should handle the scandal.

Eventually, the team and Colangelo parted ways. Accompanying that announcement was a statement from Colangelo that said, "While I am grateful that the independent investigation conducted by the 76ers has confirmed that I had no knowledge or involvement in the Twitter activity conducted by my wife, I vigorously dispute the allegation that my conduct was in any way reckless. At no point did I ever purposefully or directly share any sensitive, non-public, club related information with her."

Although he termed his wife's actions "a seriously misguided effort to publicly defend and support me," Colangelo never explained how his wife obtained the information if she didn't learn if from

her husband.

L'Affaire Colangelo offers many lessons for lawyers because, like Bryan Colangelo, lawyers are privy to confidential and sensitive information about their clients, information that they may not disclose without violating the Rules of Professional Conduct.

Consider some examples. It could be a criminal lawyer who reveals to his wife that his client admitted committing the crime for which he was charged. As it turns out, the lawyer's wife was planning to divorce her spouse and, as part of her revenge upon him, she tells all her Facebook friends about the criminal's admission of guilt. Or it could be a lawyer who tells her children all about a client's sensitive medical information, only to discover that one of her daughters is friends with the client's daughter, and reveals that information to the girl. Or it could be a lawyer representing a major corporation that is trying to purchase a competitor, who boasts to his family about the enormous potential deal, only to see his son brag about his dad's big deal on Facebook, and therefore to the world. It could also be a staff member trying to impress a friend.

In each example, a lawyer or staff member revealed confidential information to a person not entitled to know about it. Regardless of the situation, the person revealed confidential information whose disclosure could prejudice a client, and whose disclosure violated Rule of Professional Conduct 1.6(a), which prohibits a lawyer from "revealing information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation." The rules also require a lawyer to assure that their staff also preserve confidential information.

Comment 2 to Rule 1.6(a) explains that "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. … 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 upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."

Some lawyers and their employees, like everyone else, like to talk, or perhaps brag, about their firms' clients, their influence, or their presumed importance; revealing interesting tidbits is one way to do so, albeit one that can place them in disciplinary hot water. But seemingly innocent revelations are not so innocent when they include confidential information.

That may well be what happened to Colangelo. His tenure in Philadelphia was filled with controversy, and he was not universally liked. It's possible that he had frustrating days dealing with players and their agents, or was upset about his players' injuries, and needed to vent. By including sensitive information with his comments, Colangelo may have revealed confidential team information as well as HIPAA-protected information about players.

Even if, as Colangelo claims, his wife was tweeting just to protect her husband, the only likely source of her information had to be her husband, whose poor judgment not only cost him his job, but also endangered relationships between the players and team management. If Colangelo were a lawyer, such revelations would likely signal the end of the attorney-client relationship and the beginning of a legal malpractice claim and possibly Disciplinary Board proceedings.

Breaches of confidentiality come in many forms, from table talk, to publication on the internet. In *Office of Disciplinary Counsel v. Wrona*, in his first case as primary attorney, attorney Eugene Wrona made untruthful statements in pleadings; he also wrote a letter to the editor of the major newspaper in the area, wrote a press release and posted it on the Internet, and breached confidentiality requirements regarding action before the Judicial Conduct Board. Because of these actions, the Pennsylvania Supreme Court disbarred him.

Colangelo's fate was sealed when his wife decided to "defend" her husband on the internet, without ever realizing that nothing is truly anonymous online. While the accounts were anonymous, the tipster who revealed the story told the website that revealed it that he used a data analysis tool to link the five "anonymous" Twitter accounts. The tipster noticed that the accounts at times revealed proprietary information that would have been available only to a small number of high-ranking 76ers officials. From there, the website and others connected the dots, which eventually led to Barbara Bottini and her husband's demise.

Lawyers have an obligation to protect confidential information. That means that they cannot discuss the information with family, friends or anyone outside their firms without client consent. Otherwise, they may find themselves in a fate like Colangelo's.

Sports are often used as metaphors for life. They also offer lessons about what lawyers and their staff must never do.

Daniel J. Siegel, *principal of the Law Offices of Daniel J. Siegel, provides ethical guidance and Disciplinary Board representation for attorneys and law firms; he is the editor of "Fee Agreements in Pennsylvania" (6th Edition) and author of "Leaving a Law Practice: Practical and Ethical Issues for Lawyers and Law Firms" (Second Edition), published by the Pennsylvania Bar Institute. Contact him at dan@danieljsiegel.com.*

L’Affaire Colangelo and Its Lessons for Attorneys (Part II)

law.com/thelegalintelligencer/2018/10/25/laffaire-colangelo-and-its-lessons-for-attorneys-part-ii

By Daniel J. Siegel | October 25, 2018 at 12:17 PM

Daniel J. Siegel.

When I first wrote about “L’Affaire Colangelo,” the social media-based soap opera involving Bryan Colangelo, former-Philadelphia 76ers president of basketball operations, my focus was on its lesson: that lawyers and their staff should never share confidential client information with family members or others. Otherwise, such “unguarded talk” could lead to very serious consequences, as Colangelo’s demise confirmed.

But as I said then, there were other lessons for attorneys in Colangelo’s rapid fall. These lessons become clear when you consider some of Colangelo’s quotes in response to the revelations that five Twitter accounts linked to him had disclosed sensitive or confidential information about his team and its players.

- *“Like many of my colleagues … I have used social media as a means to keep up with the news.”*
- *“I have never posted anything whatsoever on social media.”*
- *“I vigorously dispute … that my conduct was in any way reckless.”*
- *“At no point did I ever purposely or directly share any sensitive, nonpublic … information.”*

I removed all basketball- or team-related references from Colangelo’s quotes to permit you to consider his comments in the context of the many lawyers who assert that they know little, or know nothing—about social media—and believe that you do not have to know or learn anything about social media. ‘Au contraire.

Lawyers cannot use ignorance as a defense to social media missteps because ignorance is merely another word for incompetence, and lawyers must be competent in their professional actions. That’s why the American Bar Association amended Comment 6 Model Rule of Professional Conduct 1.1 in 2012 to explain that “competence” means 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.” Pennsylvania adopted this amendment in 2013.

Many lawyers shrugged at this rules change, and continued to ignore discussions about social media and its implications for clients—and for them. After all, they reasoned, if they don't use social media, or simply don't use much technology, they aren't in any danger.

But if Colangelo's saga demonstrated anything, it's that anyone, including lawyers, can get into a lot of trouble—perhaps lose their job—despite claiming technological ignorance as a defense.

As social media takes over more nuances of our lives, it is easier than ever for lawyers, and judges, to get into that kind of trouble.

Consider Jefferson County, Kentucky District Court Judge Sandra McLaughlin, who shared a news story on Facebook about a Jefferson County district court case, commenting that "This murder suspect was RELEASED FROM JAIL just hours after killing a man and confessing to police." Those comments led to a public reprimand for the Judge.

Or consider attorney Aaron Schlossberg, who ranted about Spanish-speaking employees at a New York restaurant. Schlossberg never thought that another customer would film his rant and post it on Twitter, where it, quite predictably, went viral. While Schlossberg has not been publicly disciplined for his comments, his conduct has had an enormous impact on his reputation, as Google confirms.

First, when you perform a Google search for "attorney Aaron Schlossberg," you will discover pages of results, the vast majority focusing on his comments, not on his professional skills or successes. Then look at Schlossberg's Facebook page, which appears prominently in the results. Schlossberg now has a 1.1 rating based on the opinions of 2,367 people. It is a safe guess that most of those opinions are based on Schlossberg's tirade, and are not clients or others who personally know him.

While McLaughlin's and Schlossberg's conduct have garnered broad attention, most attorneys' Colangelo-like failings are less newsworthy. While there are many ways lawyers' social media ignorance surfaces, there are four primary traps for the unwary:

- Believing in the myth of privacy;
- Forgetting that the Rules of Professional Conduct apply to social media;
- Misusing or failing to use social media as a discovery or investigatory tool; and
- Failing to counsel clients about their use of social media.

The myth of privacy—this is the idea that social media accounts are private, cannot easily be discovered or that no one except perhaps "friends" will ever know what we say online. In other words, it is the erroneous belief that when you are in a zone of privacy when you write a blog post or share your views on Facebook. That is simply not the case. There is a reason "social" is social media's first name.

An example of this myth of privacy is former public defender Anya Cintron Stern, who learned about it in 2012 when she wrote a Facebook post that included a photo of the leopard print underwear her client's family gave him to wear at his murder trial. Although her Facebook page was "private," someone who saw the post informed the trial judge, who declared a mistrial.

Second, there are countless other examples of lawyers who do not realize that the Rules of Professional Conduct apply to their social media activity. Despite their ignorance, these attorneys should consider the Pennsylvania Bar Association committee on legal ethics and professional responsibility's Formal Opinion 2014-300 ("Ethical Obligations for Attorneys Using Social Media"), which concluded:

- Attorneys may advise clients about the content of their social networking websites, including the removal or addition of information.
- Attorneys may connect with clients and former clients.
- Attorneys may not contact a represented person through social networking websites.
- Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.
- Attorneys may use information on social networking websites in a dispute.
- Attorneys may accept client reviews but must monitor those reviews for accuracy.
- Attorneys may generally comment or respond to reviews or endorsements, and may solicit such endorsements.
- Attorneys may generally endorse other attorneys on social networking websites.
- Attorneys may review a juror's internet presence.
- Attorneys may connect with judges on social networking websites provided the purpose is not to influence the judge in carrying out his official duties.

This opinion provides an excellent analysis of the issues surrounding attorneys' and clients' use of social media, along with advice about how attorneys should address social media in an ethically compliant manner.

Third, attorneys often do not realize that the discovery of social media is a tool that they should use, or consider using, in every case, regardless whether they represent a plaintiff or defendant,

or a person or a corporation. While most news reports focus on how plaintiffs reveal damaging information on social media, or how criminals post information that helps lead to their arrest, corporations also misuse social media. Like individuals, corporations at times post information not intended to be public, or that can be damaging in future litigation. As a result, every attorney should research every opponent's social media, including blogs, Facebook, LinkedIn, Instagram and YouTube.

Finally, lawyers must counsel clients about their social media use, and the implications of their activities. Lawyers have always counseled clients not to discuss their cases with others, and not to destroy physical evidence. The advent of social media merely transforms that obligation to the electronic/online world.

Lawyers must advise clients to avoid posting information online that could impact their cases. Similarly, just like clients may not destroy physical evidence, so too must they no destroy electronic evidence. In that regard, the fact that the information is electronic is irrelevant, the advice remains the same.

Lawyers have always had an obligation to protect confidential information. The advent of social media means that they must heed that advice in a different forum. Otherwise, they may find themselves suffering a fate like Colangelo's.

L'Affaire Colangelo confirms that sports are not only a metaphor for life, they also offers lessons about what lawyers must never do.

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FORMAL OPINION 2014-300

ETHICAL OBLIGATIONS FOR ATTORNEYS USING SOCIAL MEDIA

I. Introduction and Summary

"Social media" or "social networking" websites permit users to join online communities where they can share information, ideas, messages, and other content using words, photographs, videos and other methods of communication. There are thousands of these websites, which vary in form and content. Most of these sites, such as Facebook, LinkedIn, and Twitter, are designed to permit users to share information about their personal and professional activities and interests. As of January 2014, an estimated 74 percent of adults age 18 and over use these sites.[1]

Attorneys and clients use these websites for both business and personal reasons, and their use raises ethical concerns, both in how attorneys use the sites and in the advice attorneys provide to clients who use them. The Rules of Professional Conduct apply to all of these uses.

The issues raised by the use of social networking websites are highly fact-specific, although certain general principles apply. This Opinion reiterates the guidance provided in several previous ethics opinions in this developing area and provides a broad overview of the ethical concerns raised by social media, including the following:

1. Whether attorneys may advise clients about the content of the clients' social networking websites, including removing or adding information.
2. Whether attorneys may connect with a client or former client on a social networking website.
3. Whether attorneys may contact a represented person through a social networking website.
4. Whether attorneys may contact an unrepresented person through a social networking website, or use a pretextual basis for viewing information on a social networking site that would otherwise be private/unavailable to the public.
5. Whether attorneys may use information on a social networking website in client-related matters.
6. Whether a client who asks to write a review of an attorney, or who writes a review of an attorney, has caused the attorney to violate any Rule of Professional Conduct.
7. Whether attorneys may comment on or respond to reviews or endorsements.
8. Whether attorneys may endorse other attorneys on a social networking website.
9. Whether attorneys may review a juror's Internet presence.

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

10. Whether attorneys may connect with judges on social networking websites.

This Committee concludes that:

1. Attorneys may advise clients about the content of their social networking websites, including the removal or addition of information.
2. Attorneys may connect with clients and former clients.
3. Attorneys may not contact a represented person through social networking websites.
4. Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.
5. Attorneys may use information on social networking websites in a dispute.
6. Attorneys may accept client reviews but must monitor those reviews for accuracy.
7. Attorneys may generally comment or respond to reviews or endorsements, and may solicit such endorsements.
8. Attorneys may generally endorse other attorneys on social networking websites.
9. Attorneys may review a juror's Internet presence.
10. Attorneys may connect with judges on social networking websites provided the purpose is not to influence the judge in carrying out his or her official duties.

This Opinion addresses social media profiles and websites used by lawyers for business purposes, but does not address the issues relating to attorney advertising and marketing on social networking websites. While a social media profile that is used exclusively for personal purposes (*i.e.,* to maintain relationships with friends and family) may not be subject to the Rules of Professional Conduct relating to advertising and soliciting, the Committee emphasizes that attorneys should be conscious that clients and others may discover those websites, and that information contained on those websites is likely to be subject to the Rules of Professional Conduct. Any social media activities or websites that promote, mention or otherwise bring attention to any law firm or to an attorney in his or her role as an attorney are subject to and must comply with the Rules.

II. Background

A social networking website provides a virtual community for people to share their daily activities with family, friends and the public, to share their interest in a particular topic, or to increase their circle of acquaintances. There are dating sites, friendship sites, sites with business purposes, and hybrids that offer numerous combinations of these characteristics. Facebook is currently the leading personal site, and LinkedIn is currently the leading business site. Other social networking sites include, but are not limited to, Twitter, Myspace, Google+, Instagram, AVVO, Vine, YouTube, Pinterest, BlogSpot, and Foursquare. On these sites, members create their own online "profiles," which may include biographical data, pictures and any other information they choose to post.

Members of social networking websites often communicate with each other by making their latest thoughts public in a blog-like format or via e-mail, instant messaging, photographs, videos, voice or videoconferencing to selected members or to the public at large. These services permit members to locate and invite other members into their personal networks (to "friend" them) as well as to invite friends of friends or others.

Social networking websites have varying levels of privacy settings. Some sites allow users to restrict who may see what types of content, or to limit different information to certain defined groups, such as the "public," "friends," and "others." For example, on Facebook, a user may make all posts available only to friends who have requested access. A less restrictive privacy setting allows "friends of friends" to see content posted by a specific user. A still more publicly-accessible setting allows anyone with an account to view all of a person's posts and other items.

These are just a few of the main features of social networking websites. This Opinion does not address every feature of every social networking website, which change frequently. Instead, this Opinion gives a broad overview of the main ethical issues that lawyers may face when using social media and when advising clients who use social media.

III. Discussion

A. Pennsylvania Rules of Professional Conduct: Mandatory and Prohibited Conduct

Each of the issues raised in this Opinion implicates various Rules of Professional Conduct that affect an attorney's responsibilities towards clients, potential clients, and other parties. Although no Pennsylvania Rule of Professional Conduct specifically addresses social networking websites, this Committee's conclusions are based upon the existing rules. The Rules implicated by these issues include:

- Rule 1.1 ("Competence")
- Rule 1.6 ("Confidentiality of Information")
- Rule 3.3 ("Candor Toward the Tribunal")
- Rule 3.4 ("Fairness to Opposing Party and Counsel")
- Rule 3.5 ("Impartiality and Decorum of the Tribunal")
- Rule 3.6 ("Trial Publicity")
- Rule 4.1 ("Truthfulness in Statements to Others")
- Rule 4.2 ("Communication with Person Represented by Counsel")
- Rule 4.3 ("Dealing with Unrepresented Person")
- Rule 8.2 ("Statements Concerning Judges and Other Adjudicatory Officers")
- Rule 8.4 ("Misconduct")

The Rules define the requirements and limitations on an attorney's conduct that may subject the attorney to disciplinary sanctions. While the Comments may assist an attorney in understanding or arguing the intention of the Rules, they are not enforceable in disciplinary proceedings.

B. General Rules for Attorneys Using Social Media and Advising Clients About Social Media

Lawyers must be aware of how these websites operate and the issues they raise in order to represent clients whose matters may be impacted by content posted on social media websites. Lawyers should also understand the manner in which postings are either public or private. A few Rules of

Professional Conduct are particularly important in this context and can be generally applied throughout this Opinion.

Rule 1.1 provides:

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

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, including privacy issues, as well as their clients' obligation to preserve information that may be relevant to their legal disputes.

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.

Another Rule applicable in almost every context, and particularly relevant when social media is involved, is Rule 8.4 ("Misconduct"), which states in relevant part:

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

This Rule prohibits "dishonesty, fraud, deceit or misrepresentation." Social networking easily lends itself to dishonesty and misrepresentation because of how simple it is to create a false profile or to post information that is either inaccurate or exaggerated. This Opinion frequently refers to Rule 8.4, because its basic premise permeates much of the discussion surrounding a lawyer's ethical use of social media.

C. Advising Clients on the Content of their Social Media Accounts

As the use of social media expands, so does its place in legal disputes. This is based on the fact that many clients seeking legal advice have at least one account on a social networking site. While an attorney is not responsible for the information posted by a client on the client's social media profile, an attorney may and often should advise a client about the content on the client's profile.

Against this background, this Opinion now addresses the series of questions raised above.

1. Attorneys May, Subject to Certain Limitations, Advise Clients About The Content Of Their Social Networking Websites

Tracking a client's activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client's legal dispute. An attorney can reasonably expect that opposing counsel will monitor a client's social media account.

For example, in a Miami, Florida case, a man received an $80,000.00 confidential settlement payment for his age discrimination claim against his former employer.[2] However, he forfeited that settlement after his daughter posted on her Facebook page "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." The Facebook post violated the confidentiality agreement in the settlement and, therefore, cost the Plaintiff $80,000.00.

The Virginia State Bar Disciplinary Board[3] 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, fairness to opposing counsel, and misconduct. 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.[4]

While these may appear to be extreme cases, they are indicative of the activity that occur involving social media. As a result, lawyers should be certain that their clients are aware of the ramifications of their social media actions. Lawyers should also be aware of the consequences of their own actions and instructions when dealing with a client's social media account.

Three Rules of Professional Conduct are particularly important when addressing a lawyer's duties relating to a client's use of social media.

Rule 3.3 states:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; …
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal

[2] "Girl costs father $80,000 with 'SUCK IT' Facebook Post, March 4, 2014: http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/

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

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

or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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

Rule 3.4 states:

> 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 states:

> 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; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The Rules do not prohibit an attorney from advising clients about their social networking websites. In fact, and to the contrary, a competent lawyer should advise clients about the content that they post publicly online and how it can affect a case or other legal dispute.

The Philadelphia Bar Association Professional Guidance Committee issued Opinion 2014-5, concluding that a lawyer may advise a client to change the privacy settings on the client's social media page but may not instruct a client to destroy any relevant content on the page. Additionally, a lawyer must respond to a discovery request with any relevant social media content posted by the client. The Committee found that changing a client's profile to "private" simply restricts access to the content of the page but does not completely prevent the opposing party from accessing the information. This Committee agrees with and adopts the guidance provided in the Philadelphia Bar Association Opinion.

The Philadelphia Committee also cited the Commercial and Federal Litigation Section of the New York State Bar Association and 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.
- 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. This duty arises when the potential for litigation or other conflicts arises [5]

In 2014 Formal Ethics Opinion 5, the North Carolina State Bar concluded that a lawyer may advise a client to remove information on social media if not spoliation or otherwise illegal.[6]

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, provided the conduct does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information in the event it is discoverable or becomes relevant to the client's matter.

Similarly, an attorney may not advise a client to post false or misleading information on a social networking website; nor may an attorney offer evidence from a social networking website that the attorney knows is false. Rule 4.1(a) prohibits an attorney from making "a false statement of material fact or law." If an attorney knows that information on a social networking site is false, the attorney may not present that as truthful information. It has become common practice for lawyers to advise clients to refrain from posting any information relevant to a case on any website, and to refrain from using these websites until the case concludes.

2. Attorneys May Ethically Connect with Clients or Former Clients on Social Media

Social media provides many opportunities for attorneys to contact and connect with clients and other relevant persons. While the mode of communication has changed, the Rules that generally address an attorney's communications with others still apply.

There is no *per se* prohibition on an attorney connecting with a client or former client on social media. However, an attorney must continue to adhere to the Rules and maintain a professional relationship with clients. If an attorney connects with clients or former clients on social networking sites, the attorney should be aware that his posts may be viewed by clients and former clients.

Although this Committee does not recommend doing so, if an attorney uses social media to communicate with a client relating to representation of the client, the attorney should retain records of those communications containing legal advice. As outlined below, an attorney must not reveal confidential client information on social media. While the Rules do not prohibit connecting with clients on social media, social media may not be the best platform to connect with clients, particularly in light of the difficulties that often occur when individuals attempt to adjust their privacy settings.

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

[6] http://www.ncbar.com/ethics/printopinion.asp?id=894

3. Attorneys May Not Ethically Contact a Represented Person Through a Social Networking Website

Attorneys may also use social media to contact relevant persons in a conflict, but within limitations. As a general rule, if contacting a party using other forms of communication would be prohibited,[7] it would also be prohibited while using social networking websites.

Rule 4.2 states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Regardless of the method of communication, Rule 4.2 clearly states that an attorney may not communicate with a represented party without the permission of that party's lawyer. Social networking websites increase the number of ways to connect with another person but the essence of that connection is still a communication. Contacting a represented party on social media, even without any pretext, is limited by the Rules.

The Philadelphia Bar Association Professional Guidance Committee concluded in Opinion 2009-02,[8] that an attorney may not use an intermediary to access a witness' social media profiles. The inquirer sought access to a witness' social media account for impeachment purposes. The inquirer wanted to ask a third person, *i.e.*, "someone whose name the witness will not recognize," to go to Facebook and Myspace and attempt to "friend" the witness to gain access to the information on the pages. The Committee found that this type of pretextual "friending" violates Rule 8.4(c), which prohibits the use of deception. The action also would violate Rule 4.1 (discussed below) because such conduct amounts to a false statement of material fact to the witness.

The San Diego County Bar Legal Ethics Committee issued similar guidance in Ethics Opinion 2011-2,[9] concluding that an attorney is prohibited from making an *ex parte* "friend" request of a represented party to view the non-public portions of a social networking website. Even if the attorney clearly states his name and purpose for the request, the conduct violates the Rule against communication with a represented party. Consistent with this Opinion, this Committee also finds that "friending" a represented party violates Rule 4.2.

While it would be forbidden for a lawyer to "friend" a represented party, it would be permissible for the lawyer to access the public portions of the represented person's social networking site, just as it would be permissible to review any other public statements the person makes. The New York State

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[7] *See, e.g.,* Formal Opinion 90-142 (updated by 2005-200), in which this Committee concluded that, unless a lawyer has the consent of opposing counsel or is authorized by law to do so, in representing a client, a lawyer shall not conduct ex parte communications about the matter of the representation with present managerial employees of an opposing party, and with any other employee whose acts or omissions may be imputed to the corporation for purposes of civil or criminal liability.

[8] Philadelphia Bar Assn., Prof'l Guidance Comm., Op. 2009-02 (2009).

[9] San Diego County Bar Assn., Legal Ethics Comm., Op. 2011-2 (2011).

Bar Association Committee on Professional Ethics issued Opinion 843,[10] concluded that lawyers may access the public portions of other parties' social media accounts for use in litigation, particularly impeachment. The Committee found that there is no deception in accessing a public website; it also cautioned, however, that a lawyer should not request additional access to the social networking website nor have someone else do so.

This Committee agrees that accessing the public portion of a represented party's social media site does not involve an improper contact with the represented party because the page is publicly accessible under Rule 4.2. However, a request to access the represented party's private page is a prohibited communication under Rule 4.2

4. Attorneys May Generally Contact an Unrepresented Person Through a Social Networking Website But May Not Use a Pretextual Basis For Viewing Otherwise Private Information[11]

Communication with an unrepresented party through a social networking website is governed by the same general rule that, if the contact is prohibited using other forms of communication, then it is also prohibited using social media.

Rule 4.3 states in relevant part:

> (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. …
> (c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

Connecting with an unrepresented person through a social networking website may be ethical if the attorney clearly identifies his or her identity and purpose. Particularly when using social networking websites, an attorney may not use a pretextual basis when attempting to contact the unrepresented person. Rule 4.3(a) instructs that "a lawyer shall not state or imply that the lawyer is disinterested." Additionally, Rule 8.4(c) (discussed above) prohibits a lawyer from using deception. For example, an attorney may not use another person's name or online identity to contact an unrepresented person; rather, the attorney must use his or her own name and state the purpose for contacting the individual.

In Ohio, a former prosecutor was fired after he posed as a woman on a fake Facebook account in order to influence an accused killer's alibi witnesses to change their testimony[12]. He was fired for "unethical behavior," which is also consistent with the Pennsylvania Rules. Contacting witnesses under false pretenses constitutes deception.

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[10] New York State Bar Assn., Comm. on Prof'l Ethics, Op. 843 (2010).

[11] Attorneys may be prohibited from contacting certain persons, despite their lack of representation. This portion of this Opinion only addresses communication and contact with persons with whom such contact is not otherwise prohibited by the Rules, statute or some other basis.

[12] "Aaron Brockler, Former Prosecutor, Fired for Posing as Accused Killer's Ex-Girlfriend on Facebook," June 7, 2013. http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/

Many Ethics Committees have addressed whether an attorney may contact an unrepresented person on social media. The Kentucky Bar Association Ethics Committee[13] concluded that a lawyer may access the social networking site of a third person to benefit a client within the limits of the Rules. The Committee noted that even though social networking sites are a new medium of communication, "[t]he underlying principles of fairness and honesty are the same, regardless of context."[14] The Committee found that the Rules would not permit a lawyer to communicate through social media with a represented party. But, the Rules do not prohibit social media communication with an unrepresented party provided the lawyer is not deceitful or dishonest in the communication.

As noted above, in Opinion 2009-02,[15] the Philadelphia Bar Association Professional Guidance Committee concluded that an attorney may not access a witness' social media profiles by deceptively using a third party intermediary. Use of an alias or other deceptive conduct violates the Rules as well, regardless whether it is permissible to contact a particular person.

The New Hampshire Bar Association Ethics Committee agreed with the Philadelphia Opinion in Advisory Opinion 2012-13/05,[16] concluding that a lawyer may not use deception to access the private portions of an unrepresented person's social networking account. The Committee noted, "A lawyer has a duty to investigate but also a duty to do so openly and honestly, rather than through subterfuge."

The Oregon State Bar Legal Ethics Committee concurred with these opinions as well in Opinion 2013-189,[17] concluding that a lawyer may request access to an unrepresented party's social networking website if the lawyer is truthful and does not employ deception.

These Committees consistently conclude that a lawyer may not use deception to gain access to an unrepresented party's page, but a lawyer may request access using his or her real name. There is, however, a split of authority among these Committees. The Philadelphia and New Hampshire Committees would further require the lawyer to state the purpose for the request, a conclusion with which this Committee agrees. These Committees found that omitting the purpose of the contact implies that the lawyer is disinterested, in violation of Rule 4.3(a).

This Committee agrees with the Philadelphia Opinion (2009-02) and concludes that a lawyer may not use deception to gain access to an unrepresented person's social networking site. A lawyer may ethically request access to the site, however, by using the lawyer's real name and by stating the lawyer's purpose for the request. Omitting the purpose would imply that the lawyer is disinterested, contrary to Rule 4.3(a).

5. Attorneys May Use Information Discovered on a Social Networking Website in a Dispute

If a lawyer obtains information from a social networking website, that information may be used in a legal dispute provided the information was obtained ethically and consistent with other portions of

[13] Kentucky Bar Assn., Ethics Comm., Formal Op. KBA E-434 (2012).
[14] *Id.* at 2.
[15] Philadelphia Bar Assn., Prof'l Guidance Comm., Op. 2009-02 (2009).
[16] New Hampshire Bar Assn., Ethics Comm., Op. 2012-13/05 (2012).
[17] Oregon State Bar, Legal Ethics Comm., Op. 2013-189 (2013).

this Opinion. As mentioned previously, a competent lawyer has the duty to understand how social media works and how it may be used in a dispute. Because social networking websites allow users to instantaneously post information about anything the user desires in many different formats, a client's postings on social media may potentially be used against the client's interests. Moreover, because of the ease with which individuals can post information on social media websites, there may be an abundance of information about the user that may be discoverable if the user is ever involved in a legal dispute.

For example, in 2011, a New York[18] court ruled against a wife's claim for support in a matrimonial matter based upon evidence from her blog that contradicted her testimony that she was totally disabled, unable to work in any capacity, and rarely left home because she was in too much pain. The posts confirmed that the wife had started belly dancing in 2007, and the Court learned of this activity in 2009 when the husband attached the posts to his motion papers. The Court concluded that the wife's postings were relevant and could be deemed as admissions by the wife that contradicted her claims.

Courts have, with increasing frequency, permitted information from social media sites to be used in litigation, and have granted motions to compel discovery of information on private social networking websites when the public profile shows relevant evidence may be found.

For example, in *McMillen v. Hummingbird Speedway, Inc.,*[19] the Court of Common Pleas of Jefferson County, Pennsylvania granted 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.,*[20] 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 the information may be inconsistent with plaintiff's claims of loss of enjoyment of life and physical injuries, thus making the social media accounts relevant.

In *Largent v. Reed,*[21] a Pennsylvania Court of Common Pleas granted a discovery request for access to a personal injury plaintiff's social media accounts. The Court engaged in a lengthy discussion of Facebook's privacy policy and Facebook's ability to produce subpoenaed information. The Court also ordered that plaintiff produce her login information for opposing counsel and required that she make no changes to her Facebook for thirty-five days while the defendant had access to the account.

Conversely, in *McCann v. Harleysville Insurance Co.,*[22] a New York court denied 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,*[23] Judge R. Stanton Wettick, Jr. of the Court of Common Pleas of Allegheny County denied a party access to a

[18] *B.M. v D.M.,* 31 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2011).
[19] *McMillen v. Hummingbird Speedway, Inc.,* 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. County Ct. 2010).
[20] *Romano v Steelcase Inc.,* 30 Misc. 3d 426 (N.Y. Sup. Ct. 2010).
[21] *Largent v. Reed*, No. 2009-1823 (Pa.Ct.Com.Pl. Franklin Cty. 2011).
[22] *McCann v. Harleysville Ins. Co. of N.Y.,* 78 A.D.3d 1524 (N.Y. App. Div. 4th Dep't 2010).
[23] *Trail v. Lesko,* 2012 Pa. Dist. & Cnty. Dec. LEXIS 194 (Pa. County Ct. 2012).

plaintiff's social media accounts, concluding that, under Pa. R.Civ.P. 4011(b), the defendant did not produce any relevant evidence to support its request; therefore, granting access to the plaintiff's Facebook account would have been needlessly intrusive.

6. Attorneys May Generally Comment or Respond to Reviews or Endorsements, and May Solicit Such Endorsements Provided the Reviews Are Monitored for Accuracy

Some social networking websites permit a member or other person, including clients and former clients, to recommend or endorse a fellow member's skills or accomplishments. For example, LinkedIn allows a user to "endorse" the skills another user has listed (or for skills created by the user). A user may also request that others endorse him or her for specified skills. LinkedIn also allows a user to remove or limit endorsements. Other sites allow clients to submit reviews of an attorney's performance during representation. Some legal-specific social networking sites focus exclusively on endorsements or recommendations, while other sites with broader purposes can incorporate recommendations and endorsements into their more relaxed format. Thus, the range of sites and the manner in which information is posted varies greatly.

Although an attorney is not responsible for the content that other persons, who are not agents of the attorney, post on the attorney's social networking websites, an attorney (1) should monitor his or her social networking websites, (2) has a duty to verify the accuracy of any information posted, and (3) has a duty to remove or correct any inaccurate endorsements. For example, if a lawyer limits his or her practice to criminal law, and is "endorsed" for his or her expertise on appellate litigation on the attorney's LinkedIn page, the attorney has a duty to remove or correct the inaccurate endorsement on the LinkedIn page. This obligation exists regardless of whether the information was posted by the attorney, by a client, or by a third party. In addition, an attorney may be obligated to remove endorsements or other postings posted on sites that the attorney controls that refer to skills or expertise that the attorney does not possess.

Similarly, the Rules do not prohibit an attorney from soliciting reviews from clients about the attorney's services on an attorney's social networking site, nor do they prohibit an attorney from posting comments by others.[24] Although requests such as these are permissible, the attorney should monitor the information so as to verify its accuracy.

Rule 7.2 states, in relevant part:

> (d) No advertisement or public communication shall contain an endorsement by a celebrity or public figure.
> (e) An advertisement or public communication that contains a paid endorsement shall disclose that the endorser is being paid or otherwise compensated for his or her appearance or endorsement.

Rule 7.2(d) prohibits any endorsement by a celebrity or public figure. A lawyer may not solicit an endorsement nor accept an unsolicited endorsement from a celebrity or public figure on social

[24] In *Dwyer v. Cappell*, 2014 U.S. App. LEXIS 15361 (3d Cir. N.J. Aug. 11, 2014), the Third Circuit ruled that an attorney may include accurate quotes from judicial opinions on his website, and was not required to reprint the opinion in full.

media. Additionally, Rule 7.2(e) mandates disclosure if an endorsement is made by a paid endorser. Therefore, if a lawyer provides any type of compensation for an endorsement made on social media, the endorsement must contain a disclosure of that compensation.

Even if the endorsement is not made by a celebrity or a paid endorser, the post must still be accurate. Rule 8.4(c) is again relevant in this context. This Rule prohibits lawyers from dishonest conduct and making misrepresentations. If a client or former client writes a review of a lawyer that the lawyer knows is false or misleading, then the lawyer has an obligation to correct or remove the dishonest information within a reasonable amount of time. If the lawyer is unable to correct or remove the listing, he or she should contact the person posting the information and request that the person remove or correct the item.

The North Carolina State Bar Ethics Committee issued Formal Ethics Opinion 8,[25] concluding that a lawyer may accept recommendations from current or former clients if the lawyer monitors the recommendations to ensure that there are no ethical rule violations. The Committee discussed recommendations in the context of LinkedIn where an attorney must accept the recommendation before it is posted.[26] Because the lawyer must review the recommendation before it can be posted, there is a smaller risk of false or misleading communication about the lawyer's services. The Committee also concluded that a lawyer may request a recommendation from a current or former client but limited that recommendation to the client's level of satisfaction with the lawyer-client relationship.

This Committee agrees with the North Carolina Committee's findings. Attorneys may request or permit clients to post positive reviews, subject to the limitations of Rule 7.2, but must monitor those reviews to ensure they are truthful and accurate.

7. Attorneys May Comment or Respond to Online Reviews or Endorsements But May Not Reveal Confidential Client Information

Attorneys may not disclose confidential client information without the client's consent. This obligation of confidentiality applies regardless of the context. While the issue of disclosure of confidential client information extends beyond this Opinion, the Committee emphasizes that attorneys may not reveal such information absent client approval under Rule 1.6. Thus, an attorney may not reveal confidential information while posting celebratory statements about a successful matter, nor may the attorney respond to client or other comments by revealing information subject to the attorney-client privilege. Consequently, a lawyer's comments on social media must maintain attorney/client confidentiality, regardless of the context, absent the client's informed consent.

This Committee has opined, in Formal Opinion 2014-200,[27] that lawyers may not reveal client confidential information in response to a negative online review. Confidential client information is defined as "information relating to representation," which is generally very broad. While there are

[25] North Carolina State Bar Ethics Comm., Formal Op. 8 (2012).

[26] Persons with profiles on LinkedIn no longer are required to approve recommendations, but are generally notified of them by the site. This change in procedure highlights the fact that sites and their policies and procedures change rapidly, and that attorneys must be aware of their listings on such sites.

[27] Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-200 (2014).

certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception.

As Rule 1.6 states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
> (b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.
> (c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
> (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client
> (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
> (e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Thus, any information that an attorney posts on social media may not violate attorney/client confidentiality.

An attorney's communications to a client are also confidential. In *Gillard v. AIG Insurance Company,*[28] the Pennsylvania Supreme Court ruled that the attorney-client privilege extends to communications from attorney to client. The Court held that "the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice."[29] The court noted that communications from attorney to client come with a certain expectation of privacy. These communications only originate because of a confidential communication from the client. Therefore, even revealing information that the attorney has said to a client may be considered a confidential communication, and may not be revealed on social media or elsewhere.

Responding to a negative review can be tempting but lawyers must be careful about what they write. The Hearing Board of the Illinois Attorney Registration and Disciplinary Commission reprimanded an attorney for responding to a negative client review on the lawyer referral website AVVO[30]. In her response, the attorney mentioned confidential client information, revealing that the client had been in a physical altercation with a co-worker. While the Commission did not prohibit an attorney from

[28] *Gillard v. AIG Insurance Co.*, 15 A.3d 44 (Pa. 2011).
[29] *Id.* at 59.
[30] *In Re Tsamis*, Comm. File No. 2013PR00095 (Ill. 2013).

responding, in general, to a negative review on a site such as AVVO, it did prohibit revealing confidential client information in that type of reply.

The Illinois disciplinary action is consistent with this Committee's recent Opinion and with the Pennsylvania Rules. A lawyer is not permitted to reveal confidential information about a client even if the client posts a negative review about the lawyer. Rule 1.6(d) instructs a lawyer to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of . . . information relating to the representation of a client." This means that a lawyer must be mindful of any information that the lawyer posts pertaining to a client. While a response may not contain confidential client information, an attorney is permitted to respond to reviews or endorsements on social media. These responses must be accurate and truthful representations of the lawyer's services.

Also relevant is Rule 3.6, which states:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

This Rule prohibits lawyers from making extrajudicial statements through public communication during an ongoing adjudication. This encompasses a lawyer updating a social media page with information relevant to the proceeding. If a lawyer's social media account is generally accessible publicly then any posts about an ongoing proceeding would be a public communication. Therefore, lawyers should not be posting about ongoing matters on social media when such matters would reveal confidential client information.

For example, the Supreme Court of Illinois suspended an attorney for 60 days[31] for writing about confidential client information and client proceedings on her personal blog. The attorney revealed information that made her clients easily identifiable, sometimes even using their names. The Illinois Attorney Registration and Disciplinary Commission had argued in the matter that the attorney knew or should have known that her blog was accessible to others using the internet and that she had not made any attempts to make her blog private.

Social media creates a wider platform of communication but that wider platform does not make it appropriate for an attorney to reveal confidential client information or to make otherwise prohibited extrajudicial statements on social media.

8. Attorneys May Generally Endorse Other Attorneys on Social Networking Websites

Some social networking sites allow members to endorse other members' skills. An attorney may endorse another attorney on a social networking website provided the endorsement is accurate and not misleading. However, celebrity endorsements are not permitted nor are endorsements by judges. As previously noted, Rule 8.4(c) prohibits an attorney from being dishonest or making

[31] *In Re Peshek*, No. M.R. 23794 (Il. 2010); Compl.., *In Re Peshek*, Comm. No. 09 CH 89 (Il. 2009).

misrepresentations. Therefore, when a lawyer endorses another lawyer on social media, the endorsing lawyer must only make endorsements about skills that he knows to be true.

9. Attorneys May Review a Juror's Internet Presence

The use of social networking websites can also come into play when dealing with judges and juries. A lawyer may review a juror's social media presence but may not attempt to access the private portions of a juror's page.

Rule 3.5 states:

> A lawyer shall not:
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
> (c) communicate with a juror or prospective juror after discharge of the jury if:
> (1) the communication is prohibited by law or court order;
> (2) the juror has made known to the lawyer a desire not to communicate; or
> (3) the communication involves misrepresentation, coercion, duress of harassment; or
> (d) engage in conduct intended to disrupt a tribunal.

During jury selection and trial, an attorney may access the public portion of a juror's social networking website but may not attempt or request to access the private portions of the website. Requesting access to the private portions of a juror's social networking website would constitute an ex parte communication, which is expressly prohibited by Rule 3.5(b).

Rule 3.5(a) prohibits a lawyer from attempting to influence a juror or potential juror. Additionally, Rule 3.5(b) prohibits *ex parte* communications with those persons. Accessing the public portions of a juror's social media profile is ethical under the Rules as discussed in other portions of this Opinion. However, any attempts to gain additional access to private portions of a juror's social networking site would constitute an ex parte communication. Therefore, a lawyer, or a lawyer's agent, may not request access to the private portions of a juror's social networking site.

American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 466 concluded that a lawyer may view the public portion of the social networking profile of a juror or potential juror but may not communicate directly with the juror or jury panel member. The Committee determined that a lawyer, or his agent, is not permitted to request access to the private portion of a juror's or potential juror's social networking website because that type of *ex parte* communication would violate Model Rule 3.5(b). There is no *ex parte* communication if the social networking website independently notifies users when the page has been viewed. Additionally, a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.

This Committee agrees with the guidance provided in ABA Formal Opinion 466, which is consistent with Rule 3.5's prohibition regarding attempts to influence jurors, and *ex parte* communications with jurors.

10. Attorneys May Ethically Connect with Judges on Social Networking Websites Provided the Purpose is not to Influence the Judge

A lawyer may not ethically connect with a judge on social media if the lawyer intends to influence the judge in the performance of his or her official duties. In addition, although the Rules do not prohibit such conduct, the Committee cautions attorneys that connecting with judges may create an appearance of bias or partiality.[32]

Various Rules address this concern. For example, Rule 8.2 states:

> (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

In addition, Comment [4] to Canon 2.9 of the Code of Judicial Conduct, effective July 1, 2014, states that "A judge shall avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending matters or matters that may appear before the court, including a judge who participates in electronic social media." Thus, the Supreme Court has implicitly agreed that judges may participate in social media, but must do so with care.

Based upon this statement, this Committee believes that attorneys may connect with judges on social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to assure that there is no ex parte or other prohibited communication. This conclusion is consistent with Rule 3.5(a), which forbids a lawyer to "seek to influence a judge" in an unlawful way.

IV. Conclusion

Social media is a constantly changing area of technology that lawyers keep abreast of in order to remain competent. As a general rule, any conduct that would not be permissible using other forms of communication would also not be permissible using social media. Any use of a social networking website to further a lawyer's business purpose will be subject to the Rules of Professional Conduct.

Accordingly, this Committee concludes that any information an attorney or law firm places on a social networking website must not reveal confidential client information absent the client's consent. Competent attorneys should also be aware that their clients use social media and that what clients reveal on social media can be used in the course of a dispute. Finally, attorneys are permitted to use social media to research jurors and may connect with judges so long as they do not attempt to

[32] American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 462 concluded that a judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with the relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.

influence the outcome of a case or otherwise cause the judge to violate the governing Code of Judicial Conduct.

Social media presents a myriad of ethical issues for attorneys, and attorneys should continually update their knowledge of how social media impacts their practice in order to demonstrate competence and to be able to represent their clients effectively.

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 2436 Disciplinary Docket No. 3
	:	
Petitioner	:	No. 32 DB 2017
	:	
v.	:	Attorney Registration No. 74824
	:	
STACY PARKS MILLER,	:	(Centre County)
	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 8th day of February, 2019, upon consideration of the Report and Recommendations of the Disciplinary Board and the parties' responses, Stacy Parks Miller is suspended from the Bar of this Commonwealth for a period of one year and one day, and she shall comply with all the provisions of Pa.R.D.E. 217. Respondent shall pay costs to the Disciplinary Board pursuant to Pa.R.D.E. 208(g).

A True Copy Patricia Nicola
As Of 02/08/2019

Attest: Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL Petitioner	:	No. 32 DB 2017
v.	:	Attorney Registration No. 74824
STACY PARKS MILLER Respondent	:	(Centre County)

REPORT AND RECOMMENDATIONS OF
THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES
OF THE SUPREME COURT OF PENNSYLVANIA:

Pursuant to Rule 208(d)(2)(iii) of the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board of the Supreme Court of Pennsylvania ("Board") herewith submits its findings and recommendations to your Honorable Court with respect to the above-captioned Petition for Discipline.

I. HISTORY OF PROCEEDINGS

By Petition for Discipline filed on February 23, 2017, Petitioner, Office of Disciplinary Counsel, charged Respondent, Stacy Parks Miller, with violations of the Rules of Professional Conduct arising out of allegations contained in two separate charges. Charge I alleges that Respondent engaged in ex parte communications with judges. Charge II alleges that Respondent created, disseminated and used a fictitious Facebook page. Pursuant to Disciplinary Board Rule 89.54(a), on March 2, 2017,

Respondent sought and received a one-time 20-day extension to file her Answer, which was due on April 11, 2017. ODC-C.

On March 27, 2017, Respondent filed an Emergency Motion for Protective Order and for Temporary Stay of All Proceedings. ODC-D. Therein, Respondent indicated that she was prohibited from responding to the charges against her. This position was based on an Order entered on March 14, 2017, by the Honorable Norman A. Krumenacker, III, Supervising Judge of the 37th Statewide Investigating Grand Jury. ODC-B. On March 31, 2017, Petitioner filed a response in Opposition to Respondent's Motion for Protective Order and Temporary Stay. ODC-E. Therein, Petitioner indicated that Respondent should request disclosure from Judge Krumenacker, and further, that she was not prohibited from responding to Charge II of the Petition for Discipline.

On April 20, 2017, the Board entered an Order providing Respondent an opportunity to obtain evidence that she deemed necessary to mount her defense to the Petition for Discipline. ODC-F. The Order further directed Respondent to file her Answer to Charge II within five business days. Respondent failed to answer Charge II by April 27, 2017, the deadline set by the Board.

On or about April 24, 2017, Respondent filed with Judge Krumenacker Petitioner's Motion for Release/Disclosure or for Such Other Relief as the Court Considers Warranted ("Motion for Relief"), and filed an accompanying brief on May 18, 2017. Respondent requested that Judge Krumenacker enter an order staying the disciplinary matter. On May 19, 2017, Judge Krumenacker issued an Order on Respondent's Motion for Relief, and held that "ex parte judicial communications and two additional emails were not the subject of the Grand Jury investigation." ODC-I.

On June 12, 2017, after all deadlines for filing an Answer to Petition for Discipline had expired, Petitioner filed a Motion to Deem All Allegations in the Petition for Discipline Admitted. ODC-K. On June 26, 2017, Respondent filed an Answer in Opposition to the Motion for Admission. On August 4, 2017, Petitioner filed a Response to Respondent's Answer to the Motion for Admission.

On August 10, 2017, the Board entered an Order granting Petitioner's Motion for Admission, thereby precluding Respondent from filing an Answer and deeming all factual allegations in the Petition for Discipline admitted. ODC-N. That same date, Respondent provided an untimely Answer to the Petition for Discipline. By Order dated August 11, 2017, the Board stated that it had considered Respondent's Answer as a Motion for Reconsideration/Motion for Enlargement of Time for Submission, and denied Respondent's Motion. ODC-O.

On August 16, 2017, a District III Hearing Committee ("Committee") was appointed to preside over the disciplinary proceedings. On September 11, 2017, Respondent filed an Emergency Application for Special Relief ("King's Bench Petition") before the Supreme Court of Pennsylvania. ODC-P. Respondent requested that the Court reverse the Board's decision to preclude her from filing an Answer to Petition for Discipline. By Order dated November 9, 2017, the Court denied the King's Bench Petition, leaving the Board's Order of August 11, 2017 undisturbed.

Prehearing conferences were conducted on September 12, 2017, October 10, 2017, November 6, 2017, and November 29, 2017, before Committee Chair Joanne Ludwikowski, Esquire.

On April 19, 2018, Respondent provided Petitioner with a list of exhibits and witnesses, and included the Answer to Petition for Discipline as an exhibit. Prior to the

disciplinary hearing, Petitioner filed a Motion in Limine to preclude Respondent's Answer from being entered into evidence as contrary to the Board's Order dated August 10, 2017.

A disciplinary hearing was held on April 23, 2018, before Chair Ludwikowski and Members Kevin C. McNamara, Esquire and Seth T. Moseby, Esquire.[1] At the hearing, the parties submitted Joint Stipulations of Facts and Law, and Petitioner's Exhibits ODC-1 through 48 and ODC-A through T were admitted into evidence. Petitioner did not provide testimonial evidence during its case-in-chief. The Committee granted Petitioner's Motion in Limine and precluded Respondent from including the Answer as part of the record. Respondent testified on her own behalf and presented character and fact testimony from five witnesses. Respondent's Exhibits R-1 through 3 were admitted into evidence.

On June 4, 2018, Petitioner filed a brief to the Committee and requested that Respondent receive no less than a three-month suspension for her violations of the Rules of Professional Conduct.

On June 27, 2018, Respondent filed a Brief to the Committee and requested that the Committee conclude that she engaged in a very limited violation of the Rules of Professional Conduct pertaining to ex parte judicial communications and that she be subjected to a minimal sanction or to time-served.

The Committee filed a Report on August 21, 2018. The Committee concluded that Respondent violated Rules of Professional Conduct as to the charges contained in Charge I, relating to ex parte judicial communications, but did not violate the

[1] The hearing originally was scheduled for November 29, 2017 and was rescheduled twice.

rules as to the charges contained in Charge II, relating to the Facebook page. The Committee recommended that Respondent be suspended for a period of three months.

On September 6, 2018, Petitioner filed a Brief on Exceptions to the Report and Recommendation of the Committee and requested that the Board reject the recommendation of the Committee with respect to the Facebook charges and find that Respondent violated the rules pertaining to that conduct.

On September 11, 2018, Respondent filed a Brief on Exceptions to the Report and Recommendation of the Committee, raised six exceptions, and requested that the Board reject the Committee's recommendation for a three-month suspension as excessive, and in the alternative, make the suspension retroactive to January 1, 2018.

On September 26, 2018, Respondent filed a Brief Opposing Petitioner's Exceptions and contended that the Committee correctly concluded that Respondent did not violate the Rules regarding the Facebook page, but further contends that even if the Board concludes that she violated those Rules, no additional discipline is warranted above the three-month suspension recommended by the Committee.

On October 1, 2018, Petitioner filed a Brief Opposing Respondent's Exceptions and requested that the Board reject Respondent's exceptions to the Committee's Report.

The Board adjudicated this matter at the meeting on October 25, 2018.

II. FINDINGS OF FACT

The Board makes the following findings:

1. Petitioner, whose principal office is located at Pennsylvania Judicial Center, 601 Commonwealth Avenue, Suite 2700, P.O. Box 62485, Harrisburg,

Pennsylvania 17106, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, with the power and the duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings in accordance with the various provisions of the aforesaid Rules.

2. Respondent, Stacy Parks Miller, was born in 1969 and admitted to the practice of law in the Commonwealth of Pennsylvania in 1994. Her registered public address is 113 Harvest Run Road S., State College, Centre County, Pennsylvania 16823. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania. Joint Stipulation ("JS") 2, 3.

3. Respondent has no record of professional discipline in Pennsylvania. JS 37.

4. Following her admission to the bar in 1994, Respondent worked briefly for a sole practitioner, then became an Assistant District Attorney in Clearfield County, where she was employed for six or seven years, after which time she moved to private practice in Centre County. She was elected District Attorney of Centre County in 2009 and served two terms. N.T. 29-31; JS 38.

5. At all times relevant, Respondent served as the District Attorney of Centre County, Pennsylvania. ODC-A at 2; N.T. 28, 32.

6. In or about December 2014, Petitioner opened a complaint on its own motion after receiving information which raised concerns with Respondent's actions as Centre County's District Attorney. Petitioner also received additional complaints which necessitated further investigation. JS 4.

7. Petitioner filed a Petition for Discipline against Respondent on February 23, 2017. JS 5.

8. Respondent failed to timely file an Answer to the Petition and the factual allegations as alleged in the Petition were deemed admitted by Order of the Board dated August 10, 2017. JS 6.

9. Respondent attempted to file an Answer after the issuance of the Board's Order, but the Board did not accept the Answer. JS 6.

The Ex Parte Matters

The Cluck Matter

10. On February 1, 2013, Respondent sent an email to: Centre County Court of Common Pleas Judge Bradley Lunsford; his secretary; his law clerk; and Christopher Sheffield, Esquire, defense counsel for Justin Cluck, relating to a criminal prosecution. The subject of the email was "Justin Cluck." ODC-A 3, 4. Respondent acted on an emergency basis to prevent what she believed to be the illegal release of Mr. Cluck, who was serving a sentence for rape in a state correctional institution. JS 9.

11. In the email, Respondent asked the Judge to strike a portion of his Order that set bail and sought a hearing on the bail issue. ODC–A 5; JS 9.

12. On that same day, in response to Respondent's email, Judge Lunsford replied, only to Respondent, without copying defense counsel. He stated: "Good point. Probably should have brought him back here first for that hearing. We'll schedule one in." ODC-A 6; JS 10.

13. In response to Judge Lunsford's email, Respondent replied ex parte to Judge Lunsford, without copying Attorney Sheffield. In the email, Respondent argued that Judge Lunsford should "rescind the order." ODC-A 7, 8, 9.

14. Specifically, the email stated:

> Will u [sic] rescind that order so we can deal with it then? He is still in. He has not been let out yet as your order just came through. Otherwise, we [sic] will walk out. You have no idea where he will go etc. U [sic] don't even have a supervised bail eval! ODC-A 9.

15. On that same day, in response to Respondent's email, Judge Lunsford replied, only to Respondent, stating: "He is already gone." ODC-A 11.

16. By Supplemental Request for Statement of Respondent's Position (Form DB-7A) dated June 8, 2015, Petitioner advised Respondent of its concerns arising from, *inter alia*, the ex parte communications that had occurred between her and Judge Lunsford. ODC-A 16.

17. On June 18, 2015, Respondent filed her verified response to the Form DB-7A, in which she stated, *inter alia*, "It is denied that [Respondent] intended to communicate with Judge Lunsford ex parte or that she realized at the time that Judge Lunsford had left off of the e-mail chain the other counsel of record." ODC-A 17.

The Horan Matter

18. On April 21, 2014, Patrick Horan filed a pro se Petition for Writ of Mandamus against Respondent. ODC-A 19. JS 11.

19. On May 8, 2014, Judge Lunsford scheduled a hearing to determine the propriety of the writ. ODC-A 20.

20. On May 14, 2014, Respondent sent an email only to Judge Lunsford and did not copy Mr. Horan. ODC-A 21.

21. The subject of the email was "Horan v. DA Stacy Parks Miller." ODC-A 22.

22. Respondent's email stated:

> Are you serious? Scheduling a hearing with me and a pro se inmate on a [w]rit of mandaum [sic] making me answer to him about the complaints he filed about guards? Giving him a teleconference face to face making me report to him? ODC-A 23.

23. Respondent's email also included two caselaw citations to convey Respondent's point, evidencing her intention to influence Judge Lunsford's decision. ODC-A 25.

24. On that same day, in response to Respondent's email, Judge Lunsford replied, only to Respondent, stating: "Ok. Thanks for clearing that up. I'll cancel the hearing." ODC-A 27.

25. Thereafter, on June 2, 2014, Judge Lunsford denied the Petition for Writ of Mandamus in Horan, with prejudice. ODC-A 28.

26. By Form DB-7A dated June 8, 2015, Petitioner advised Respondent of its concerns arising from, *inter alia*, the ex parte communications that had been sent from Respondent to Judge Lunsford relating to Horan. ODC-A 31.

27. In Respondent's verified DB-7A Answer dated June 18, 2015, she admitted that the email was sent ex parte, that she never should have sent it to Judge Lunsford, and should have filed a motion. ODC-A 32.

The Shirk Matter

28. On May 12 and 13, 2014, a jury trial took place before Centre County Court of Common Pleas Judge Jonathan Grine in Commonwealth v. Shirk, CP-14-CR-182-2013 (Centre Co). ODC-A 33.

29. During the trial, Brian Manchester, Esquire, defense counsel for Mr. Shirk, presented the testimony of Dr. Randall Tackett, a pharmacologist, challenging the evidence of Mr. Shirk's blood alcohol level. ODC-A 34.

30. On behalf of the Commonwealth, Respondent introduced Dr. Harry Kamerow, a pathologist at Mount Nittany Medical Center, to dispute the validity of Dr. Tackett's findings. ODC-A 35.

31. During closing, Attorney Manchester included argument which calculated Mr. Shirk's blood alcohol content based upon the number of alcoholic beverages he had allegedly consumed. ODC-A 36.

32. On May 13, 2014, Mr. Shirk was found guilty and released on bail pending sentencing scheduled for July 7, 2014, before Judge Grine. ODC-A 37.

33. On May 14, 2014, at 8:55 a.m., Respondent began text messaging with Judge Grine. In total, fifteen message were sent by Respondent to Judge Grine between 8.55 a.m. and 9:45 a.m. ODC-A 39, 40.

34. These messages were deleted from Respondent's phone on an unknown date. ODC-A 40.

35. The first thirty characters of each message were recovered from Respondent's phone's internal storage by Petitioner though digital forensic analysis. Only Respondent's outgoing messages were recovered. ODC-A 41, 42; JS 25.

36. Of the fifteen messages sent by Respondent to Judge Grine, six specifically related to the Shirk matter:

a. At 9:02: "You laughed when Kamerow told…";

b. At 9:03: "U laughed!!";

c. At 9:05: "Yes agreed. You didn't bust ou[t]…";

d. At 9:15" Calculations adding and subtra[cting]...";

e. At 9:16""Wonder what that poor kids fam[ily]..." and

f. At 9:17" "As part of restitution you sho[uld].."

ODC-A 43; JS 26.

37. On July 7, 2014 a sentencing hearing was held in Shirk. Judge Grine sentenced Mr. Shirk to a minimum of three years in prison; the sentence included a requirement of ordinary restitution. ODC-A 47, 51; JS 27.

The Best Matter

38. On May 19, 2014, a Motion in Limine hearing (Rape Shield Hearing) took place between 1:00 p.m. and approximately 1:24 p.m., before Judge Lunsford as a pretrial matter in Commonwealth v. Best, CP-14-CR-1772-2013 (Centre Co). The Rape Shield Hearing occurred the day before the jury trial was to begin. ODC-A 52, 53, 55.

39. The purpose of the Rape Shield Hearing was to determine whether the defense would be permitted to pierce the rape shield exclusion during the trial. JS 17.

40. During the hearing, Assistant District Attorney Nathan Boob stated, "So not only does the DNA then match from the vaginal swab of Mr. Best but also the penile swab has indicia of her presence there as well." ODC-A 56; JS 18.

41. On that date, Respondent sent two text messages to Judge Lunsford between 1:26 and 1:27 p.m. These messages were deleted from Respondent's phone on an unknown date. ODC-A 57, 58.

42. The first thirty characters of each messages were recovered from Respondent's phone's internal storage by Petitioner through digital forensic analysis. Only Respondent's outgoing messages were recovered. ODC-A 59, 60; JS 19.

43. The 1:27 p.m. message to Judge Lunsford began "Vag. Swab. Oh he said inducia..[,]" ODC-A 61; JS 20..

44. This text message copied ADA Boob in the correspondence but did not include opposing counsel. ODC- A 62; JS 21.

45. In her "group" text message, Respondent was referring to ADA Boob's statement during the hearing. ODC-A 63; JS 22.

46. On that same date, Judge Lunsford entered an Order at 4:16 p.m. granting the Commonwealth's motion. ODC-A 67.

47. By Request for Statement of Respondent's Position (Form DB-7 dated January 21, 2015, Petitioner advised Respondent of its concerns arising from, *inter alia*, the text messaging that had occurred between her and Judge Lunsford. ODC-A 68.

48. On February 27, 2015, Respondent filed her verified response to the Form DB-7 (DB-7 Answer), in which she stated, *inter alia*:

> With respect to the text messaging at issue,...[w]hile [Respondent] knows that none of the text messaging that was sent as between her and Judge Lunsford involved any pending criminal matter, she acknowledges that, with hindsight, she wishes she had not communicated with Judge Lunsford in that manner at all. [Respondent] did not make any false statements, and she did not engage in any fraud or misrepresentation to the Court. [Respondent] never intended to influence the judiciary or to influence the Court improperly. Nevertheless, as the text messaging was not improper ex parte communication with the Court and was not used to influence the Court, [Respondent] did not violate the Rules of Professional Conduct.
>
> ***
>
> As for the text messaging itself, [Respondent] did not use that communication in any way with respect to pending criminal matters.
>
> (emphasis added).

49. By Supplemental Request for Statement of Respondent's Position (Form DB-7A-2) dated June 16, 2016, Petitioner revisited its concerns arising from the text messages that had been sent by Respondent to Judge Lunsford. ODC-A 76.

50. On August 1, 2016, Respondent filed her verified response to the Form DB-7A-2 (DB-7A-2 Answer) in which Respondent stated, *inter alia*:

> [Respondent] has no independent recollection of sending two (2) text messages to Judge Lunsford (or anyone else) for that matter. On the contrary, [Respondent] does remember a group text in which she later learned that Judge Lunsford may have been included on the list, but she has no recollection that he was the intended recipient for the referenced texts.
> (emphasis added).

51. Respondent's knowledge of Judge Lunsford being included in the text is evidenced by Respondent's use of "he," referring to ADA Boob's statements during the Rape Shield Hearing, rather than directing the statement to ADA Boob (which would have been stated as "you".). ODC-A 79.

The McClure Matter

52. On October 30, 2014, a hearing was held on a Motion for Recusal filed by Bernard Cantorna, Esquire, on behalf of his client, Jalene McClure. Commonwealth v. McClure, CP-14-CR-1778-2012 (Centre Co.). ODC-A 80.

53. The Motion stated: "Judge...Lunsford is a personal friend of [Respondent], lead counsel in the above-captioned case, outside the bounds of a professional courthouse relationship...That personal friendship includes text messaging, telephone calls, social media contact and social interactions outside of the courthouse." ODC-A 82.

54. During the hearing, Respondent stated: "In terms of the rest of the allegations [*inter alia* Respondent's text messaging], I am not dignifying them. He has to bring forth proof before this Court goes any further, and notably, I expected him not to because there is none." ODC-A 83.

55. Judge Lunsford also made the statement: "There are no text messages between me and these two. I swear to God...There are no e-mails – well you are going to find e-mails because we are always attached on e-mails but you are not going to find any e-mail that is inappropriate that relates to this trial or any trial whatsoever. They're not there." ODC-A 85.

56. Respondent failed to correct Judge Lunsford's statement. ODC-A 86.

57. Respondent made these statements in open court only five months after the ex parte communications with Judge Lunsford in Horan and Best. ODC-A 89.

58. Respondent knew that Judge Lunsford's claim with respect to text messages was not true, as she and he sent each other text messages. ODC-A 90.

59. By Form DB-7 dated January 21, 2015, Petitioner advised Respondent of its concerns arising from, *inter alia*, the allegedly false statement made during the hearing in McClure by both her and Judge Lunsford. ODC-A 93.

60. In Respondent's verified Answer dated February 27, 2015, Respondent stated, *inter alia*, "It is admitted that [Respondent] did not correct Judge Lunsford. It is denied that she had any reason to believe that she needed to correct him." ODC-A 94.

61. By Form DB-7A dated June 8, 2015, Petitioner revisited its concerns arising from, *inter alia*, the allegedly false statements made during the McClure hearing by both her and Judge Lunsford. ODC-A 96.

62. In Respondent's verified DB-7A Answer dated June 18, 2015, Respondent stated, *inter alia*, "[Respondent] did not correct Judge Lunsford because, at the time, she had no reason to believe that what Judge Lunsford was stating was incorrect. [Respondent] had no recollection of the Horan e-mail or the fact that her last e-mail in the Cluck matter excluded counsel of record. ODC-A 97.

63. By Form DB-7A-2 dated June 16, 2016, Petitioner, again, revisited its concerns arising from, *inter alia*, the allegedly false statements made during the McClure hearing by both her and Judge Lunsford. ODC-A 99.

64. In Respondent's verified DB-7A-2 Answer dated August 1, 2016, Respondent stated, *inter alia*, that "the only issue before the court during the McClure hearing was whether there had been text messaging between ADA [] Boob and Judge Lunsford...[Respondent] had no recollection of any text messaging in the Best matter and such texts were not ex parte communications..." ODC-A 100.

The Hoy Matter

65. On November 21, 2014, a hearing was held on a Motion to Recuse and Supplemental Motion to Recuse filed by Public Defender Patrick Klena, Esquire, on behalf of his client, Michele Hoy. Commonwealth v. Hoy, CP-14-CR-83-2012 (Centre Co.). ODC-A 102.

66. At issue was, *inter alia*, whether evidence existed which would warrant Judge Lunsford's recusal from the matter. ODC-A 103.

67. The Motion stated: "62 text messages have been exchanged between [Judge Lunsford] and [Respondent]." ODC-A 104.

68. During the hearing, Respondent stated that Attorney Klena "has no indication and he has no evidence or proof to suggest that any communications between my office and your office are ex parte...Never has this Court had ex parte conversations about any cases..." ODC-A 105.

69. Respondent made these statements in open court only six months after the ex parte communications in Horan and Best. ODC-A 107.

70. By Form DB-7 dated January 21, 2015, Petitioner advised Respondent of its concerns arising from, *inter alia*, the false statement made during the hearing in Hoy. ODC-A 109.

71. In Respondent's verified Answer dated February 27, 2015, Respondent stated, *inter alia*: "to [Respondent]'s understanding, none of the text messages were improper ex parte communications with the Court." ODC-A 110.

72. By Form DB-7A dated June 8, 2015, Petitioner revisited its concerns arising from, *inter alia*, the allegedly false statements made during the Hoy hearing. ODC-A 112.

73. In Respondent's verified DB-7A Answer dated June 18, 2015, Respondent stated, *inter alia*, "When [Respondent] made the statement during the argument in the Hoy matter, she had no recollection of the Horan e-mail or the fact that her last e-mail in the Cluck matter excluded counsel of record. [Respondent] never intended to make a false statement or to mislead anyone." ODC-A-113.

74. Petitioner concedes that it does not possess evidence that the vast majority of text message communications were intended to influence the court. Instead,

many were personal, jocular in nature, and in some instances, arguably authorized by law. JS 15.

75. Respondent admits that she engaged in ex parte communications via email with Judge Lunsford relating to the Cluck and Horan matters and that these communications violated the Rules of Professional Conduct. JS 8, 42.

76. Respondent testified at the disciplinary hearing that she inadvertently emailed Judge Lunsford in the Cluck matter without copying Attorney Sheffield. N.T. 51; JS 10.

77. In the Horan matter, Respondent admits that she should have expressed her opposition to the scheduling of a hearing through a formal motion that included the opposing party, rather than through an ex parte communication with Judge Lunsford. JS 12.

78. Respondent admitted that she intended to influence the court when she sent the email in the Horan matter. N.T. 53, 61.

79. Respondent admits that she engaged in ex parte communications via text messages with Judge Lunsford and Judge Grine, related to two matters, and that these communications violated the Rules of Professional Conduct. JS 13, 42.

80. Respondent admitted that she communicated ex parte via text messages with Judge Lunsford relating to a criminal prosecution in the Best matter. JS 16.

81. Respondent testified that her text messages to Judge Lunsford were a "joke within the office." N.T. 57. She further admitted that it is not appropriate to joke about cases with a Judge. N.T. 79.

82. Respondent admitted that she communicated ex parte via text messages with Judge Grine relating to a criminal prosecution in the Shirk matter. JS 24.

83. Respondent testified that to the best of her recollection, her communications with Judge Grine were intended as "a joke," and not intended to influence the court. N.T. 54; JS 27.

The Facebook Page Matter

The Creation and Use

84. Pending legislation to make bath salts illegal, the judiciary of Centre County declared the sale of bath salts to be a nuisance and instituted injunctions against thee stores for selling bath salts. N.T. 63.

85. On or about May 16, 2011, in order to track the stores until legislation was passed to make the bath salt sales illegal and to enforce the injunctions, Respondent created a fictitious Facebook account under the name of "Britney Bella," for the purpose of "liking" establishments suspected of selling illegal bath salts, so that her office could be alerted to events where the establishments provided free "samples," which could be obtained and tested. JS 29; ODC-A 116.

86. Persons who had also liked the bath salt establishments "friended" the fictitious Facebook page, and the page sent and accepted "friend requests" in order to appear legitimate. JS 29.

87. In creating the fictitious account, Respondent utilized photos from around the internet of young female individuals to enhance the page's allure. ODC-A 117.

88. The account indicated that "Britney Bella" was a Pennsylvania State University drop-out who had moved to State College from Pittsburgh, in order to portray a connection to the local community. ODC-A 118.

89. Prior to creating the Facebook page, Respondent discussed with the Pennsylvania State Police the possibility of that entity creating a similar Facebook page, but the State Police declined due to information technology concerns, among other issues. N.T. 64.

90. Respondent did not seek an advisory opinion prior to creating and utilizing the Facebook page. N.T. 77.

91. On May 17, 2011, Respondent sent an email to the Assistant District Attorneys in her office as well as to the office secretarial staff, stating that she had "made a [F]acebook page that is fake for us to befriend people and snoop. Her name is Britney Bella...Use it freely to masquerade around [F]acebook. Please edit it...to keep it looking legit...Use it to befriend defendants or witnesses if you want to snoop." ODC-A 120.

92. By Form DB-7 dated January 21, 2015, Petitioner advised Respondent of its concerns arising from, *inter alia*, the "Britney Bella" Facebook account. ODC-A 121.

93. In Respondent's verified Answer dated February 27, 2015, Respondent stated, *inter alia*, "[Respondent] has not located the described email and does not believe that she would have used language in the nature described [in the Form DB-7]." ODC-A 122.

94. In Respondent's verified Answer, Respondent alleged, *inter alia*, the "Britney Bella" Facebook account constituted a "proper law enforcement operation" which "lacked active ongoing interaction with the targets of the investigation," and that the

"Britney Bella" Facebook account's "exclusive purpose" was "to facilitate the self-identification of sellers of illegal and highly dangerous synthetic drugs and paraphernalia." ODC-A 123.

95. Respondent's verified Answer dated February 27, 2015, alleged that, specifically, "three stores were raided, the owners were later prosecuted, and two [stores] were put out of business as a result." ODC-A 124.

96. Based on Respondent's statements, the "stores" that the "Britney Bella" Facebook account would have been "tracking and targeting" were raided in or about February 2012. ODC-A 125.

97. The Facebook account remained active and was utilized long after the investigation into the establishments selling illegal bath salts concluded. JS 29.

The Hill Matter

98. On or about May 29, 2012, a criminal matter was initiated against Samuel Hill in Centre County. Commonwealth v. Hill, MJ-49305-CR-157-2012 (Center CO.). Mr. Hill's matter was not drug-related. ODC-A 136.

99. On May 29, 2012, Mr. Hill was charged with simple assault and harassment and represented by counsel before the Magisterial District Court and the Court of Common Pleas. On or about August 29, 2012, Mr. Hill became a "friend" of the "Britney Bella" Facebook account. On November 15, 2012, Mr. Hill entered a plea of guilty and was sentenced. ODC-A 138.

The McClure Matter

100. On or about September 11, 2012, a criminal matter was initiated against Jalene McClure in Centre County. Commonwealth v. McClure, MJ-49302-CR-

282-2012 (Centre Co.) Ms. McClure's matter was not drug-related. ODC-A 141.

101. In September 2012, Ms. McClure was charged with various offenses relating to the injury of an infant under her care and was represented by counsel before the Centre County Court of Common Pleas. ODC-A 143.

102. On November 9, 2012, the same date Ms. McClure's criminal case was transferred from the Magisterial District Court to the Court of Common Pleas, the "Britney Bella" Facebook account was utilized to search Facebook for Ms. McClure and her three sons. ODC-A 145.

103. At an unknown date, presumptively the same date of the search, "friend requests" were sent from the "Britney Bella" Facebook account to, at a minimum, Ms. McClure and one of her sons. ODC-A 146.

104. Ms. McClure and her son did not accept the "friend request" sent from the "Britney Bella" Facebook account. ODC-A 149.

105. Respondent's verified Answer to the DB-7 dated February 27, 2015, stated that "to the best of [Respondent's] knowledge and understanding, and based upon a review of the "friend request" section of the Facebook profile in question....individuals became "friends" of the Britney Bella profile on his or her own initiative, not due to any invitation sent by anyone on behalf of the Britney Bella profile." ODC-A 144.

106. Respondent testified that her efforts curbed a dangerous bath salts epidemic and contributed to the issuance of a novel county injunction to stop the sale of the deadly substance in her county before the legislature formally criminalized the substance. The page assisted with subsequent raids and seizures of thousands of packets of bath salts, the prosecution of the owners and seizure of large amounts of profits from drug sales. JS 30.

Miscellaneous Findings

107. At the disciplinary hearing, Respondent acknowledged remorse for her ex parte communication with Judge Lunsford in the Horan matter and understands that she should not have done it. N.T. 53; JS 41.

108. Respondent did not acknowledge her other misconduct and did not accept responsibility or express sincere remorse. The regret expressed by Respondent was directed at her personal feelings that she had been charged with misconduct. Respondent expressed embarrassment and testified that she was "mortified" that she was charged with professional misconduct. N.T. 70; JS 41. Respondent did not express regret that she caused harm to her profession and the public.

109. Respondent believed that the rumors and speculation surrounding the disciplinary matter cost her the job she loved. JS 36.

110. Respondent presented the credible testimony of five character witnesses, two of whom also testified as fact witnesses.

111. Thomas R. Kline, Esquire, has practiced law in Pennsylvania for decades and came to know Respondent in her capacity as District Attorney in approximately February 2017, through his representation of Jim and Evelyn Piazza, whose son had died as the result of a Pennsylvania State University fraternity hazing incident. N.T. 113.

112. Mr. Kline, in his limited experience with Respondent, found her to be zealous, moral, ethical and competent, N.T. 115.

113. Mr. Kline was unfamiliar with the disciplinary charges against Respondent. N.T. 117 ("I don't know a lot about these charges, and I really still don't. I know nothing more than the public accounts which I read.")

114. Kristin Ann Shirey became acquainted with Respondent in June 2017 through a case involving the murder of Ms. Shirey's sister. N.T. 129.

115. Ms. Shirey found Respondent to be of good character with a deep concern for the victims of crime. N.T. 134.

116. Ms. Shirey was only generally aware of the disciplinary charges against Respondent. N.T. 132.

117. Jeffrey S. Helffrich, Esquire, has known Respondent since 2009, when he interned for Respondent for approximately one year while attending law school. He had the opportunity to observe her in court when he served as a law clerk for Judge Grine. N.T. 136, 139, 142, 143.

118. Mr. Helffrich described Respondent as an individual with high integrity and as a zealous advocate for victims. N.T. 140.

119. Mr. Helffrich had a "general familiarity" with the disciplinary charges against Respondent. N.T. 140.

120. William A. Shaw, Jr., Esquire, testified as a character and fact witness. He serves as the District Attorney for Clearfield County. N.T. 146 He has known Respondent for approximately twenty years, when they both served as Assistant District Attorneys in Clearfield County. N.T. 147.

121. District Attorney Shaw testified that Respondent is very conscientious and mindful of the victims of crimes. N.T. 148.

122. District Attorney Shaw never observed Respondent engage in unethical behavior during the six or seven years they worked together. N.T. 148.

123. District Attorney Shaw testified that as the District Attorney of a small county with two judges, ex parte communications are wholly inappropriate, at a minimum

cause the appearance of impropriety, and should be given "zero tolerance." N.T. 155-156.

124. District Attorney Shaw testified that he would terminate an employee in his office for engaging in ex parte communications to influence a judge. N.T. 165.

125. Bruce L. Castor, Jr., Esquire, testified as a character and a fact witness. Although Mr. Castor testified favorably about Respondent's character, the value of his testimony is limited by his role as her counsel in other matters for the last three years.

III. CONCLUSIONS OF LAW

By her conduct as set forth above, Respondent violated the following Rules of Professional Conduct:

The Ex parte Matters

1. RPC 3.5(a) – A lawyer shall not seek to influence a judge, juror, prospective juror or other official by means prohibited by law.

2. RPC 3.5(b) – A lawyer shall not communicate ex parte with such a person during the proceedings unless authorized to do so by law or court order.

3. RPC 4.1(a) – In the course of representing a client a lawyer shall not knowingly make a false representation of material fact or law to a third person.

4. RPC 8.1(a) – A lawyer in connection with a disciplinary matter shall not knowingly make a false statement of material fact.

5. RPC 8.4(d) – It is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice.

6. RPC 8.4(f) – It is professional misconduct for a lawyer to knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Respondent was charged with violation of RPC 8.1(b), which states that a lawyer in connection with a disciplinary matter shall not...knowingly fail to respond to a lawful demand for information from...disciplinary authority. We conclude that Petitioner did not meet its burden of proof with respect to Respondent's violation of this rule.[2]

The Facebook Matter

1. RPC 4.3(a) – In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

2. RPC 4.3(c) - When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

3. RPC 5.3(b) – A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

4. RPC 5.3(c)(1) – A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by lawyer if....the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.

[2] The Committee did not discuss RPC 8.1(b) and did not make an affirmative conclusion that Respondent violated RPC 8.1(b). Petitioner did not take exception to the Committee's conclusions of law relating to the ex parte communication matter.

5. RPC 5.3(c)(2) – A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by lawyer if...the lawyer...has comparable managerial authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

6. RPC 8.1(a) – A lawyer in connection with a disciplinary matter shall not knowingly make a false statement of material fact.

7. RPC 8.4(a) – It is professional misconduct for a lawyer to...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.

8. RPC 8.4(c) - It is professional misconduct for a lawyer to...engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

9. RPC 8.4(d) – It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

IV. DISCUSSION

This matter is before the Board for consideration following the issuance of a Report and Recommendation by the Committee and the parties' exceptions thereto. Petitioner initiated disciplinary proceedings against Respondent by way of a Petition for Discipline filed on February 23, 2017, which charged Respondent with violating multiple Rules of Professional Conduct in two separate matters. Charge I alleged that Respondent engaged in ex parte communications with members of the judiciary, in violation of RPC

3.5(a), 3.5(b), 4.1(a), 8.1(a), 8.1(b), 8.4(c), 8.4(d), and 8.4(f). Charge II alleged that Respondent created, disseminated and used a fake Facebook page, in violation of RPC 4.3(a), 4.3(c), 5.4(b), 5.3(c)(1), 5.3(c)(2), 8.1(a), 8.4(a), 8.4(c) and 8.4(d). Petitioner has the burden of proving ethical misconduct by a preponderance of clear and satisfactory evidence. ***Office of Disciplinary Counsel v. John Grigsby***, 425 A.2d 730, 732 (Pa. 1981). Based on the evidentiary record, and for the reasons stated herein, we recommend that Respondent be suspended from the practice of law for a period of one year and one day.

This disciplinary proceeding has a protracted and convoluted history, as set forth above, during which Respondent's various deadlines to file her Answer to the Petition for Discipline expired, resulting in the Board's Order dated August 10, 2017, whereby the Board precluded Respondent from filing an Answer and deemed all factual allegations admitted. That same day, Respondent attempted to untimely file an Answer; the Board refused to accept it. The Supreme Court denied Respondent's King's Bench Petition, leaving the August 10, 2017 Board Order undisturbed.

The facts as deemed admitted and Joint Stipulations of Facts and Law establish that at all times relevant, Respondent, while serving as the duly elected District Attorney of Centre County and representing the Commonwealth in that capacity, engaged in ex parte communications with the judiciary by email and text messages, and created, disseminated and used a fictitious Facebook page.

Respondent engaged in improper email communications in two matters. During the pendency of the Horan matter, Respondent emailed Judge Bradley Lunsford and did not copy the pro se defendant. She sought to influence the Judge by requesting that he cancel a hearing, and in response to Respondent's ex parte communication,

Judge Lunsford canceled the hearing. During the pendency of the Cluck matter, Respondent emailed Judge Lunsford and defense counsel to oppose the release of a prisoner. While Respondent's initial email was proper, Judge Lunsford replied only to Respondent without copying defense counsel, and Respondent replied ex parte to Judge Lunsford, seeking to influence the Judge to rescind his order. He did not rescind the order, as the prisoner had been released.

Respondent engaged in improper text message communications with Judge Lunsford during the pendency of the Best criminal proceeding. The text messages were sent ex parte without including defense counsel. These messages made reference to a Rape Shield hearing that had occurred less than 30 minutes prior to the time of the text messages and referenced statements made during that hearing by an assistant district attorney. Respondent engaged in improper text message communications with Judge Jonathan Grine relating to the pending criminal prosecution in the Shirk matter. The text messages were sent one day after Mr. Shirk was convicted in a jury trial before Judge Grine, but prior to Mr. Shirk's sentencing.

Respondent admitted that she engaged in the ex parte email and text communications and that her communications violated the Rules of Professional Conduct. She further admitted that she intended to influence the court in the Horan matter and the proper course of action would have been to file a motion and copy the pro se defendant. Respondent admitted that her email communication in the Cluck matter were improper, although she claims that her ex parte responses to Judge Lunsford were inadvertent. Respondent explained that her text messages in the Best matter were an "office joke," and also a "joke" in the Shirk matter, but she admitted that they were improper and a violation of the conduct rules.

In addition to sending the communications themselves, Respondent made false and misleading responses to inquiries regarding the communications. In her response to Petitioner's Form DB-7, she represented that she knew that none of the text messaging that was sent between her and Judge Lunsford involved any pending criminal matter and that to her understanding, none of the text messages were improper ex parte communications. Additionally, Respondent made statements in open court in two separate matters indicating that no text messages existed between her and the judiciary.

The admitted facts establish that Respondent in her capacity as the District Attorney of Centre County, created, disseminated and used a fake Facebook page. Respondent used social media to "friend" the Facebook pages of several establishments in Centre County known for selling illegal bath salts, in order to be alerted to events where these establishments provided free samples, which could be obtained and tested. Respondent intended the Facebook page to assist in curbing bath salt sales in her county, and she testified that the information gathered from the Facebook page assisted with raids and seizure of thousands of packets of bath salts, the prosecution of the owners, and the seizure of large amounts of profits from drug sales.

Respondent did not seek ethical guidance on the propriety of such a course of action, believing that the fictitious Facebook activity constituted a "proper law enforcement operation" which "lacked actively ongoing interaction with the targets of the investigation." ODC-A-123. She recalled a conversation with the State Police to determine if they had any interest in setting up a similar page, but they declined. Respondent's email announcement of the Facebook page to her staff, attorneys and non-attorneys alike, pointedly directed staff to freely "masquerade" and "snoop" around Facebook under the guise of "Britney Bella." Respondent provided no guidelines or restrictions to her staff to

prevent contact with defendants or witnesses. Although Respondent described the fictitious Facebook page as exclusively targeting the bath salts investigation, the Facebook account remained active and was utilized after the bath salts prosecutions concluded in February 2012. In August 2012, the page received a "friend request" from a defendant in a non-bath salts prosecution, who became a "friend" of the "Britney Bella" account. In September 2012, the "Britney Bella" page sent a "friend request" to another non-bath salts defendant, who did not accept the request.

The Committee, considering these facts, issued a Report and concluded that Respondent violated RPC 3.5(a), 3.5(b), 4.1(a), 8.1(a), 8.4(d) and 8.4(f) pertaining to the ex parte communications. The Committee further concluded that Respondent did not violate any rules pertaining to the Facebook charge.

The Committee reviewed the totality of the circumstances of the Facebook page and found that it was a matter of first impression, and further found that Respondent's conduct did not rise to the level of violating any of the rules, although the Committee noted its concern about "the lack of care and inquiry made by Respondent with regard to the Facebook page, both before and after its creation." Hearing Committee Report, p. 12. While the Committee found that Respondent was genuinely remorseful for her ex parte communication in the Horan matter, it concluded that she did not regret the remainder of her conduct. The Committee recommended a suspension for a period of three months.

Both parties filed exceptions to the Committee's Report and exceptions in opposition to the other party's exceptions. We address these exceptions below.

Petitioner contends that while the Committee correctly concluded Respondent's ex parte communications constituted violations of the Rules of Professional

Conduct, it argues that the Committee erred in its conclusion that the creation, dissemination, and use of a fictitious Facebook page did not rise to the level of any rules violations.[3] After review of this issue, we agree.

The question of whether a prosecutor violates the Rules of Professional Conduct by engaging in covert activity through the use of social media is novel within Pennsylvania's adjudication of disciplinary matters. There is no dispute that covert activity is permitted in criminal investigations; however, attorneys themselves are prohibited from participating in such activity. RPC 8.4(c) broadly prohibits an attorney from engaging in dishonesty, fraud, deceit or misrepresentation. Significantly, Pennsylvania has no express prosecutorial investigation exception that allows prosecutors to engage in activity prohibited by RPC 8.4(c).[4]

The case law from other jurisdictions and Pennsylvania ethics opinions are not binding precedent on the Board or the Court, but nonetheless, constitute persuasive authority in a matter of first impression.

In ***In re Pautler***, 47 P.3d 1175 (Co. 2002), Pautler, a deputy district attorney, was introduced during a telephone call to a suspect as a public defender in order to obtain the suspect's surrender. The fact that Pautler engaged in this deceptive behavior constituted violation of Colorado's Rule of Professional Conduct 8.4(c) and 4.3, and warranted discipline.

The specific issue involving prosecutors using fake online persona to obtain otherwise protected information has been addressed by other jurisdictions. *See*

[3] Petitioner does not take exception to the Committee's recommendation of a three month period of suspension, even in the event that the Board concludes Respondent violated the rules pertaining to the Facebook charge.

[4] Exceptions exist in other jurisdictions for prosecutorial investigations. *See*, Oregon RPC 8.4(b) (specifically permitting 'covert activity" by a lawyer, Amendment effective 2015).

Disciplinary Counsel v. Brockler, 48 N.E. 4d 557 (Oh. 2016). Brockler was an assistant district attorney assigned to a murder investigation. During the investigation, Brockler did not believe the defendant's alibi, but the alibi witnesses refused to discuss the matter with Brockler when he approached them and truthfully identified himself. Thereafter, Brockler engaged in deceptive tactics, posing as the defendant's paramour through a fake Facebook persona, to contact the witnesses.

The Ohio Supreme Court found that Brockler's conduct violated Ohio's Rule of Professional Conduct 8.4(c), among others. While Ohio's rules permitted supervision of nonlawyers for lawful covert investigative activities, the Court refused to broaden the exception to the actions of attorneys themselves.

A 2009 Pennsylvania ethics opinion relating to this issue generally condemns covert attempts to gain access to restricted social media websites, a point which Respondent conceded. JS 31; R-2. In 2009, the Philadelphia Bar Association Professional Guidance Committee found that the mere act of concealing a "highly material fact" as to why the contact was being made would violate multiple Rules of Professional Conduct, including RPC 8.4(c), 4.3, and possibly 5.3, depending on the attorney's authority over the third party. JS 31; R-2. This Opinion existed at the time Respondent created the fictitious Facebook page in 2011, although she sought no guidance before she created the page. This issue was revisited in a 2014 Opinion, which reinforced the fact that even the innocuous act of having a third-person send a friend request to a represented party in order to gain access to the private portion of their profile violates RPC 8.4(c).

Respondent knowingly created a fake social media persona, provided access to a fake Facebook page to her staff, and indicated that the page should be used

to "masquerade" and "snoop" around Facebook. Respondent sought no ethical guidance prior to embarking on the Facebook operation and had no compunction about potential communication with represented parties. The page created by Respondent used pictures of an individual who had no association with the District Attorney's office, and had a fabricated backstory. Respondent encouraged her staff to send "friend requests," in order to maintain the appearance of legitimacy, thereby giving a false impression to the public and concealing the fact that the page was operated by the District Attorney's office. In the course of the District Attorney's operation of the fake Facebook page, individuals represented in criminal proceedings either sent friend requests to the page or received friend requests from the page.

The Facebook page created by Respondent and disseminated to her staff was fake, and constituted fraudulent and deceptive conduct, in violation of RPC 8.4(c). Regardless of Respondent's intent to curb criminal activity in her county, she was not permitted to engage in dishonest conduct. Respondent's tactics crossed the boundaries of professional ethics. As the Court stated in ***Office of Disciplinary Counsel v. John Grigsby, III***, 425 A.2d 730, 733 (Pa. 1981) "[t]ruth is the cornerstone of the judicial system; a license to practice requires allegiance and fidelity to truth." Every lawyer licensed in Pennsylvania, including prosecutors, is bound by the ethics rules to practice law within this construct.

Respondent induced her staff, both attorneys and non-attorneys alike, to engage in dishonest behavior and to imply disinterest in matters, without correcting any misapprehensions. The staff carried out Respondent's directives and used the page to "friend" individuals, some of whom were defendants. Respondent enabled her staff to

engage in deceptive conduct, without specific direction, for an unrestricted period of time. This conduct violated RPC 4.3(a), 4.3(c), 5.3(b), 5.3(c)(1) and 5.3(c)(2). .

Respondent raises six exceptions to the Committee's Report and generally excepts to the Committee's recommendation of a three-month suspension as excessive. Upon review, we find no substance to these exceptions, for the following reasons.

Respondent argues the Committee erred in refusing to admit her untimely filed Answer and further avers that the Board's Order to deem the factual allegations in the Petition admitted was excessive, given the totality of the circumstances. We conclude that the Committee did not err in their refusal to accept Respondent's Answer, as the Committee had no legitimate basis to overturn the Board's Order, which was entered after Respondent missed previous deadlines to file her Answer.

Respondent next argues that she was prejudiced by her former counsel's withdrawal without notice or opportunity to respond. Respondent's former counsel filed a Motion to Withdraw on August 11, 2017, which was granted. There is no authority in the Pennsylvania Rules of Disciplinary Enforcement or case law that permits the Board to deny a counsel's request to withdraw. Respondent received notice of her former counsel's intention to withdraw when he filed the Motion with the Board. The fact that Respondent's counsel withdrew did not stay the proceedings.

Respondent further avers that the Committee erred in refusing to admit into evidence an affidavit which gave rise to the Grand Jury investigation. While the Committee accepted the Grand Jury Report into evidence, Respondent submits that a more complete record would show that the factual predicate for the Petition for Discipline derived from the "fruits of a highly poisonous and toxic tree." We conclude that the Committee did not err in considering the grand jury investigation as irrelevant to the issues

presented in the Petition for Discipline. The Committee found that Petitioner opened a complaint on its own motion after receiving information concerning Respondent's actions as District Attorney, and conducted a thorough investigation. Respondent's fixation on the Grand Jury Report appears to be an attempt to divert attention from Respondent's misconduct at issue in this disciplinary proceeding.

Respondent next contends that the Committee's reasoning that Respondent was only remorseful for the Horan matter mischaracterizes Respondent's testimony in its totality. Our review of the record indicates that the Committee did not err. The Board accords substantial deference to the Committee's credibility findings. ***See In re Anonymous No. 116 DB 93***, 31 Pa. D. & C. 4th 199, 206 (1995) (citing ***Office of Disciplinary Counsel v Wittmaack***, 522 A.2d 522, 524 (Pa. 1987) ("[I]n matters of witness credibility, great deference is accorded to determinations of the trier of fact.") Other than the instance when Respondent expressed remorse for her actions in the Horan matter, her testimony deflected blame for her actions. Respondent did not appear remorseful for the conduct; rather, she was "mortified" that she found herself in such a predicament. N.T. 70.

Respondent further avers the Committee erred by failing to make the recommended three-month suspension retroactive. In support of her request for entry of a retroactive suspension, Respondent claims that she has self-imposed her own suspension, commencing January 1, 2018, when she was out of her position as District Attorney, and seeks retroactivity to that date. We conclude that the Committee did not err.

The Pennsylvania Rules of Disciplinary Enforcement and Board Rules and Procedures do not provide for when or if retroactivity should be granted. Indeed,

retroactivity of a suspension is a discretionary act implemented by the Court on some occasions, typically where a respondent has been placed on temporary suspension from the practice of law and an order imposing suspension or disbarment is thereafter imposed. The retroactivity component of a disciplinary order recognizes that the respondent has been without a license to practice for a previous time frame. In a situation where an attorney maintains an active license to practice, such as the instant matter, there is no precedent to make a suspension retroactive.

Finally, Respondent argues that the Committee erred in admitting Petitioner's exhibits, which she claims were hearsay, irrelevant and inflammatory, and without material relevance. The exhibits generally consisted of newspaper articles, docket entries involving certain criminal proceedings, and certain Grand Jury documentation, which Respondent argues is at best redundant, given the deemed factual admissions. Petitioner's rationale for the evidence is to show that there was negative publicity. The presentation of this type of evidence for consideration is supported by prior disciplinary case law. "Both the Board and the Court have considered the impact of a respondent's misconduct on the reputation of the bar to be[a] factor in assessing the measure of discipline. ***Office of Disciplinary Counsel v. Jeff Foreman***, 164 DB 2009 (D. Bd. Rpt. 5/19/2014) (S. Ct. Order 9/17/2014) (citing ***In re Lawrence Greenberg***, 749 A.2d 434 (Pa. 2000). Upon review, we conclude that the Committee properly admitted Petitioner's exhibits.[5]

Having reviewed the record and having considered the parties' arguments, we conclude that Respondent engaged in professional misconduct by her ex parte

[5] It appears from the Report that the Committee gave little, if any, weight to the newspaper articles. The Report did not specifically state that the Committee considered adverse publicity as an aggravating factor.

communications with judges and creation, dissemination and use of a fictitious Facebook page. This matter is ripe for the determination of discipline.

In looking at the general considerations governing the imposition of final discipline, it is well-established that each case must be decided individually on its own unique facts and circumstances. ***Office of Disciplinary Counsel v. Robert Lucarini***, 427 A.2d 186 (Pa. 1983). In order to "strive for consistency so that similar misconduct is not punished in radically different ways," ***Office of Disciplinary Counsel v Anthony Cappuccio***, 48 A.3d 1231, 1238 (Pa. 2012) (quoting ***Lucarini***, 473 A.2d at 190), the Board is guided by precedent for the purpose of measuring "the respondent's conduct against other similar transgressions." ***In re Anonymous No. 56 DB 94***, 28 Pa. D. & C. 4th 398 (1995). The Board is mindful when adjudicating each case that the primary purpose of the lawyer discipline system in Pennsylvania is to protect the public, preserve the integrity of the courts, and deter unethical conduct. ***Office of Disciplinary Counsel v. Akim Czmus***, 889 A.2d 117 (Pa. 2005).

Examining the record before us, we find several aggravating factors. Most significantly, at the time of her misconduct, Respondent served as the duly elected District Attorney of Centre County, the highest law enforcement official in that jurisdiction. As District Attorney, she represented the Commonwealth of Pennsylvania and owed an allegiance to her constituency: victims; the general public; and the accused. To all of these individuals, Respondent owed a duty to conduct herself with the highest degree of integrity and honesty. ***Office of Disciplinary Counsel v. Ernest Preate***, 731 A.2d 129 (Pa. 1999). Respondent failed to balance these interests and compromised her ability to exercise her broad discretion fairly, and to protect the legal rights of all citizens of

Centre County. Respondent placed herself squarely in the public eye; it is in this context that her misconduct must be judged.

Respondent's position as District Attorney is an aggravating factor in the Board's assessment of discipline. ***Cappuccio,*** 48 A.3d at 1240, ("[T]he fact that a lawyer holds a public office, or serves in a public capacity, as here, is a factor that properly may be viewed as aggravating the misconduct in an attorney disciplinary matter.") The Court reasoned that many attorneys hold positions of trust with respect to individual clients, but "[t]hat trust is not the same as the broader public trust reposed in judges, prosecutors and the like." ***Id.*** Respondent betrayed the faith and trust of the public by engaging in misconduct in her official capacity, including dishonest acts, and this factor weighs heavily in the assessment of discipline.

Respondent demonstrated genuine remorse only for her ex parte communication in the Horan matter. She did not acknowledge her remaining misconduct and expressed no regret for it, but did express personal embarrassment that she found herself accused of professional misconduct, for which she felt "mortified." Respondent fails to grasp the larger consequences of her actions. When the trust between a public servant and the public is broken, there is no doubt that the public's perception of the legal profession is damaged. Intertwined with the issue of remorse is Respondent's complete failure to appreciate and acknowledge the damage she has done to the reputation of the bar. ***Office of Disciplinary Counsel v. Brian Preski***, 134 A.3d 1027 (Pa. 2016) ("[T]he transgressions of a lawyer who is also a public servant are even more injurious to the reputation of the bar because they bring dishonor both to the profession and to our democratic institutions.")

In mitigation, Respondent has practiced law in Pennsylvania since 1994 and has no prior discipline. Respondent presented character evidence from five witnesses. These witnesses all credibly testified as to Respondent's zealous representation of victims and her competency as a litigator. However, several of the witnesses were unfamiliar with the details of Respondent's misconduct. Thomas Kline, Esquire, Kristen Shirey, and Jeffrey Helffrich, Esquire, testified that they either did not know much about the charges against Respondent or only had a general familiarity with the charges. William Shaw, Esquire, also a District Attorney, was generally aware of the charges against Respondent, and did not appear to be aware of the fact that Respondent had been texting with members of the judiciary. Mr. Shaw credibly testified that as a District Attorney, he does not communicate by text message with the judiciary in his county and testified that ex parte communications with the judiciary are wholly inappropriate and at a minimum, cause the appearance of impropriety. The value of the testimony of Bruce Castor, Esquire, is limited by his role as Respondent's counsel for the past several years.

Our review of prior Pennsylvania disciplinary cases did not yield a case with similar factual circumstances to Respondent's matter. Two prior matters involving ex parte communications also involved other misconduct. In the matter of ***Office of Disciplinary Counsel v. Ronald James Gross***, 174 DB 2014 (S. Ct. Order 4/10/2015), Gross engaged in a single ex parte communication with a Magisterial District Judge, whereby he met in person with the Judge to request a sentence modification for his criminal client. Gross admitted that he intended to influence the judge. This misconduct was accompanied by acts of neglect in a separate client matter. Gross had a history of discipline, showed genuine remorse for his conduct and consented to a six-month license suspension. Unlike the instant Respondent, Gross was not a prosecutor.

In the matter of ***Office of Disciplinary Counsel v. Gary Scott Silver***, Nos. 56 & 178 DB 2003 (D. Bd. Rpt. 1/7/2005) (S. Ct. Order 4/6/2005), the respondent engaged in comingling of client funds, failure to maintain records, and failure to promptly distribute client funds, as well as a separate instance of ex parte communication, whereby he sent a facsimile to a judge to request that a hearing be rescheduled, without copying opposing counsel. Silver had a history of private discipline and expressed sincere remorse. Similar to the respondent in ***Gross***, Silver was not a prosecutor. The Court suspended Silver for a period of six months, with probation for twelve months and a practice monitor.

Our review included prior cases resulting in discipline of a prosecutor. Three respondents engaged in criminal conduct while serving as prosecutors. In ***Cappuccio***, the respondent served as a Chief Deputy District Attorney in Bucks County. While serving in that capacity, he engaged in criminal acts that resulted in his entering a guilty plea in Bucks County to offenses including three counts of endangering the welfare of children, one count of criminal use of a communication facility, three counts of corruption of minors, and three counts of furnishing liquor or malt or brewed beverages to minors. The Supreme Court disbarred Cappuccio, retroactive to the date of his temporary suspension, after considering the aggravating factor of his position as a prosecutor and the fact that his misconduct occurred over an extended period of time and involved three minor victims. In the matter of ***Office of Disciplinary Counsel v. Mark Peter Pazuhanich***, No. 15 DB 2005 (D. Bd. Rpt. 8/11/2006) (S. Ct. Order 11/17/2006), the respondent, a two-term District Attorney of Monroe County, recently elected to the trial bench, was arrested because he was observed fondling a ten-year old girl at a concert. Pazuhanich pleaded *nolo contendere* to indecent assault, endangering the

welfare of children, corruption of minors, and public drunkenness. The Board found Pazuhanich's position as an elected official in a powerful law enforcement position at the time the criminal conduct occurred aggravated the final discipline. The Court disbarred Pazuhanich, retroactive to the date of his temporary suspension. In ***Preate***, while serving as District Attorney of Lackawanna County, the respondent solicited, either indirectly or directly, illegal cash contributions from owner-operators of video poker gambling machines. In order to conceal the illegal cash contributions, Preate, while either the District Attorney or the Attorney General of Pennsylvania, caused false and materially misleading campaign finance reports to be filed under oath with the Commonwealth of Pennsylvania Bureau of Elections. Preate pled guilty to one count of mail fraud. He presented character evidence in mitigation of discipline. The Court imposed a suspension for a period of five years, retroactive to the date of the temporary suspension.

In the matter of ***Office of Disciplinary Counsel v. James Paul Carbone***, No. 71 DB 2014 (D. Bd. Rpt. 6/17/2015) (S. Ct. Order 8/12/2015), the respondent, while serving as an assistant district attorney in Venango County, engaged in misconduct in three separate matters. This conduct included interviewing a witness in violation of a court order; making misrepresentations to the court; utilizing intemperate language and making a profane hand gesture during a closing argument; yelling and pointing at a defendant and his counsel during closing argument; misrepresenting evidence during an opening statement; and, discussing a case with a represented defendant. The Board found aggravating factors in that Carbone's position as a prosecutor harmed the public's confidence in the integrity of the legal system. In addition, Carbone failed to participate in his disciplinary proceeding. The Board recommended that Carbone be disbarred, and the Court ordered his disbarment.

The Court imposed a three-year period of suspension in the matter of ***Office of Disciplinary Counsel v. John T. Olshock***, No. 28 DB 2002 (D. Bd. Rpt. 7/30/2003) (S. Ct. Order 10/24/2003). Olshock maintained a private practice of law and was also the First Assistant District Attorney for Washington County at the time of his misconduct, which involved misappropriation of estate monies related to a case in his private practice. The Board considered as an aggravating factor Olshock's position as a prosecutor, noting that even though his misconduct did not occur during the exercise of his public duties, his position demanded integrity, as he was entrusted with the protection of the public. The Board found mitigating factors related to his character evidence and his lack of prior disciplinary history.

The Court imposed a Public Censure in the matter of ***Office of Disciplinary Counsel v. Charles J. Aliano***, No. 25 DB 2003 (D. Bd. Rpt. 8/31/2005) (S. Ct. Order 12/1/2005). At the time of Aliano's misconduct, he was the part-time District Attorney in Susquehanna County and maintained a private practice of law. Aliano represented a client in his private practice, and a short time after being retained, the client's husband was charged with Driving Under the Influence. Aliano remained actively involved in the institution and disposition of criminal charges against the husband, violating the conflict of interest provisions of the Rules of Professional Conduct. The Board found that Aliano used his position as District Attorney to impact the outcome of the case and to get more serious charges against his client's husband dismissed. In considering the matter, the Board found that Aliano abused his position as a public official.

The misconduct in ***Cappuccio***, ***Pazuhanich***, ***Preate***, ***Carbone***, and ***Olshock*** is more egregious than the instant Respondent's conduct. Unlike the respondents in several of those cases, Respondent has not been criminally convicted

and did not misappropriate client funds, nor does her conduct rise to the same level of prosecutorial misconduct as in the ***Carbone*** matter.

Herein, Respondent's serious misconduct involved ex parte communications with judges about pending criminal matters. Respondent created the appearance of impropriety in the judicial system, as well as in fact influencing a judge. Respondent engaged in deceitful conduct by creating, disseminating, and using a fictitious Facebook page. All of these actions subjected the District Attorney's office and Centre County Court to scrutiny and suspicion by the public. Respondent failed to acknowledge the seriousness of her conduct and failed to accept responsibility. Considering the weighty aggravating factors, Respondent's misconduct warrants a suspension of one year and one day.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, Stacy Parks Miller, be Suspended for one year and one day from the practice of law in this Commonwealth.

It is further recommended that the expenses incurred in the investigation and prosecution of this matter are to be paid by the Respondent.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

By:_____
Dion G. Rassias, Member

Date: 12.6.18

Members Porges, Trevelise and Haggerty recused.