



The NDNY-FCBA's CLE Committee Presents

“THE IMPACT OF SOCIAL MEDIA ON THE ETHICAL PRACTICE OF LAW”

WEDNESDAY, NOVEMBER 10, 2021

10:00 AM – 12:00 PM

Because of COVID-19 related restrictions, this CLE will be offered via Zoom. A link for the Zoom CLE will be provided to registered attendees. A code will be provided during the program, which can be used to claim CLE credit.

Please RSVP by November 3, 2021.

Program Description: Social media permeates the practice of law. From marketing and the solicitation of clients, to the investigation of adversaries and witnesses, to the preservation of information, practitioners must understand how to navigate the ethical pitfalls inherent in the use of social media. This program will review applicable ethical rules and opinions relating to the use of social media in the practice of law and will provide information on how the use of social media has evolved and is being used in practice.

Presenters:

Suzanne M. Messer, Esq.
Bond, Schoeneck & King, PLLC

Kenneth Derr
Vice President, AMRIC Associates

Anthony Martino
Senior Forensic Examiner, AMRIC Associates

Agenda:

- 10:00-10:55 am: Introduction of Program and Speakers; Discussion of Ethical Rules and Opinions Relating to Social Media
- 10:55-11:05 am: Break
- 11:05-11:25 am: Continued Discussion of Ethical Rules and Opinions Relating to Social Media
- 11:25-12:00 pm: Social Media Use in Practice (including Q&A)

“The Impact of Social Media on the Ethical Practice of Law” has been approved in accordance with the requirements of the NYS CLE Board for **1.5 Ethics and .5 hours of Professional Practice CLE Credits.**

The NDNY FCBA has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York. This program is appropriate for newly admitted and experienced attorneys. This is a single program. No partial credit will be awarded. This program is complimentary to all NDNY FCBA Members.

Social Media and the Practice of Law: Ethical Considerations and Practice Tips

- I. Attorney Advertising
 - a. Applicable Rules
 - i. **NYRPC 1.0:** Defines advertisement as any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.
 - ii. **NYRPC 7.1:** A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: contains statements or claims that are false, deceptive, misleading, or violates a rule.
 - iii. **NYRPC 7.3:** Defines solicitation as any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request.
 - iv. **NYRPC 7.4:** A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, unless 1) a lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "This certification is not granted by any governmental authority", or 2) a lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "This certification is not granted by any governmental authority within the State of New York."
 - v. **NYRPC 7.5:** A lawyer or law firm may use internet websites, professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with rule 7.1 and any specific requirements of 7.5 depending on the type of advertisement.
 - b. Social Media and Attorney Advertising

- i. NYSBA Social Media Ethics Guidelines for the Commercial and Federal Litigation Section
 1. **Guideline 2A:** A lawyer's social media profile—whether its purpose is for business, personal or both—may be subject to attorney advertising and solicitation rules. If the lawyer communicates concerning his or her services using her social media profile, she must comply with rules pertaining to attorney advertising and solicitation.
 2. **Guideline 2B:** Lawyers shall not advertise areas of practice under headings in social media platforms that include the term “specialist” unless the lawyer is certified by the appropriate accrediting body in the particular area.
 - Lawyers should be cognizant about listing specialties and skills when crafting social media profiles.
 3. **Guideline 2C:** A lawyer who maintains a social media profile must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media account, blog, or profile.
 - A lawyer is responsible for all content that the lawyer posts on her social media website or profile.
 - A lawyer also has a duty to periodically monitor her social media profile or blogs for comments, endorsements and recommendations that ensure that third-party posts do not violate ethics rules.
 - If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media that violates the ethics rules, the lawyer must remove or hide such content if such removal is within their control. If it is not within their control, they should ask that the third-party removes it or consider a curative post.
 4. **Guideline 2D:** A lawyer must ensure the accuracy of third-party endorsements and recommendations, specifically online reviews (Google, Avvo, Yelp). Lawyers should periodically monitor and review such posts for accuracy and must correct misleading information posted by clients or other third parties.
 - Allowing a misleading endorsement of your skill or expertise to remain on a profile is equivalent to accepting the endorsement.
 - Beware of disclosing confidential client information when responding to negative comments made about your practice on social media, also known as “reverse advertising”.

c. Real-life Disciplinary Consequences

i. *Matter of Meagher*¹

Facts: Attorney was subject to one year suspension for rule violations. In that time, the attorney maintained a law firm website advertising him as an attorney as well as a Facebook page identifying him as a “malpractice lawyer” and “property lawyer”.

Holding: Disbarred from the practice of law in New York State.

ii. *In re Shapiro*²

Facts: Attorney advertised via a tv commercial that depicted him as an experienced, aggressive personal injury lawyer who was prepared to take personal action on behalf of clients, when in fact he had not tried a case to conclusion, nor had he practiced law in the State for years.

Holding: Because the attorney had previously been warned about misleading advertising, the court determined that a one-year suspension from the practice of law was appropriate.

iii. *Matter of Musafir*³

Facts: Attorney was subject to six-month suspension based on discipline by a different state’s Bar Association. In the time of her suspension, she continued to hold herself out as an attorney to the court, as well as on the internet via her LinkedIn webpage.

Holding: Attorney was disbarred from the practice of law and her name was struck from the roll of attorneys and counselors at law in the State of New York.

d. Formal Opinions on Social Media and Attorney Advertising

i. **NYC Formal Opinion 2015-7:** Application of Attorney Advertising Rules to LinkedIn

- An attorney’s LinkedIn profile will constitute attorney advertising and therefore be subject to the rules if it meets the five following criteria:
 1. Communication made by or on behalf of a lawyer
 2. The primary purpose is to attract new clients to retain the lawyer for pecuniary gain
 3. The content relates to the legal services offered by the lawyer
 4. The content is intended to be viewed by potential clients
 5. The content does not fall within any recognized exception to the definition of attorney advertising

ii. **NYCLA Formal Opinion 748**

¹ 178 A.D. 3d 1351 (3rd Dept. 2019).

² 7 A.D.3d 120 (4th Dept. 2004).

³ 178 A.D. 3d 32 (1st 2019).

- A LinkedIn profile that includes subjective statements regarding an attorney’s skills, areas of practice, endorsements, or testimonials from clients or colleagues is likely to be considered advertising. If an attorney claims to have certain skills—even when those skills are chosen from fields created by LinkedIn—they constitute “characterizing the quality of the lawyer’s services” under Rule 7.1(d).
 - **Note:** Attorneys practicing in NY should be aware of both the NYCLA and the NYCBA opinions when complying with New York attorney advertising rules.

iii. NYSBA Ethics Opinion 1110

Question: May an attorney give a webinar/seminar to lay people, and advertise said webinar on social media using social media provided filters to target a specific audience (ex. Neighborhood specific groups, parenting groups)?

Opinion: A lawyer may organize and participate in online webinars for non-lawyers on topics within their field of competence so long as the purpose of the webinar is education and not solicitation. Furthermore, targeted social media filters to provide invitations are not individually addressed and are therefore akin to public media and permissible.

iv. NYSBA Ethics Opinion 1052

Question: May a lawyer give clients a \$50 credit on their legal bills if they rate the lawyer on a website (Avvo) that allows clients to evaluate their lawyers?

Opinion: A client’s freely given review or rating is not an “advertisement” because it is not made “by or on behalf of the lawyer”, so long as the lawyer did not coerce or compel the client to rate them, the rating was written by the client, and the credit is not contingent on the content of the rating.

v. NYSBA Ethics Opinion 1009

Question: If a law firm issues press releases to inform potential clients of new investigations or actions, and sends “tweets” to alert recipients to the press releases, then are the press releases and tweets “advertisements” governed by Rule 7.1, and if so, (a) must copies be retained for one year or three years; and (b) must the tweets be labeled “attorney advertising”? Are such press releases and tweets “solicitations” governed by Rule 7.3, and if so, (a) must copies be filed with the attorney disciplinary committee, and (b) are the tweets a permissible form of solicitation?

Opinion: The subject press releases and tweets constitute “advertisements” and are thus subject to the retention requirements. Copies of the press releases must be retained for three years. The tweets must be labeled “attorney

advertising” and copies must be retained for one year. The press releases and tweets also are “solicitations” and are thus subject to filing requirements if directed to recipients in New York. The tweets are not prohibited by the rule against interactive solicitation.

II. Other Ethical Considerations

a. Potential Conflicts and Social Media Posts

i. **Guideline 2A:** When communicating and stating positions on issues and legal developments on social media, a lawyer should avoid situations where her communicated positions on issues and legal developments are inconsistent with those advanced on-behalf of her client.

1. **Remember Rule 1.7:** “A lawyer shall not represent a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property, *or other personal interests.*” (emphasis added)

2. **Example:** You represent a company that is trying to build a pipeline across multiple states. The proposed pipeline has received a lot of public disapproval and it is the subject of many ongoing legal proceedings. Despite representing the company, you personally disapprove of the pipeline and often post on your Facebook many statuses and articles opposing its construction, some of which are based on legal issues. Your Facebook shows your full and accurate name and identifies you as an attorney.

→ Rule violation? Maybe. Your Facebook posts are in direct conflict with the interests of your client and show that your personal interests may present a risk to your professional judgment.

b. Providing Legal Advice via Social Media

i. **Guideline 3A:** A lawyer may provide general answers to legal questions asked on social media. A lawyer may not, however, provide specific legal advice on a social media network because a lawyer’s responsive communications may be found to have created an attorney-client relationship, and legal advice also may impermissibly disclose information protected by attorney-client privilege.

1. Rules possibly implicated: 1.0, 1.4, 1.6, 7.1, 7.3.
2. **Example 1:** Your neighbor shares an article on Facebook with the caption, “This CAN’T be constitutional, can someone explain this to me!?” You reply explaining the constitutional issues in the article and your informed legal opinion on whether the article is accurate.
 - ▶ Rule violation? NO. This is a general answer to a legal question posted on social media.
3. **Example 2:** Your neighbor posts on Facebook “Someone just hit me in an intersection and my neck is killing me, what do I do to make them pay?” You reply: “Make sure to go to the hospital and get that documented, you may have a negligence claim on your hands. Keep your police reports from the accident, and do not respond if their insurance company contacts you.”
 - ▶ Rule violation? Most likely. This example looks more like specific legal advice that may have led the client to believe that an attorney-client relationship exists. When responding to legal questions on social media, be sure to respond carefully, or provide a disclaimer that you are not providing specific legal advice so as to establish an attorney-client relationship.

c. Review and Use of Evidence from Social Media

i. Viewing a public portion of a social media account

1. **Guideline 4A:** A lawyer may view the public portion of a person’s social media profile or view public posts even if that person is represented by a lawyer.
 - Example: You represent the plaintiff in a personal injury suit. The defendant is represented by ABC Law Firm. You search the defendant on Facebook and find that their page is completely public despite not being “friends”, and that they posted about events relating to your dispute.
 - ▶ Rule violation? NO. A lawyer is ethically permitted to view the public portion of a party’s social media website, profile, or posts, whether or not that party is represented, for the purpose of obtaining information about the party,

including impeachment material for use in litigation.

ii. Unrepresented Parties and Non-Public Social Media

1. **Guideline 4B:** A lawyer may communicate with an unrepresented party and request permission to view a non-public portion of the unrepresented party's social media. *However*, the lawyer must use their full name and accurate profile and may not create a profile to mask her identity.

- **Example 1:** You represent the plaintiff in a personal injury suit. The defendant is unrepresented, and you think she may have posted information pertaining to the dispute on her Instagram, but her page is private. Your Instagram profile shows your name fully and accurately. You request to follow the defendant and she accepts, giving you access to all the photos she has ever posted, including those pertaining to the dispute.

—> Rule violation? NO. In New York, no deception occurs when a lawyer utilizes his or her real account name and profile to contact an unrepresented party via friend request. The lawyer is not initially required to disclose the reasons for the request. However, if the subject of the request asks for the purpose of the communication or additional information you must answer accurately and within the requirements of the Rules. (See NYSBA Ethics Opinion 843)

- **Example 2:** Same facts, but instead of using your own profile to request to follow the defendant, you ask your assistant to use her personal art business Instagram with the profile name "Sally's Personal Portraits," and the defendant accepts the request.

—> Rule Violation? YES. Lawyers and their agents are prohibited from anonymously using trickery to gain access to an otherwise secure social networking page, regardless of whether the party is unrepresented.

iii. Represented Parties and Non-Public Social Media

1. Guidance 4C and D: Lawyers and their agents may not contact a represented party or request access to review the non-public portion of a represented party's social media profile unless express consent has been furnished by the represented party's counsel.

- **Example 1:** You represent the plaintiff in a personal injury suit. defendant is represented by ABC Law Firm. You want to access the defendant's personal Twitter account to gather information, but their account is private. You decide to request to follow them, because your profile accurately states your full name, and even lists your employer as Law Firm.

—> Rule violation? YES. Unlike an unrepresented party, lawyers may not attempt to access a non-public account of a represented party, even if they use an accurate profile.

- **Example 2:** Same facts, but your client already was "friends" with the defendant on Twitter and gives you information from their private account.

—> Rule violation? NO. (See Rule 4.2(b) and Guidance 5D) A lawyer may review a represented person's non-public social media information provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: i) inappropriately obtain non-public information from the represented party, ii) invite the represented party to take action without the advice of his or her lawyer, or iii) otherwise overreach with respect to the represented person.

iv. Adding and Removing Social Media Content

1. Guideline 5A: A lawyer may advise a client as to what content may be maintained or made non-public on her social media account, as well as what content may be removed. *However*, the lawyer must be cognizant of their duty to preserve relevant evidence as required by the applicable statute, especially if there is no preservation of the content outside of the post.

- **Example 1:** You represent a client being sued for negligence after hitting a pedestrian with their vehicle.

You see that your client posted to his Facebook a picture of his dented car and the scene on the night of the incident. There are no other pictures from the night of the incident, and you instruct him to delete the post entirely.

→ Rule Violation? YES. If the applicable substantive law imposes a duty to preserve potentially relevant information or evidence, and there is no other copy of this photo, you may be subject to sanctions or other penalties for destruction or spoliation of evidence.

- **Example 2:** Same facts, but you see that your client updated his Facebook status to “Headed out for a drink with the boys, it’s been a long week,” on the night of the incident. Rather than instruct him to delete the post, you strongly suggest that he make the account completely private and not accept any new friend requests.

→ Rule Violation? NO. There is no ethical bar to advising a client to change their privacy or security settings to be more restrictive, whether it is before or after litigation has commenced.

2. *Safer v. Hudson Hotel*⁴

Facts: Plaintiff was suing defendant for injury incurred when she stepped on a piece of broken glass on their premises. During discovery, defendant’s attorneys requested color copies of timeline photos posted to plaintiff’s Facebook account around the time of the incident. Plaintiff failed to produce 13 of the requested photos, stating that some were deleted because they depicted her ex-fiancé, and some were posted and deleted by third parties.

Holding: Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them and after being placed on notice that such evidence might be needed for future litigation. The court found that Plaintiff had a duty to preserve all posts relating to the incident, including

⁴ 134 N.Y.S.3d 161 (N.Y. Civ. Ct. 2020).

those by third parties that were posted to her page. However, because the court determined that the deleted photos were not the “sole means by which the defendant can establish its defense,” they determined that a lesser sanctions of an adverse inference charge to the jury was appropriate.

d. Lawyer’s Personal Social Media Use

i. Applicable Rules:

1. **Rule 8.4(d):** A lawyer or law firm shall not engage in conduct that is prejudicial to the administration of justice
2. **Rule 8.4(h):** A lawyer or law firm shall not engage in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.

Note: Although it may seem like a stretch, these Rules are often the basis for attorney discipline involving personal use of social media across jurisdictions.

ii. Real-Life Examples Across Jurisdictions

1. *Matter of Krapacs*⁵

Facts: Attorney barred in both New York and Florida engaged in misconduct in Florida, including using social media to make disparaging remarks about member of Judiciary and two attorneys.

Holding: Licensed attorneys are not permitted to use social media to harass and falsely attack others. The attorney was disbarred and her name was stricken from the roll of attorneys and counselors-at-law of the State of New York.

2. *Matter of Traywick*⁶ (South Carolina)

Facts: The Office of Attorney Disciplinary Counsel received 46 individual complaints regarding statements an attorney was making on his Facebook page. The attorney’s Facebook was public, and his profile identified him as a lawyer and referenced his law firm. One comment the court found

⁵ 189 A.D.3d 1962 (3d Dep’t 2020).

⁶ 844 S.E.2d 674 (2020).

particularly problematic was a profane and racially charged Facebook status about the murder of George Floyd.

Holding: The court found that “the statement was intended to incite intensified racial conflict not only in the Respondent’s Facebook community, but also in the broader community of Charleston and beyond,” and that the statement “tended to bring the legal profession in disrepute, violated the letter and spirit of the Lawyer’s Oath, and constitute[d] grounds for discipline.” The attorney was suspended from practice for six months and was required to participate in diversity and anger management training.

3. *Attorney Grievance Commission of Maryland v. Vasiliades* (Maryland)

Facts: An attorney maintained an Instagram and Twitter account that identified him as a lawyer and contained information regarding his law firm in the bio. From those accounts, he often made homophobic, sexist, and profane statements. Due to this and other misconduct he was subject to a disciplinary proceeding.

Holding: The court agreed with the hearing judge that the attorney’s posts were replete with homophobic and sexual remarks, conveyed an inappropriate bias, and were prejudicial to the administration of justice.

4. “The Tweet Heard Round the World”: In 2013 a partner at a well-recognized big law firm responded to a Supreme Court blog’s Tweet with insensitive profanity. The blog page had over 100,000 followers and the Tweet quickly became National news. Although the attorney was not subject to any bar-related sanction, his firm had to make public comments on the issue and discipline him internally.

III. Social Media and Litigation

a. Social Media and Juries

i. Researching Jurors via Social Media

1. **Guideline 6A:** A lawyer may research a prospective or sitting juror’s public social media profile and public posts so long as it does not violate any local rules or court order

2. **Guideline 6B:** A lawyer may view the social media profile of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer or her agent or automatically generated by the social media network) with the juror.
3. **NYCBA Formal Opinion 2012-2:** Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a notification.
 - **Hint:** Be careful of LinkedIn automated viewer notifications and friend/follow requests, these types of notifications *are* considered “communications” in New York.
4. The issue of whether jurors should be aware of attorneys’ ability to view their social media is ongoing.
 - The “Social Media Jury Instructions Report” published by the NYSBA, suggested that, “at a minimum judges should consult with and address these issues with counsel prior to jury selection and determine whether or not any such instructions or admonitions are appropriate on a case-by-case basis concerning whether counsel will review and/or monitor ‘public’ juror social media communications during jury selection, trial, and/or deliberations.”

ii. Juror Misconduct Related to Social Media

1. In 2014 the Federal Judicial Center issued a report about jury member use of social media during trial. They found:
 - 33 judges in total reported instances of detected social media usage by jurors during trial or deliberations.
 - 6 judges reported that a juror divulged confidential information about the case.
 - 5 judges reported a juror performing case-related research.

- 3 judges reported that a juror communicated or attempted to communicate directly with case participants.
- 2 judges reported that a juror revealed aspects of the deliberation process.
- 1 judge reported a juror “friending” or an attempt to “friend” participants in the case.
- 1 judge reported a juror texting.
- From this data: 12 judges reported that they learned of the social media use on their own, 8 reported that attorneys had advised the court, 6 reported that the court was advised by court staff, 1 reported that the court was advised by a party, 1 observed the social media use through personal observation, and 3 learned on the behavior through post-trial motions.

2. The Solution: Repetitive Jury Instructions

- *U.S. v. Ganius*⁷: The Second Circuit determined that, “a juror who ‘friends’ his fellow jurors on Facebook or who posts comments about the trial on Facebook, may, in certain circumstances, threaten a defendant’s Sixth Amendment right to an impartial jury.” Although the Second Circuit did not find a violation of the Defendant’s rights in this case specifically, they emphasized that, “[t]he vigilance on the part of trial judges is warranted to address the risks associated with jurors’ use of social media. Furthermore, the court stated: “We think it would be wise for trial judges to give [instructions] both at the start of trial and as deliberations begin, and issue similar reminders throughout the trial before dismissing the jury each day.”
- The NYSBA also suggests leaving a large sign in the courtroom during trial proceedings reminding jurors about the prohibited use of social media.
- Model Jury Instructions Regarding Social Media (as suggested by the NYSBA)

⁷ 755 F.3d 125 (2nd Cir. 2014).

- It is important to remember that you may not use any Internet services, such as Google, Bing, Facebook, LinkedIn, Instagram, YouTube, Snapchat [insert any new major social media examples], Twitter or use any other electronic applications or tools³¹ to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the lawyers, witnesses, experts or the judge. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means. For now, and as long as you are a juror in this case, be careful to remember these rules whenever you use a computer or other personal electronic device anywhere. While this instruction may seem unduly restrictive, it is vital that you carefully follow these directions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to affect your judgment, is unfair and prejudicial to the parties and could lead to this case having to be retried. Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources, like the Internet or from social media outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated, or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case.

b. Discoverability of Social Media Evidence

1. New York courts have maintained that the discoverability of the contents of social media fit within traditional discovery standards as well as the New York Civil Practice Law and Rules.

- CPLR 3101: “There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.”
 - Courts have discretion to determine what is material and necessary.

2. Case Law on Social Media Discovery

- *Tapp v. New York State Urban Dev. Corp.*⁸

Holding: “To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff’s Facebook

⁸ 102 A.D.3d 620 (1st Dep’t 2013).

account—that is, information that ‘contradicts or conflicts with plaintiff’s alleged restrictions, disabilities, and losses, and other claims.’”

- *Pecile v. Titan Capital Group, LLC*⁹

Holding: Denying defendant’s demand for access to plaintiff’s social media sites in a sexual harassment suit because defendant failed to offer any proper basis for the disclosure, relying only on vague and generalized assertions that the information might contradict or conflict with plaintiffs’ claims of emotional distress.

- *Patterson v. Turner Const. Co.*¹⁰

Facts: Plaintiff claimed damages for physical and psychological injuries including the inability to work, anxiety, post-traumatic stress disorder, and loss of enjoyment of life. Defendant made a motion to compel an authorization for all of plaintiff’s Facebook records compiled after the incident alleged in the complaint, including any records previously deleted or archived.

Holding: The postings on plaintiff’s Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service’s privacy settings to restrict access, just as relevant matter from a personal diary is discoverable. However, there was a possibility that not all Facebook communications were related to the events that gave rise to plaintiff’s cause of action. Reversed and remanded for a more specific identification of plaintiff’s Facebook information that is relevant, in that it contradicts with plaintiff’s alleged restrictions, disabilities, losses, and other claims.

- *Richards v. Hertz Corp.*¹¹

Holding: Court allowed discovery of plaintiff’s Facebook profile, but stated: “due to the likely presence in [Plaintiff]’s Facebook profile of material of a private nature that is not relevant to this action, the

⁹ 113 A.D.3d 526 (1st Dep’t 2014).

¹⁰ 88 A.D.3d 617 (1st Dep’t 2011).

¹¹ 100 A.D.3d 728 (2nd Dep’t 2012).

trial court should conduct an in camera inspection of all status reports, emails, photographs, and videos posted on [Plaintiff]'s Facebook profile since the date of the subject accident to determine which of those materials, if any, are relevant to her alleged injury.”

3. Expectations of Privacy and Discovery of Social Media

- The Second Circuit as well as New York State courts have repeatedly held that individuals do not have a reasonable expectation of privacy in internet postings.

- *U.S. v. Lifshitz*¹²

Holding: “Users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting.”

- *People v. Harris*¹³

Holding: Internet users do not retain a reasonable expectation of privacy. “If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy.”

- *Melissa “G” v. North Babylon Union Free School Dist.*¹⁴

Holding: Allowing discovery of all relevant Facebook content, but finding that private messages sent or received by plaintiff via her Facebook account are covered by a reasonable expectation of privacy and need not be reviewed absent any evidence that such routine communications with family and friends contain information that is material and necessary to the defense.

c. Authentication of Social Media Evidence

¹² 369 F.3d 173 (2d Cir. 2004).

¹³ 945 N.Y.S.2d 505 (N.Y. City Crim. Ct. 2012).

¹⁴ 6 N.Y.S.3d 445, 449 (N.Y. Sup. Ct. 2015).

- i. Social media evidence is becoming increasingly valuable in litigation, but its unique nature presents significant obstacles to authentication and admission.

1. *People v. Price*¹⁵

Facts: Defendant argued that the trial court erred by admitting into evidence a photograph of the defendant holding a handgun that was found on the internet because the prosecution failed to sufficiently authenticate it. The prosecution attempted to get the court to allow the photo to be authenticated using proof that the web page on which it was found was attributable to the defendant.

Holding: The foundation necessary to establish authenticity will differ according to the nature of the evidence sought to be admitted. The court found that the evidence was not properly authenticated because the prosecution did not offer evidence to establish that the photograph was a fair and accurate representation of what it purported to depict (traditional authentication test for photographs), nor did they offer sufficient evidence that the web page was attributable to the defendant (authentication test proposed by the prosecution on appeal). The court did not articulate a specific test for authentication of social media posts, explaining, “[i]n our view, it is more prudent to proceed with caution in a new and unsettled area of law such as this. We prefer to allow the law to develop with input from the courts below and with a better understanding of the numerous factual variations that will undoubtedly be presented to the trial courts.”

2. *People v. Goldman*¹⁶

Facts: In a murder trial, the prosecution sought to introduce a redacted version of a music video in which defendant rapped about “running up into a rival crew’s house” that was uploaded to YouTube. Defendant argued that the video was not properly authenticated.

Holding: The court distinguished this evidence from the web page photo in *Price*. The court found that the video was properly authenticated because the defendant did not dispute that he was the individual who appeared in the

¹⁵ 58 N.E.3d 1005 (N.Y. 2017).

¹⁶ 159 N.E.3d 772 (N.Y. 2020).

video, the video contained distinctive identifying characteristics, the prosecution provided testimony pertinent to the timing of the making of the video, and the video was uploaded to YouTube close in time to the homicide. The court cited a District Court case in which that court found a similar video properly authenticated after witness testimony about the source of the video and how it was discovered, and identification of the defendant as the person depicted.

Note: The Court of Appeals, again failed to adopt a specific test for authentication of social media evidence here, still using the flexible “accurately represents the subject matter it depicts” test.

3. *People v. Jordan*¹⁷

Facts: Defendant argued that Facebook images of him were not properly authenticated and therefore the trial court erred in admitting them.

Holding: The authenticity of each image was established by the testimony of a witness who had personal knowledge of the people in the images and who verified that the images accurately represented the subject matter depicted.

4. *People v. Franzese*¹⁸

Facts: Trial court admitted YouTube video that showed defendant making gang signs and taunting/threatening a rival gang member. Defendant argued that it was not properly authenticated.

Holding: Here, the video was properly authenticated by the YouTube certification, which indicated that the video was posted online, by a police officer that viewed the video at or about the time that it was posted online, and by the defendant’s own admissions about the video made in a phone call while he was housed at Rikers Island Detention Center.

¹⁷ 181 A.D.3d 1248 (4th Dep’t 2020).

¹⁸ 154 A.D.3d 706 (2nd Dep’t 2017).

The Impact of Social Media on the Ethical Practice of Law



Suzanne M. Messer
Michaela J. Mancini
November 10, 2021



Social Media Platforms

- LinkedIn
- Facebook
- Twitter
- Instagram
- Snapchat
- Reddit
- TikTok
- WhatsApp
- YouTube



In the News... Exposed on Tik Tok

October 13, 2021: “Bourne school board member says she was fired from teaching job over social media posts” (Cape Cod Times)

- TikTok video emerged of Ms. MacRae making comments about gender identity and critical race theory.



In the News...“Caught on Video”

“Plaintiff in pending disability lawsuit topples huge, historic boulder”



In the News... Attorney Misconduct

“LinkedIn Search in Spotlight At Bank of America Trial”

“BigLaw partner faces possible sanction for tweeting photos during trial”

“State admonishes Brunswick Judge for implying Bill Clinton killed Jeffrey Epstein, other matters”

“Reprimand of judges for social media misconduct warrants updated guidelines, experts say”

“Judge rebuked for sending messages to women via social media”

Attorney Advertising



Rules – New York Rules of Professional Conduct

- **NYRPC 1.0:** Defines advertisement as any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.
- **NYRPC 7.1:** A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: contains statements or claims that are false, deceptive, misleading, or violates a rule.
- **NYRPC 7.3:** Defines solicitation as any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request.

Attorney Advertising (cont'd)

- **NYRPC 7.4:** A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, unless 1) the ABA approves of a certification granted by a private organization, and the certifying organization is identified and the following statement is prominently made: “This certification is not granted by any governmental authority”; or 2) the appropriate authority in another state grants approval, and the certifying state is identified and the following statement is prominently made: “This certification is not granted by any governmental authority within the State of New York.”

Attorney Advertising (cont'd)

- **NYRPC 7.5:** A lawyer or law firm may use internet websites, professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with rule 7.1 and any specific requirements of 7.5 depending on the type of advertisement.



NYSBA Social Media Ethics Guidelines for the Commercial and Federal Litigation Section

Guideline 2A: A lawyer’s social media profile—whether its purpose is for business, personal or both—may be subject to attorney advertising and solicitation rules. If the lawyer communicates concerning his or her services using her social media profile, she must comply with rules pertaining to attorney advertising and solicitation.

Guideline 2B: Lawyers shall not advertise areas of practice under headings in social media platforms that include the term “specialist” unless the lawyer is certified by the appropriate accrediting body in the particular area.

- Lawyers should be cognizant about listing specialties and skills when crafting social media profiles.

NYSBA Social Media Ethics Guidelines for the Commercial and Federal Litigation Section

Guideline 2C: A lawyer who maintains a social media profile must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media account, blog, or profile.

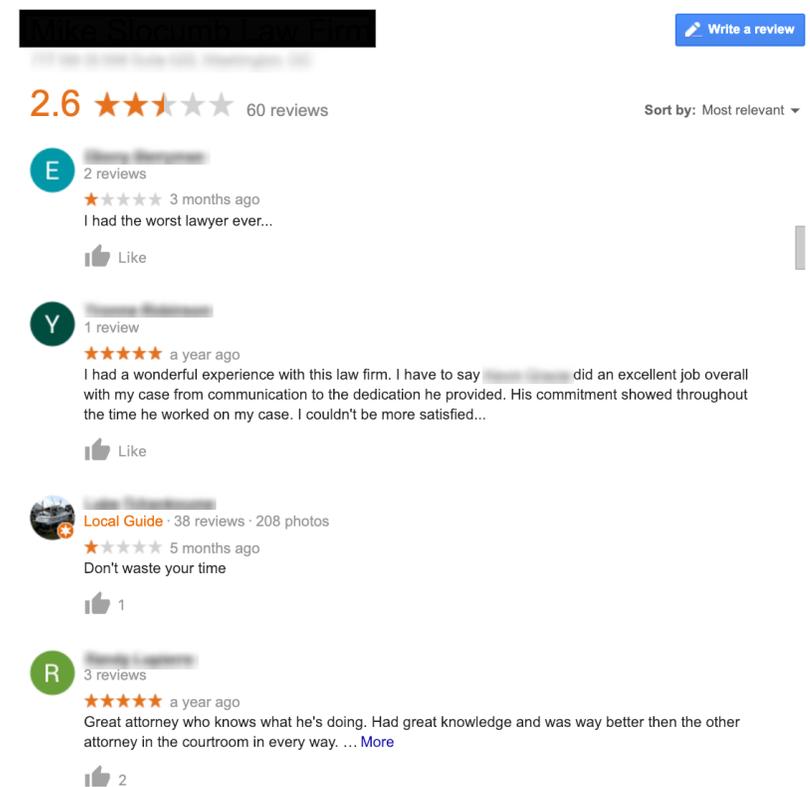
- A lawyer is responsible for all content that the lawyer posts on her social media website or profile.
- A lawyer also has a duty to periodically monitor her social media profile or blogs for comments, endorsements and recommendations that ensure that third-party posts do not violate ethics rules.
- If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media that violates the ethics rules, the lawyer must remove or hide such content if such removal is within their control. If it is not within their control, they should ask that the third-party removes it or consider a curative post.

NYSBA Social Media Ethics Guidelines for the Commercial and Federal Litigation Section

Guideline 2D: A lawyer must ensure the accuracy of third-party endorsements and recommendations, specifically online reviews (Google, Avvo, Yelp). Lawyers should periodically monitor and review such posts for accuracy and must correct misleading information posted by clients or other third parties.

- Allowing a misleading endorsement of your skill or expertise to remain on a profile is equivalent to accepting the endorsement.
- Beware of disclosing confidential client information when responding to negative comments made about your practice on social media, also known as “reverse advertising.”

Photo Source: envoc.com



Real Life Consequences

Matter of Meagher *

Facts: Attorney was subject to one year suspension for rule violations. In that time, the attorney maintained a law firm website advertising him as an attorney as well as a Facebook page identifying him as a “malpractice lawyer” and “property lawyer.”

Holding: Disbarred in New York State.

*178 A.D. 3d 1351 (3rd Dept. 2019).

Real Life Consequences

*In re Shapiro**

Facts: Attorney advertised via a tv commercial that depicted him as an experienced, aggressive personal injury lawyer who was prepared to take personal action on behalf of clients, when in fact he had not tried a case to conclusion, nor had he practiced law in the State for years.

Holding: Because the attorney had previously been warned about misleading advertising, the court determined that a one-year suspension from the practice of law was appropriate.

* 7 A.D.3d 120 (4th Dept. 2004).

Real Life Consequences

Matter of Musafiri*

Facts: Attorney was subject to six-month suspension based on discipline by a different state's Bar Association. In the time of her suspension, she continued to hold herself out as an attorney to the court, as well as on the internet via her LinkedIn webpage.

Holding: Attorney was disbarred from the practice of law and her name was struck from the roll of attorneys and counselors at law in the State of New York.

* 178 A.D. 3d 32 (1st Dep't 2019).

Formal Opinions on Social Media and Attorney Advertising

NYS Formal Opinion 2015-7 (December 2015): Application of Attorney Advertising Rules to LinkedIn

- An attorney’s LinkedIn profile will constitute attorney advertising and therefore be subject to the rules if it meets the five following criteria:
 - Communication made by or on behalf of a lawyer
 - The primary purpose is to attract new clients to retain the lawyer for pecuniary gain
 - The content relates to the legal services offered by the lawyer
 - The content is intended to be viewed by potential clients
 - The content does not fall within any recognized exception to the definition of attorney advertising

Formal Opinions on Social Media and Attorney Advertising

NYCLA Formal Opinion 748 (March 10, 2015)

- A LinkedIn profile that includes subjective statements regarding an attorney’s skills, areas of practice, endorsements, or testimonials from clients or colleagues is likely to be considered advertising. If an attorney claims to have certain skills—even when those skills are chosen from fields created by LinkedIn—they constitute “characterizing the quality of the lawyer’s services” under Rule 7.1(d).
 - **NOTE:** Attorneys practicing in NY should be aware of both the NYCLA and the NYCBA opinions when complying with New York attorney advertising rules.

Formal Opinions on Social Media and Attorney Advertising

Poll 1: May an attorney give a webinar/seminar to lay people, and advertise said webinar on social media using social media provided filters to target a specific audience (ex. Neighborhood specific groups, parenting groups)?

Poll Answer

NYSBA Ethics Opinion 1110 (November 2016):

A lawyer may organize and participate in online webinars for non-lawyers on topics within their field of competence so long as the purpose of the webinar is education and not solicitation. Furthermore, targeted social media filters to provide invitations are not individually addressed and are therefore akin to public media and permissible.



Formal Opinions on Social Media and Attorney Advertising

Poll 2: May a lawyer give clients a \$50 credit on their legal bills if they rate the lawyer on a website (Avvo) that allows clients to evaluate their lawyers?

Poll Answer

NYSBA Ethics Opinion 1052 (March 2015):

A client's freely given review or rating is not an "advertisement" because it is not made "by or on behalf of the lawyer", so long as the lawyer did not coerce or compel the client to rate them, the rating was written by the client, and the credit is not contingent on the content of the rating.



Formal Opinions on Social Media and Attorney Advertising

NYSBA Ethics Opinion 1009 (May 2014)

Question: If a law firm issues press releases to inform potential clients of new investigations or actions, and sends “tweets” to alert recipients to the press releases, then are the press releases and tweets “advertisements” governed by Rule 7.1, and if so, (a) must copies be retained for one year or three years; and (b) must the tweets be labeled “attorney advertising”? Are such press releases and tweets “solicitations” governed by Rule 7.3, and if so, (a) must copies be filed with the attorney disciplinary committee, and (b) are the tweets a permissible form of solicitation?

Opinion: The subject press releases and tweets constitute “advertisements” and are thus subject to the retention requirements. Copies of the press releases must be retained for three years. The tweets must be labeled “attorney advertising” and copies must be retained for one year. The press releases and tweets also are “solicitations” and are thus subject to filing requirements if directed to recipients in New York. The tweets are not prohibited by the rule against interactive solicitation.

Other Ethical Considerations

Rule 1.1: Competence: A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- **Comment 5:** Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.
- When representing clients, lawyers should be aware of the benefits and obstacles of technology and social media in legal proceedings.

Potential Conflicts and Social Media Posts

Poll 3: You represent a company that is trying to build a pipeline across multiple states. The proposed pipeline has received a lot of public disapproval and it is the subject of many ongoing legal proceedings. Despite representing the company, you personally disapprove of the pipeline and often post on your Facebook many statuses and articles opposing its construction, some of which are based on legal issues. Your Facebook shows your full and accurate name and identifies you as an attorney. Rule violation?

Poll Answer

Answer: Maybe. Your Facebook posts are in direct conflict with the interests of your client and show that your personal interests may present a risk to your professional judgment.

NYSBA Social Media Ethics Guideline 2A: When communicating and stating positions on issues and legal developments on social media, a lawyer should avoid situations where her communicated positions on issues and legal developments are inconsistent with those advanced on-behalf of her client.

- **Remember Rule 1.7:** “A lawyer shall not represent a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property, or other personal interests.”

Providing Legal Advice via Social Media

Guideline 3A: A lawyer may provide general answers to legal questions asked on social media. A lawyer may not, however, provide specific legal advice on a social media network because a lawyer's responsive communications may be found to have created an attorney-client relationship, and legal advice also may impermissibly disclose information protected by attorney-client privilege.

- Rules possibly implicated: 1.0, 1.4, 1.6, 7.1, 7.3.

Poll 4: Your neighbor shares an article on Facebook with the caption, "This CAN'T be constitutional, can someone explain this to me!?" You reply explaining the constitutional issues in the article and your informed legal opinion on whether the article is accurate.

Rule violation?

Providing Legal Advice via Social Media

Poll 4 Answer: No rule violation. This is a general answer to a legal question posted on social media.

Poll 5: Your neighbor posts on Facebook, “Someone just hit me in an intersection and my neck is killing me, what do I do to make them pay?” You reply, “I’m a lawyer. Make sure to go to the hospital and get that documented, you may have a negligence claim on your hands. Keep your police reports from the accident and do not try to respond if their insurance company contacts you.” Rule violation?

Providing Legal Advice via Social Media

Answer: Most likely. This example looks more like specific legal advice that may have led the client to believe that an attorney-client relationship exists. When responding to legal questions on social media, be sure to respond carefully, or provide a disclaimer that you are not providing specific legal advice so as to establish an attorney-client relationship.

Lawyer's Personal Social Media Use

Applicable Rules

- **Rule 8.4(d):** A lawyer or law firm shall not engage in conduct that is prejudicial to the administration of justice.
- **Rule 8.4(h):** A lawyer or law firm shall not engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

Lawyer's Personal Social Media Use

*Matter of Krapacs**

Facts: Attorney barred in both New York and Florida engaged in misconduct in Florida, including using social media to make disparaging remarks about member of Judiciary and two attorneys.

Holding: Licensed attorneys are not permitted to use social media to harass and falsely attack others. The attorney was disbarred and her name was stricken from the roll of attorneys and counselors-at-law of the State of New York.

*189 A.D.3d 1962 (3d Dep't 2020).

Lawyer's Personal Social Media Use

Matter of Traywick* (South Carolina)

Facts: The Office of Attorney Disciplinary Counsel received 46 individual complaints regarding statements an attorney was making on his Facebook page. The attorney's Facebook was public, and his profile identified him as a lawyer and referenced his law firm. One comment the court found particularly problematic was a profane and racially charged Facebook status about the murder of George Floyd.

Holding: The court found that “the statement was intended to incite intensified racial conflict not only in the Respondent’s Facebook community, but also in the broader community of Charleston and beyond,” and that the statement “tended to bring the legal profession in disrepute, violated the letter and spirit of the Lawyer’s Oath, and constitute[d] grounds for discipline.” The attorney was suspended from practice for six months and was required to participate in diversity and anger management training.

* 844 S.E.2d 674 (2020).

Lawyer's Personal Social Media Use

Attorney Grievance Commission of Maryland v. Vasiliades (Maryland)

Facts: An attorney maintained an Instagram and Twitter account that identified him as a lawyer and contained information regarding his law firm in the bio. From those accounts, he often made homophobic, sexist, and profane statements. Due to this and other misconduct he was subject to a disciplinary proceeding.

Holding: The court agreed with the hearing judge that the attorney's posts were replete with homophobic and sexual remarks, conveyed an inappropriate bias, and were prejudicial to the administration of justice.

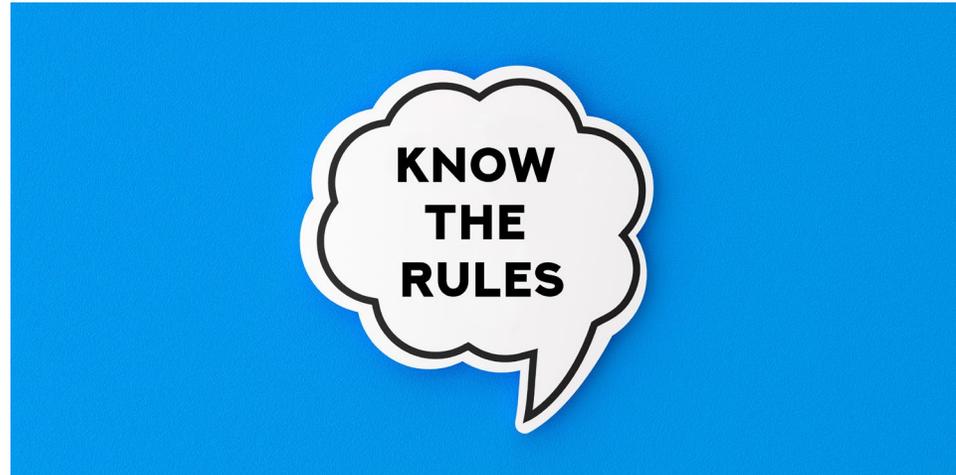
Lawyer's Personal Social Media Use

“The Tweet Heard Round the World”:

- In 2013 a partner at a well-recognized big law firm responded to a Supreme Court blog's Tweet with insensitive profanity. The blog page had over 100,000 followers and the Tweet quickly became national news. Although the attorney was not subject to any bar-related sanction, his firm had to make public comments on the issue and discipline him internally.



Social Media and Litigation



Review and Use of Evidence from Social Media

Viewing a public portion of a social media account

- **Example:** You represent the plaintiff in a personal injury suit. The defendant is represented by ABC Law Firm. You search the defendant on Facebook and find that their page is completely public despite not being “friends”, and that they posted about events relating to your dispute.

Rule violation? NO. A lawyer is ethically permitted to view the public portion of a party’s social media website, profile, or posts, whether or not that party is represented, for the purpose of obtaining information about the party, including impeachment material for use in litigation.

Guideline 4A: A lawyer may view the public portion of a person’s social media profile or view public posts even if that person is represented by a lawyer.

Review and Use of Evidence from Social Media

Unrepresented Parties and Non-Public Social Media

- **Guideline 4B:** A lawyer *may* communicate with an unrepresented party and request permission to view a non-public portion of the unrepresented party's social media. *However*, the lawyer must use their full name and accurate profile and may not create a profile to mask her identity.

Review and Use of Evidence from Social Media

Example 1: You represent the plaintiff in a personal injury suit. The defendant is unrepresented, and you think she may have posted information pertaining to the dispute on her Instagram, but her page is private. Your Instagram profile shows your name fully and accurately. You request to follow the defendant and she accepts, giving you access to all the photos she has ever posted, including those pertaining to the dispute.

Rule violation? NO. In New York, no deception occurs when a lawyer utilizes his or her real account name and profile to contact an unrepresented party via friend request. The lawyer is not initially required to disclose the reasons for the request. However, if the subject of the request asks for the purpose of the communication or additional information you must answer accurately and within the requirements of the Rules. (See NYSBA Ethics Opinion 843)

Review and Use of Evidence from Social Media

Unrepresented Parties and Non-Public Social Media

Example 2: Same facts, but instead of using your own profile to request to follow the defendant, you ask your assistant to use her personal art business Instagram with the profile name “Sally’s Personal Portraits,” and the defendant accepts the request.

Rule violation? YES. Lawyers and their agents are prohibited from anonymously using trickery to gain access to an otherwise secure social networking page, regardless of whether the party is unrepresented.



Review and Use of Evidence from Social Media

Represented Parties and Non-Public Social Media

Guidance 4C and D: Lawyers and their agents may not contact a represented party or request access to review the non-public portion of a represented party's social media profile unless express consent has been furnished by the represented party's counsel.

Example 1: You represent the plaintiff in a personal injury suit. Defendant is represented by ABC Law Firm. You want to access the defendant's personal Twitter account to gather information, but their account is private. You decide to request to follow them, because your profile accurately states your full name, and even lists your employer as Law Firm.

Rule violation? YES. Unlike an unrepresented party, lawyers may not attempt to access a non-public account of a represented party, even if they use an accurate profile.

Review and Use of Evidence from Social Media

Represented Parties and Non-Public Social Media

Example 2: Same facts, but your client already was “friends” with the defendant on Twitter and gives you information from their private account.

Rule violation? NO. (See Rule 4.2(b) and Guidance 5D) A lawyer may review a represented person’s non-public social media information provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: i) inappropriately obtain non-public information from the represented party, ii) invite the represented party to take action without the advice of his or her lawyer, or iii) otherwise overreach with respect to the represented person.

Adding and Removing Social Media Content

Guideline 5A: A lawyer may advise a client as to what content may be maintained or made non-public on her social media account, as well as what content may be removed. *However*, the lawyer must be cognizant of their duty to preserve relevant evidence as required by the applicable statute, especially if there is no preservation of the content outside of the post.

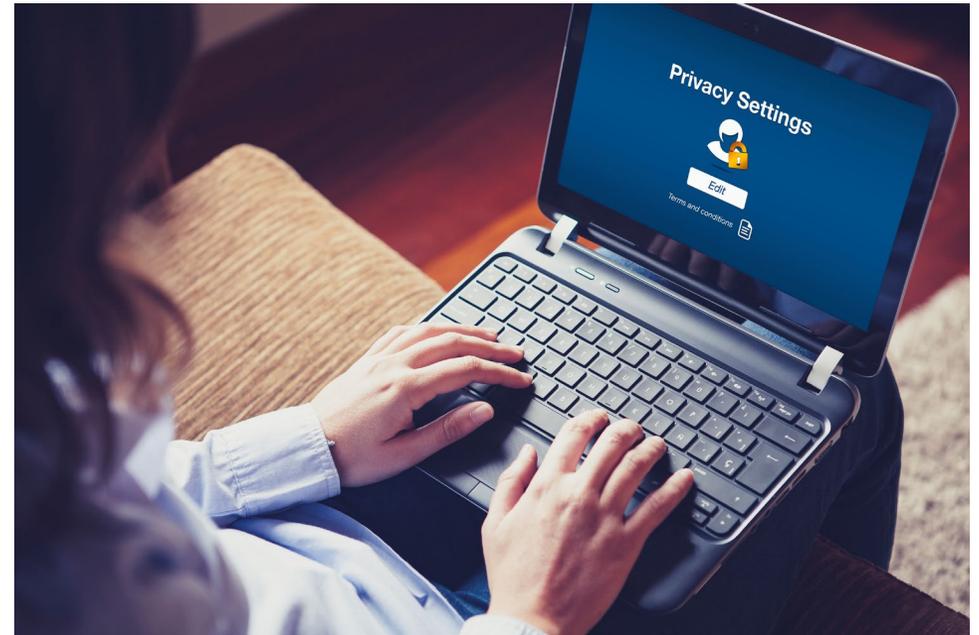
Example 1: You represent a client being sued for negligence after hitting a pedestrian with their vehicle. You see that your client posted to his Facebook a picture of his dented car and the scene on the night of the incident. There are no other pictures from the night of the incident, and you instruct him to delete the post entirely.

Rule Violation? YES. If the applicable substantive law imposes a duty to preserve potentially relevant information or evidence, and there is no other copy of this photo, you may be subject to sanctions or other penalties for destruction or spoliation of evidence.

Adding and Removing Social Media Content

Example 2: Same facts, but you see that your client updated his Facebook status to “Headed out for a drink with the boys, it’s been a long week,” on the night of the incident. Rather than instruct him to delete the post, you strongly suggest that he make the account completely private and not accept any new friend requests.

Rule Violation? NO. There is no ethical bar to advising a client to change their privacy or security settings to be more restrictive, whether it is before or after litigation has commenced.



Adding and Removing Social Media Content

Safer v. Hudson Hotel*

Facts: Plaintiff was suing defendant for injury incurred when she stepped on a piece of broken glass on their premises. During discovery, defendant's attorneys requested color copies of timeline photos posted to plaintiff's Facebook account around the time of the incident. Plaintiff failed to produce 13 of the requested photos, stating that some were deleted because they depicted her ex-fiancé, and some were posted and deleted by third parties.

Holding: Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them and after being placed on notice that such evidence might be needed for future litigation. The court found that Plaintiff had a duty to preserve all posts relating to the incident, including those by third parties that were posted to her page. However, because the court determined that the deleted photos were not the "sole means by which the defendant can establish its defense," they determined that a lesser sanctions of an adverse inference charge to the jury was appropriate.

* 134 N.Y.S.3d 161 (N.Y. Civ. Ct. 2020).

Social Media and Juries

Researching Jurors via Social Media

- **Guideline 6A:** A lawyer may research a prospective or sitting juror’s public social media profile and public posts so long as it does not violate any local rules or court order.
- **Guideline 6B:** A lawyer may view the social media profile of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer or her agent or automatically generated by the social media network) with the juror.
- **NYCBA Formal Opinion 2012-2:** Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a notification.
 - **Hint:** Be careful of LinkedIn automated viewer notifications and friend/follow requests, these types of notifications *are* considered “communications” in New York.

Researching Jurors via Social Media

The issue of whether jurors should be aware of attorneys' ability to view their social media is ongoing.

- The “Social Media Jury Instructions Report” published by the NYSBA, suggested that, “at a minimum judges should consult with and address these issues with counsel prior to jury selection and determine whether or not any such instructions or admonitions are appropriate on a case-by-case basis concerning whether counsel will review and/or monitor ‘public’ juror social media communications during jury selection, trial, and/or deliberations.”

Juror Misconduct Related to Social Media

- In 2014 the Federal Judicial Center issued a report about jury member use of social media during trial. They found:
 - 33 judges in total reported instances of detected social media usage by jurors during trial or deliberations.
 - 6 judges reported that a juror divulged confidential information about the case.
 - 5 judges reported a juror performing case-related research.
 - 3 judges reported that a juror communicated or attempted to communicate directly with case participants.
 - 2 judges reported that a juror revealed aspects of the deliberation process.
 - 1 judge reported a juror “friending” or an attempt to “friend” participants in the case.
 - 1 judge reported a juror texting.
 - From this data: 12 judges reported that they learned of the social media use on their own, 8 reported that attorneys had advised the court, 6 reported that the court was advised by court staff, 1 reported that the court was advised by a party, 1 observed the social media use through personal observation, and 3 learned on the behavior through post-trial motions.

Juror Misconduct Related to Social Media

The Solution: Repetitive Jury Instructions

*U.S. v. Ganias.** The Second Circuit determined that, “a juror who ‘friends’ his fellow jurors on Facebook or who posts comments about the trial on Facebook, may, in certain circumstances, threaten a defendant’s Sixth Amendment right to an impartial jury.” Although the Second Circuit did not find a violation of the Defendant’s rights in this case specifically, they emphasized that, “[t]he vigilance on the part of trial judges is warranted to address the risks associated with jurors’ use of social media. Furthermore, the court stated: “We think it would be wise for trial judges to give [instructions] both at the start of trial and as deliberations begin, and issue similar reminders throughout the trial before dismissing the jury each day.”

- The NYSBA also suggests leaving a large sign in the courtroom during trial proceedings reminding jurors about the prohibited use of social media.

* 755 F.3d 125 (2nd Cir. 2014).

Model Jury Instructions Regarding Social Media (as suggested by the NYSBA)

- It is important to remember that you may not use any Internet services, such as Google, Bing, Facebook, LinkedIn, Instagram, YouTube, Snapchat [insert any new major social media examples], Twitter or use any other electronic applications or tools to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the lawyers, witnesses, experts or the judge. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means. For now, and as long as you are a juror in this case, be careful to remember these rules whenever you use a computer or other personal electronic device anywhere. While this instruction may seem unduly restrictive, it is vital that you carefully follow these directions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to affect your judgment, is unfair and prejudicial to the parties and could lead to this case having to be retried. Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources, like the Internet or from social media outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case.

Discoverability of Social Media Evidence

New York courts have maintained that the discoverability of the contents of social media fit within traditional discovery standards as well as the New York Civil Practice Law and Rules.

- CPLR 3101: “There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.”
 - Courts have discretion to determine what is material and necessary.

Tapp v. New York State Urban Dev. Corp.*

Holding: “To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff’s Facebook account—that is, information that ‘contradicts or conflicts with plaintiff’s alleged restrictions, disabilities, and losses, and other claims.’”

* 102 A.D.3d 620 (1st Dep’t 2013).

Discoverability of Social Media Evidence

*Pecile v. Titan Capital Group, LLC.**

Holding: Denying defendant's demand for access to plaintiff's social media sites in a sexual harassment suit because defendant failed to offer any proper basis for the disclosure, relying only on vague and generalized assertions that the information might contradict or conflict with plaintiffs' claims of emotional distress.

* 113 A.D.3d 526 (1st Dep't 2014).

Discoverability of Social Media Evidence

Patterson v. Turner Const. Co.*

Facts: Plaintiff claimed damages for physical and psychological injuries including the inability to work, anxiety, post-traumatic stress disorder, and loss of enjoyment of life. Defendant made a motion to compel an authorization for all of plaintiff's Facebook records compiled after the incident alleged in the complaint, including any records previously deleted or archived.

Holding: The postings on plaintiff's Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access, just as relevant matter from a personal diary is discoverable. However, there was a possibility that not all Facebook communications were related to the events that gave rise to plaintiff's cause of action. Reversed and remanded for a more specific identification of plaintiff's Facebook information that is relevant, in that it contradicts with plaintiff's alleged restrictions, disabilities, losses, and other claims.

* 88 A.D.3d 617 (1st Dep't 2011).

Discoverability of Social Media Evidence

- Case Law on Social Media Discovery (cont'd)

- *Richards v. Hertz Corp.**

Holding: Court allowed discovery of plaintiff's Facebook profile, but stated: "due to the likely presence in [Plaintiff]'s Facebook profile of material of a private nature that is not relevant to this action, the trial court should conduct an in camera inspection of all status reports, emails, photographs, and videos posted on [Plaintiff]'s Facebook profile since the date of the subject accident to determine which of those materials, if any, are relevant to her alleged injury."

* 100 A.D.3d 728 (2nd Dep't 2012).

Expectations of Privacy and Social Media

- The Second Circuit as well as New York State courts have repeatedly held that individuals do not have a reasonable expectation of privacy in internet postings.

U.S. v. Lifshitz*

Holding: “Users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting.”

People v. Harris**

Holding: Internet users do not retain a reasonable expectation of privacy. “If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy.”

Melissa “G” v. North Babylon Union Free School Dist.***

Holding: Allowing discovery of all relevant Facebook content but finding that private messages sent or received by plaintiff via her Facebook account are covered by a reasonable expectation of privacy and need not be reviewed absent any evidence that such routine communications with family and friends contain information that is material and necessary to the defense.

* 369 F.3d 173 (2d Cir. 2004).

** 945 N.Y.S.2d 505 (N.Y. City Crim. Ct. 2012).

*** 6 N.Y.S.3d 445, 449 (N.Y. Sup. Ct. 2015).

Authentication of Social Media Evidence

- Social media evidence is becoming increasingly valuable in litigation, but its unique nature presents significant obstacles to authentication and admission.

People v. Price*

Facts: Defendant argued that the trial court erred by admitting into evidence a photograph of the defendant holding a handgun that was found on the internet because the prosecution failed to sufficiently authenticate it. The prosecution attempted to get the court to allow the photo to be authenticated using proof that the web page on which it was found was attributable to the defendant.

Holding: The foundation necessary to establish authenticity will differ according to the nature of the evidence sought to be admitted. The court found that the evidence was not properly authenticated because the prosecution did not offer evidence to establish that the photograph was a fair and accurate representation of what it purported to depict (traditional authentication test for photographs), nor did they offer sufficient evidence that the web page was attributable to the defendant (authentication test proposed by the prosecution on appeal). The court did not articulate a specific test for authentication of social media posts, explaining, “[i]n our view, it is more prudent to proceed with caution in a new and unsettled area of law such as this. We prefer to allow the law to develop with input from the courts below and with a better understanding of the numerous factual variations that will undoubtedly be presented to the trial courts.”

* 58 N.E.3d 1005 (N.Y. 2017).

Authentication of Social Media Evidence

People v. Goldman*

Facts: In a murder trial, the prosecution sought to introduce a redacted version of a music video in which defendant rapped about “running up into a rival crew’s house” that was uploaded to YouTube. Defendant argued that the video was not properly authenticated.

Holding: The court distinguished this evidence from the web page photo in *Price*. The court found that the video was properly authenticated because the defendant did not dispute that he was the individual who appeared in the video, the video contained distinctive identifying characteristics, the prosecution provided testimony pertinent to the timing of the making of the video, and the video was uploaded to YouTube close in time to the homicide. The court cited a District Court case in which that court found a similar video properly authenticated after witness testimony about the source of the video and how it was discovered, and identification of the defendant as the person depicted.

Note: The Court of Appeals, again failed to adopt a specific test for authentication of social media evidence here, still using the flexible “accurately represents the subject matter it depicts” test.

* 159 N.E.3d 772 (N.Y. 2020).

Authentication of Social Media Evidence

*People v. Jordan**

Facts: Defendant argued that Facebook images of him were not properly authenticated and therefore the trial court erred in admitting them.

Holding: The authenticity of each image was established by the testimony of a witness who had personal knowledge of the people in the images and who verified that the images accurately represented the subject matter depicted.

*People v. Franzese***

Facts: Trial court admitted YouTube video that showed defendant making gang signs and taunting/threatening a rival gang member. Defendant argued that it was not properly authenticated.

Holding: Here, the video was properly authenticated by the YouTube certification, which indicated that the video was posted online, by a police officer that viewed the video at or about the time that it was posted online, and by the defendant's own admissions about the video made in a phone call while he was housed at Rikers Island Detention Center.

* 181 A.D.3d 1248 (4th Dep't 2020).

** 154 A.D.3d 706 (2nd Dep't 2017).

Thank You

The information in this presentation is intended as general background information.
It is not to be considered as legal advice.
Laws can change often, and information may become outdated.

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AMRIC Associates

Investigative and Security Counseling

Kenneth Derr
Anthony Martino



Suzanne’s clients turn to her for experience in handling complex litigation matters in areas critical to their success. She represents and counsels a wide variety of clients throughout New York State as both plaintiffs and defendants, including:

- Colleges and universities
- Health care providers
- Manufacturers
- Small business owners and individuals
- Corporations
- Not-for-profit organizations
- Municipalities
- Professionals

Suzanne counsels and litigates cases for these clients on issues concerning:

- Breach of contract
- Complex collective and class actions under FLSA and ERISA
- Group Self-Insured Workers' Compensation Trusts (GSITs) formed under the New York State Workers' Compensation Law
- Trade secret matters
- Complex environmental litigation
- Violations of restrictive covenants and confidentiality provisions of employment contracts

In addition, Suzanne counsels and litigates cases and proceedings for a variety of higher education institutions concerning claims brought under Title IX of the Education Amendments of 1972 and New York State’s Enough is Enough law. Suzanne also has significant experience handling proceedings that arise under Article 78 of the New York Civil Practice Laws and Rules for organizations, municipalities and higher education institutions. In addition to trying suits in diverse venues in New York federal and state courts, Suzanne has extensive experience resolving disputes through alternative dispute resolution procedures, including mediations and arbitrations.

Ken Derr is currently the Vice President at AMRIC Associates Ltd., overseeing computer forensic, cybersecurity and watch guard services offered by AMRIC. Prior to coming to AMRIC Associates in 1996, Ken served in the US Air Force for 23 years, both active duty and reserve, as a Special Agent with the Air Force Office of Special Investigations (OSI) where he specialized in Counter Intelligence, Counter Terrorism, Computer Forensics and Protective Service Operations. Ken began his computer forensic career in 1989 when he was assigned to a joint DoD/FBI task force to develop and implement computer forensic policies and procedures to be utilized by federal law enforcement agencies. Between 1991 and 1995 Ken commanded several units providing computer investigative support to DoD components in Europe and the US. In 2003 Ken was mobilized in support of Operation Iraqi Freedom (OIF) commanding a joint federal Surveillance Detection team responsible for worldwide specialized counter terrorism, counter surveillance and protective service operations. Following several successful operations, Ken was re-assigned to a rapid response computer extraction team supporting anti-terrorism operations in the middle-east. Ken was de-mobilized in July 2004 and returned to central New York to assume his current position with AMRIC.



Michaela J. Mancini

Associate

mmancini@bsk.com
One Lincoln Center
110 West Fayette Street
Syracuse, NY 13202-1355
(315) 218-8364
(315) 218-8100 fax

Profile

Michaela assists clients in a variety of litigation matters including preparing documents for pending litigation, researching and advising on the latest data privacy regulations and analyzing complex legal issues.

Before joining Bond, Michaela served as a legal extern for the SUNY Upstate Office of General Counsel, a student attorney for the Syracuse University College of Law Criminal Defense Clinic and an Executive Editor for the *Syracuse Law Review*. She was also a Pro Bono Scholar and an Academic Success Fellow.

Honors & Affiliations

- Executive Editor, *Syracuse Law Review*
- Justinian Honorary Law Society
- Academic Success Fellow, Syracuse University College of Law
- Pro Bono Scholar, Syracuse University College of Law

Education

- Syracuse University College of Law (J.D., *summa cum laude*, 2021)
- Le Moyne College (B.A., *magna cum laude*, 2018)

Bar/Court Admissions

- New York

Curriculum Vitae

Anthony V. Martino

Address

1600 Burrstone Rd
Utica, N.Y. 13502
315-223-2433
amartino@utica.edu

Education

Utica College, M.S., Economic Crime Management, May 2004
State University of New York at Geneseo, B.A., Communications, May 1992

Northeast Cybersecurity and Forensics Center at Utica College – Director

2013 – Current

Directs the operation of a public, private and academic collaboration focused on digital forensics and cyber security. The center houses an active computer forensics laboratory that services law enforcement and private clients. Additional divisions devoted to research and development, cyber operations and training are also part of the center's mission.

Anjolen Inc. – Co-Owner

2013-Current

Participating co-owner of a leading edge business delivering cybersecurity services to commercial, government and academic customers.

AMRIC Associates - Senior Computer Forensics Examiner

2008 – Current

Performs investigations and digital examinations for corporate, educational and government clients in support of private investigations and civil litigation.

Utica College – Adjunct Instructor

2005 - Current

Course Topics: Criminal Justice, Computer Forensics, Cybersecurity, Economic Crime Investigation, Economic Crime Management

Designed the curriculum for 5 courses currently taught at the BS and MS levels

Director of the Computer Forensics Research & Development Center 2011 – 2013

Department of Homeland Security – Border Enforcement Task Force

2014 – 2017

Deputized member of the U.S. DHS border enforcement task force. Specifically involved with the collection and examination of digital evidence in support of DHS operations.

Utica Police Department - Retired

20 year veteran of the Utica, NY Police Department

Rank of Sergeant

Supervisor of 4 police department units

Conducted approximately 100 digital forensic examinations per year.
Founded the Central New York Computer Crime Coalition and the Central New York Internet Crimes Against Children Task Force.

U.S. Secret Service – Electronic Crime Task Force

2004 – 2013

Deputized U.S. Marshal as a participant in the United States Secret Service Electronic Crime Task Force.

Certifications

Currently holds a high-level government security clearance.

Publications

Contributing author to the book, “The New Technology of Crime, Law and Social Control” published by Criminal Justice Press in 2007.

Featured in “We Thought We Knew You” by M. William Phelps, published by Kensington Books

Recent Presentations

“True Crime Story: It Couldn’t Happen Here”, Sundance Network 10/2020

“Forensic Files II – The Letter”, HNN Network, 04,2020

“Incident Response in Financial Institutions”, Independent Bankers Assoc, Troy, NY 06/2018

“Building Anomaly Detection”, NY Bankers Association, Tarrytown, NY 5/17/2017

“Securing Government IT Systems”, NYS Government IT Directors, Saratoga, NY 5/16/2017

“Digital Forensics in Financial Institutions”, NY Bankers Association, Albany, NY 5/11/2016

“Response to Cyber Incidents”, Tech Summit, Verona, NY, 6/3/2015

“Pitfalls of the DarkNet”, NYS Cyber Security Conference, Albany, NY 6/2/2015

“Digital Investigations in Academia”, MASLA Conference, Lake Placid, NY 7/21/2014

“The Future of Digital Forensics” Cyber Research Institute, Rome, NY 7/30/2014

“Insider Cyber Threats”, NEXT Conference, Syracuse, NY 11/19/2013

“Incident Response to Cyber Events”, FBI InfraGard Conference, Syracuse, NY 11/15/2012

“Managing Cyber Investigations”, Oneida County Bar Association, Utica, NY 04/30/2011

“Cyber Incident Response”, Public Libraries Association Meeting, Utica, NY 10/26/2011

“Electronic Evidence Collection”, Computer Forensics Show, New York, NY 10/19/2010

“Cyber Investigations”, Syracuse University, Syracuse, NY 10/30/2009

“Electronic Evidence Collection”, ECI Institute Conference, Potomac, MD 10/21/2009

“Emerging Trends in Cybercrime”, U.S. Secret Service Conference, RPI, Troy, NY 11/15/2007

“Emerging Trends in Cybercrime”, U.S. Attorney’s Conference, Lake Placid, NY 9/21/2005

“Law Enforcement in a Wireless World”, FBI InfraGard Conference, Buffalo, NY 03/15/2005

Boards and Committees

2010-2012 Defense Cyber Crime Center – Centers of Digital Forensics Academic Excellence advisory board

2002-2004 National Institute of Justice – Technical working group on presentation of digital evidence in courtrooms

Research

2014-2015 Bureau of Justice Assistance – Contractor team member on funded research related to the use of identity manipulation by sex offenders to avoid registration

- law compliance
- 2014-2015 Air Force Office of Scientific Research – Contractor team member on funded research into Modulated Execution Security
- 2013-2014 Air Force Research Laboratory – Contractor project manager on funded research into Trusted Platform Module security
- 2009-2010 Air Force Research Laboratory – Contractor project manager on funded research into the development of malware taxonomy

Awards and Honors

- 2008 U.S. Attorney’s Office - Wallie Howard, Jr. Award for Excellence in Law Enforcement
- 2012 The American Legion Post 229 – Award of Commendation for Outstanding Law Enforcement Service
- 2006 Oneida County Law Enforcement Coalition – Outstanding Service Award

Training – Specific to Computer Crime:

- Evidence Technician Certification – New York State DCJS
- Basic Data Recovery & Analysis – National White Collar Crime Center (NW3C)
- Advanced Data Recovery & Analysis NT Systems – NW3C
- Advanced Data Recovery & Analysis ILook – NW3C
- Basic Computer Crime Investigation – United States Secret Service
- Ultimate Toolkit Forensic Bootcamp – Access Data Inc.
- Windows Forensics – Access Data Inc.
- Cellular Forensics Examiner – Paraben Inc.
- Windows Vista Forensics – Access Data Inc.
- Cellular Forensics – BK Forensics Inc.
- Encase Intermediate Forensics – Guidance Software Inc.
- Advanced Forensic Tools – United States Secret Service
- Peer to Peer Marshal Forensics – ATC Corp
- Peer to Peer Investigations – Internet Crimes Against Children Task Force

Recent Testimony Experience

- 07/2011 Federal Court NDNY – Peer to peer file sharing analysis expert testimony
- 08/2011 Federal Court NDNY – Grand jury testimony – computer forensics
- 08/2011 Jefferson County, NY – Grand jury testimony – computer forensics & child exploitation investigations
- 03/2012 Jefferson County, NY – Trial testimony computer forensics & child exploitation investigations
- 02/2012 N.Y. State Education Dept. Hearing – Computer forensics expert testimony
- 10/2012 Oneida County Court – Trial testimony - Computer forensics and peer to peer file sharing expert testimony
- 10/2012 Madison County Court – Trial testimony - Computer forensics testimony
- 12/2013 Federal Court NDNY – Trial testimony – Computer forensics and Usenet testimony
- 4/2014 Federal Court NDNY – Trial testimony - Computer forensics and peer to peer file sharing expert testimony
- 10/2014 Herkimer County Court – Trial testimony – Cellular phone forensics
- 10/2014 State University of New York – Arbitration hearing – computer forensics expert testimony

1/2015 Oneida County Court – Trial testimony – Cellular phone forensics
11/2015 Oneida County Court - Grand jury testimony – Cellular phone forensics
12/2015 Oneida County Court – Grand jury testimony – Computer forensics
3/2016 Oneida County Court – Trial testimony – Computer forensics
4/2016 Federal Court NDNY – Trial testimony – Computer forensics
4/2017 Oswego County Court – Grand jury testimony – Computer forensics
5/2017 Oneida County Court - Trial testimony - Computer forensics expert testimony
10/2017 Oneida County Court - Trial testimony - Computer forensics expert testimony
11/2018 Oneida County Court – Trial testimony – Computer forensics expert testimony
05/2019 Federal Court VT – Trial testimony – Computer forensics expert testimony
02/2020 Oswego County – Arbitration hearing - Computer forensics expert testimony
03/2020 Potsdam NY – Education Dept. hearing - Computer forensics expert testimony
10/2020 Ft Drum NY – Military Courts Marshal - Cellular phone forensics expert
testimony
10/2020 Federal Court VT – Hearing testimony – Cellular phone forensics expert
testimony
06/2021 Oswego County – Arbitration hearing - Computer forensics expert testimony