

# ETHICS & SOCIAL MEDIA

---

Presented by:  
J. Grady Hepworth

# What is Social Media?

- Social media is defined as forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content (video).
- Professional and Personal: Includes websites, blogs, online messaging, cell phone apps, social networking sites, LinkedIn, Facebook, Twitter, Google, YouTube, Pinterest, Instagram, and Snapchat.

# Foundational Rule of Thumb

Social Media Influences how we interact with our clients, colleagues, and opposing counsel.

We may violate the rules of professional responsibility by refusing to use social media or by misusing social media.

# I.R.P.C. 1.6: Confidentiality

- Duty to avoid inadvertent or intentional disclosure. Probably the most prevalent dilemma facing lawyers regarding social media.
- Idaho Rule of Professional Responsibility 1.6

“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.”

--Work Selfies

--The Cloud

--Attorney/Client Communications

# I.R.P.C 1.1: Competence

*Comment [8] requires us to:*

Keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.

Examples: Communicate with client:

- about not posting case information;
- not communicating with opposing party on social media;
- not deleting evidence, spoliation;
- Advising client that public posts may be used by opposing party.

# I.R.P.C. 1.3: Diligence

- Basic search of social media profiles associated with clients, opponents, witnesses, and jurors is now considered to be minimum-level diligence for litigators.
- “Duty to Google”
  - *Personal Injury – Extent of injury, emotional distress after an accident.*
  - *Family Law/Bankruptcy – Proof of assets or employment.*
  - *Employment Law – Workplace environment/culture, substantive facts, identifying witnesses.*
  - *Criminal Law – Motive, substantive facts, identifying witnesses.*

## I.R.P.C. 3.4(a): 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;

# I.R.P.C. 5.1-5.3: Supervision

- Supervision of lawyers and non-lawyers to ensure they meet ethical standards relating to social media.
  - How do paralegals and staff use social media?
  - Do you yourself understand social media in order to supervise?
  - How do you control access to information?



# I.R.P.C. 1.2(d): Scope of Representation

- A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

# Question 1 – Group Discussion

Can a lawyer advise or instruct client to delete information that may be damaging from client's Facebook page?

I.R.P.C. 1.1, 1.2(d), 1.3, and 3.4(a)

# Answer to Question 1

Yes, **but** lawyer has obligations under I.R.P.C. 1.2(d) and 3.4(a).

- Removal cannot violate any substantive law regarding preservation and/or **spoliation of evidence** and **obstruction of justice**.
- Also, if the case has started, also need to assure it is **not violation of a court order**.
- To prevent such violations, lawyer giving “clean up” advice **must ensure** an appropriate record of the removed material is **preserved**.

## Question 2 – Group Discussion

- Can a lawyer instruct a client to change security and privacy settings on social media pages to higher levels of restricted access (before and/or after lawsuit filed)?

# Answer to Question 2

- Yes, as long as such advice is not violation of law or a court order.

# Investigating Opponents and Witnesses

**Issue:** We must avoid communicating with represented persons under I.R.P.C. 4.2 and with unrepresented persons under I.R.P.C. 4.3.

- Ex parte contact with parties, experts, etc.
- Krzyzanowski v. Orkin Exterminating Co., No. C 07-05362 SBA, 2009 WL 4050674, at \*2 (N.D. Cal. Nov. 20, 2009)
  - “Campbell conducted a search on Google for experts and found Dr. Ballard's name.”
  - “Using a professional networking site known as ‘LinkedIn,’ Campbell conducted a search for ‘former’ Rollins employees.

**General Rule:** We can access represented parties and unrepresented persons’ **PUBLIC** social media when it requires no communication to or permission from the party/person.

## Question 3 – Group Discussion

- May a lawyer “friend” a person on Facebook or send a LinkedIn invitation to a person to try to find relevant information?

# Answer to Question 3

- Lawyers and non-attorney employees may not “friend” or send LinkedIn invitations to another party or use any subterfuge, trickery, dishonesty, deception, false pretense or an alias to gain access to **RESTRICTED** social media.
- “Furthermore, Campbell has presented evidence, which is undisputed by Orkin, that Campbell contacted Tharpe without knowing Tharpe was a current Rollins employee.” *Krzyzanowski* at \*8 (N.D. Cal. Nov. 20, 2009).



# Jury Selection Issues

- It is ethically permissible to research potential jurors so long as lawyer does not send an access request when PRIVACY OR RESTRICTED settings are active.
- General limitations and duties consistent with I.R.P.C. 3.5:
  - No ex parte communications with a juror or prospective juror;
  - Cannot use deception to gain access to a juror's social media sites or obtain information;
  - We have an obligation to report any juror misconduct that may be revealed during a social media search, especially if it violates court's instructions.

# Federal Rules: Dist. Idaho Loc. Civ. R. 47.2

- (a) Attorneys may use websites available to the public, including social media websites, for juror or prospective juror research, so long as:
  - (1) The website or information is available and accessible to the public;
  - (2) The attorney does not send an access request to a juror's electronic social media;
  - (3) No direct communication or contact occurs between the attorney and a juror or prospective juror as a result of the research, including, but not limited to Facebook "friend" requests, Twitter or Instagram "follow" requests, LinkedIn "connection" requests, or other forms of internet and social media contact;
  - (4) Social media research is done anonymously. For example, a search on a social media site must not disclose to the juror who is making the inquiry, and it must only seek information available and accessible to the public and not the result of an attorney's account on said social media site; and
  - (5) Deception is not used to gain access to any website or to obtain any information.

# Dist. Idaho Loc. Civ. R. 47.2 Continued...

(b) Third parties working for the benefit of or on behalf of any attorney must comply with all the same restrictions as set forth above for attorneys.

(c) If an attorney becomes aware of a juror's or prospective juror's conduct that is criminal or fraudulent, IRPC 3.3(b) requires the attorney to take remedial measures including, if necessary, reporting the matter to the Court.

(d) If an attorney becomes aware of a juror's posting on the internet about the case in which she or he is serving, the attorney shall report the posting to the Court.

## Question 4 – Group Discussion

- May an attorney or paralegal review a potential juror's LinkedIn page without connecting to the person?

# Answer to Question 4: It depends.

- Dist. Idaho Loc. Civ. R. 47.2: Advisory Committee Notes:
- Jurors will be advised during the orientation process that their backgrounds will be of interest to the litigants and that the attorneys in the case may investigate their backgrounds, including a review of internet websites and social media.
- **If there is not a method of conducting the internet research in a manner which prevents the juror or prospective juror from discovering who is doing the research, the research shall not be done because it would constitute an inappropriate communication.** Attorneys must be familiar with the technology and internet tools they use to be able to do searches, including automatic, subscriber-notification features so as to maintain anonymity in any search.

# I.R.C.P. 7.1: Advertising

- Advertising cannot:
  1. Be False or Misleading;
  2. Create unjustified expectation about results; or
  3. Make factually unsubstantiated comparison with other lawyers.

# I.R.C.P. 7.3: Solicitation

We may not solicit professional employment from:

1. people we have no professional or personal relationship with;
2. from people known to be in need of legal services; and
3. without including Advertising Material at the beginning and ending of every electronic communication.

# Takeaways: Appropriate Precautions with Social Media

- Advisable to advise clients against communicating about their cases on social media: Facebook, Twitter, Instagram, etc., because of lack of privacy, potential waiver of privilege (see I.R.E. 502) and confidentiality (see I.R.P.C. 1.6).
- Also wise to advise client that any removal without retention may be destruction of evidence, spoliation or obstruction of justice.
- With respect to advertising/solicitation, be attentive to what is posted on web sites, blogs, Twitter, Facebook, LinkedIn, and video sharing sites .