Think Before You Post – Ethical Concerns and Social Media

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What is Social Media?

- **SOCIAL MEDIA -** forms of electronic communication (such as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)

Social Media

- **First Known Use of SOCIAL MEDIA**
- 2004
- http://www.merriam-webster.com/dictionary/social%20media

Attorney Use of Social Media

- 2014 ABA Legal Technology Survey Report
  - 85 % of attorneys use social media for personal reasons.
  - 75% of attorneys use social media for professional reasons.
  - Reasons why lawyers use social media
    - Career development and networking - 72%
    - case investigation - 22%
    - client development – 44%
    - education and current awareness - 50%
    - http://www.americanbar.org/publications/techreport/2014/blogging-and-social-media.html

Most Popular Sites

- Facebook
- LinkedIn
- Twitter
- Attorney Blog sites
- Personal Blog sites
- Instagram









Model Rules of Professional Responsibility

- Rule 1.1 Competence
- Rule 1.6 Confidentiality
- Rule 1.18 Duties to Prospective Client
- Rule 3.3 Candor to the Tribunal
- Rule 3.4 Fairness to Opposing Party
- Rule 3.5 Ex Parte Communications
- Rule 3.9 Advocate in Nonadjudicative Proceeding

More Rules . . .

- Rule 4.1 Truthfulness in Statements to Others
- Rule 4.2 Communication With persons Represented by Counsel
- Rule 5.3 Responsibilities Regarding Non Lawyer Assistants
- Rule 8.2 Judicial and Legal Officials
- Rule 8.4 Misconduct
- http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

Rule 1.1 Competence

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

Service of Process

- Competence requires the use of internet searches to attempt to locate missing parties.
- *Munster v. Groce*, 829 N.E.2d 52 (Ind. Ct. App. 2005) case dismissed for failure of plaintiff's attorney to properly serve defendant. Court noted the attorney's failure to do a Google search of the defendant. Court had Googled defendant and had immediately found a different address for the defendant along with his mother's obituary that gave other information that could be used to find and serve him.

Service -

- Court questioned the competence of an attorney in dismissing a case for failure to properly serve the defendant where the attorney had called directory assistance in an attempt to locate the defendant but had not performed an internet search.
- Court compared the attorney's sole reliance on directory assistance as the equivalent to using "the horse and buggy and the eight track stereo."
- *DuBois v. Butler ex rel. Butler*, 901 So.2d 1029, 1031 (Fla.Dist.Ct.App. 2005).

Service -

- Court allowed service of process by Facebook messenger where party had no current address and the opposing party could show that there was an active Facebook account which was regularly logged into.
- "In this age of technological enlightenment, what is for the moment unorthodox and unusual stands a good chance of sooner or later being accepted and standard, or even outdated and passé. And because legislatures have often been slow to react to these changes, it has fallen on courts to insure that our legal procedures keep pace with current technology."
- *Baidoo v Blood-Dzraku*, 48 Misc.3d 309 (Sup.Ct. NY County 2015)

Social Media Evidence

- Social media evidence should not be an afterthought.
- Social media evidence is discoverable when the proper foundation is laid.
- Failure of lawyer to look for social media evidence may be malpractice
- Update your forms – preservation of evidence, requests for production, etc. to include social media.

Romano v. Steelcase, Inc.
907 N.Y.S. 2d 650 (N.Y. Sup. Ct. 2010)

- Defendant sought order granting access to Plaintiff's current and deleted Facebook accounts. (*MySpace)
- Plaintiff had brought a personal injury case alleging she had sustained permanent injuries that prevented her from engaging in various activities.
- A review of Plaintiff's public Facebook pages showed her living an active lifestyle.

Romano

- Photos showed the Plaintiff traveling to Pennsylvania and Florida during the time she claimed that her injuries prevented such activities.
- Plaintiff refused to turn over the Facebook information asserting a right to privacy in the non-public pages.
- Court ordered production.

Romano - Rationale

- The court based its decision largely on the fact that the plaintiff voluntarily posted the information she was seeking to protect.
- Judge observed that the very purpose of social networking sites is to share "personal information" with others. Therefore, since the plaintiff "knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy."

Glenn Taylor - Utah

- http://www.youtube.com/watch?v=qicKWK5ZPJs&feature=em-share_video_user

Glenn Taylor - Utah

- Boy Scout Leader topples 2,000 pound ancient Goblin Sandstone formation in Utah state park.
- Films the incident and posts it on Facebook.
- One month prior had filed a lawsuit for personal injuries alleging that he had suffered "debilitating" physical injuries that arose out of a car crash with a teen driver.

Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010)

- After a verdict was rendered, plaintiff's attorney conducted a search of the jurors using Missouri's automated case record service and discovered that a juror had failed to disclose that she was a defendant in a number of cases. Plaintiff moved for a mistrial.
- Court granted request for a new trial based on juror non-disclosure but noted that "in light of advances in technology, . . . it is appropriate to bring such matters to the court's attention at an earlier stage…litigants should endeavor to prevent retrials by completing an early investigation."

Cannedy v. Adams,
706 F.3d 1148 (9th Cir. 2013)

- Criminal defense lawyer's failure to investigate AOL Instant Messages (AIM) allegedly sent by victim leads to finding of ineffective assistance of counsel.
- Victim's friend states that she saw an AIM "away" message from victim which stated:
  - *"To everyone whos reading this, the rumers that you've heard are wrong. I just wanted to move to my dads because everyone hates me, and I don't want to put up with it anymore. Everything you've heard isnt true. I just made it up, so I could get away from it all."*

Cannedy -

- Defendant's trial counsel was informed of the AIM but failed to interview the friend, did not attempt to get victim's AIMs from AOL or present any evidence at trial related to the away message.
- Court stated: "It was reasonably likely that a competent lawyer could have introduced evidence of the away message in an admissible form." *Canedy* at 1166.
- The District Court in reviewing the matter had noted that perhaps the attorney's error resulted from his "misunderst[anding] the workings of AOL Instant Messenger in ways that caused him to depreciate the value of the information." *Cannedy v. Adams*, 2009 WL 3711958 (C.D. Cal. 2009) at n.19.

Investigations

- Social media should be used to research the backgrounds of witnesses, jurors and respondents, prepare for depositions and understand the backgrounds of decision makers.
- However – only the public portions should be reviewed outside of formal discovery requests. Subterfuge is ethically improper.

“Friending” for Information

- Do not create false personas or have others "friend” an individual for investigative purposes.
- In Philadelphia Bar Assn. Op. 2009-2 (2009), an attorney asked a third party whose name a key witness wouldn’t recognize to contact the witness through her Facebook page. The third party did not disclose his association with the attorney in his Friend request. The Ethics Committee found that the lawyer’s activities violated Rule 4.1 [Truthfulness in Statements to Others] and 8.4(c) [Engaging in Conduct involving Dishonesty] reasoning that the attorney’s behavior was deceptive.

Friending . . .

- In San Diego Bar Legal Ethic Opinion 2011-2 (2011) –
  - Attorney is representing a former employee in a wrongful termination lawsuit.
  - Attorney identifies two high ranking current employees who he believes are unhappy and would be likely to post derogatory comments about their employer.
  - Attorney sends Friend requests to the two employees using his real name.

Problems…

- High ranking employees are represented parties
- Friend request is impermissible communication with represented parties under Rule 4.2.
- Violation of attorney duty not to deceive by not disclosing that the Friend request was to gather evidence for litigation. Rule 4.1.

Ethics Committee says…

- "We have concluded that those rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. ***Represented parties shouldn't have "friends" like that and no one – represented or not, party or non-party – should be misled into accepting such a friendship***."

Currently in New Jersey ….

- Two attorneys are defending a personal injury case and their paralegal "Friended" the plaintiff. It is alleged that they instructed the paralegal to Friend the defendant so that they could access information on the Plaintiff's page that was not publicly available. The attorneys counter that they only told the paralegal to do general internet research on the plaintiff.
- The Facebook access came to light during deposition questioning - the plaintiff was asked very specific questions about his travel, dancing and wrestling activities which would tend to disprove his claims as to the seriousness of the injuries he allegedly suffered after being struck by a police cruiser while doing push-ups in a driveway.
- The New Jersey Office of Attorney Ethic brings a complaint which charges….

Charges Brought:

- Rule 4.2 communications with represented parties;
- Rules 5.3(a), (b) and (c), failure to supervise a non-lawyer assistant;
- Rule 8.4(c), conduct involving dishonesty and violation of ethics rules through someone else's actions or inducing those violations; and
- Rule 8.4(d), conduct prejudicial to the administration of justice.
- The supervising attorney, is also charged with breaching Rules 5.1(b) and (c)- ethical obligations on lawyers for the actions of attorneys they supervise.
- http://www.workplaceprivacyreport.com/2012/09/articles/social-networking-1/friend-request-lands-attorneys-in-hot-water/

Aaron Brockler (June 2013)

- Brockler is a prosecutor in Cleveland, Ohio and was the lead prosecutor in the Damon Dunn matter. Dunn was indicted for aggravated murder – accused of shooting a man at a carwash.
- Defense attorneys provided Brockler with the names of two female witnesses who Dunn said would testify that he was on the other side of town when the shooting occurred.
- Brockler creates a fake Facebook profile using the name of Dunn's former girlfriend.

Brockler

- Brockler sends Friend requests to the two defense witnesses and engages them in chats.
- Brockler sends messages to the women that "she" has just had Dunn's child.
- Brockler asserts that the women went "crazy" when they heard this and both said they would not lie for Dunn.
- Brockler is on medical leave when another prosecutor covers his files and discovers copies of the Facebook chats on the file.

Brockler

- Brockler is fired by the County Prosecutor.
- http://abcnews.go.com/US/ohio-prosecutor-posing-woman-fired-allegedly-facebooking-witnesses/story?id=19350118
- http://www.digitaltrends.com/social-media/prosecutor-posts-as-accused-killers-girlfriend-on-facebook-gets-fired/

Deletion is Spoliation

- Address social media use early on in representation.
- Advise your client to preserve all information on their pages.
- Do not advise your client to delete post or pictures; such data is retrievable from the site.

Allied Concrete v. Lester

Nos. CL08-150, CL09-223 (Va. Cir. Ct. Oct. 21, 2011)

- Isaiah Lester sued Allied Concrete Company and William Donald Sprouse seeking monetary damages for negligence and wrongful death stemming from an accident with a concrete truck which resulted in the death of Lester's wife.
- Defendants sought the production of screen print copies of Lester's Facebook account, including all of his pictures, message board, status updates, and messages sent or received. Defendants attached to their request a photo of Lester, after his wife's death, holding a beer can while wearing a t-shirt with the logo
- -
- -



Lester

- After receiving the demand, Lester's counsel, Matthew Murray, instructed his paralegal to advise Lester to "clean up" his Facebook because "we don't want blowups of this stuff at trial," and the paralegal sent two emails to Lester instructing him accordingly.
- Lester deactivated his account, a fact he later denied at his deposition and during trial, despite evidence that clearly demonstrated that he knew those statements to be false. Lester provided his responses one day after the deactivation, answering the request "I do not have a Facebook page on the date this is signed, April 15, 2009."

Lester

- Defendants subpoena Facebook and find evidence of spoliation.
- Court sanctions Murray $542,000.00 post verdict which had awarded Lester $10 million.
- Murray brought up on charges before the State Bar:
  - On July 17, 2013, the Virginia State Bar Disciplinary Board suspended **Murray's** license to practice law for five years for violating professional rules that govern candor toward the tribunal, fairness to opposing party and counsel, and misconduct.

Rule 1.6 Confidentiality

- (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraphs (b) and (c).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
- (1) To prevent reasonably certain death or substantial bodily harm;
- (2) To prevent the client from committing a criminal or fraudulent act in furtherance of which the client has used or is using the lawyer's services, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take suitable action;
- (3) To prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been or are being used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action;
- (4) To secure legal advice about the lawyer's compliance with these Rules;
- (5) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) To comply with other law or a court order.
- (c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent a criminal act that the lawyer believes is likely to result in reasonably certain death or substantial bodily harm.

Nevada Standing Comm. On Ethics and Professional Responsibility, Formal Opinion No. 41(2009)

- QUESTION – Confidentiality – What types of information does Rule 1.6 restrict the lawyer from revealing?
- ANSWER – **ALL** information relating to the representation of the client.
- *"In view of the unrestricted language of Rule 1.6, all lawyers should pause and think before revealing any information relating to the representation of a client unless the client has given informed consent."*

In the Matter of Tsamis
No. 6288664 (Ill. 2013)

- Betty Tsamis is a sole practitioner. Tsamis agreed to represent RR in receiving unemployment benefits from his previous employer American Airlines. Tsamis charged RR $1500.
- RR had been terminated from AA for allegedly assaulting a fellow flight attendant during a flight.
- After a hearing, where RR was represented by Tsamis, RR was denied unemployment benefits.

Tsamis

- On February 5, 2013, RR posted a negative review of Tsamis on AVVO which was removed by AVVO.
- On April 10, 2013, RR posted another review of Tsamis which said:
  - "I paid Ms. Tsamis $1500 to help me secure unemployment while she knew full well that a law in Illinois would prevent me from obtaining unemployment benefits."

Tsamis

- On April 11, 2013 – Tsamis posted (on AVVO) a reply to RR's review:
  - "This is simply false. The person did not reveal all the facts of his situation up front in our first and second meeting. [*sic*] When I received his personnel file, ***I discussed the contents of it with him and informed him that he would likely lose unless the employer chose not to contest the unemployment*** (employers sometimes do is [*sic*]). Despite knowing that he would likely lose, he chose to go forward with a hearing to try to obtain benefits. I dislike it very much when my clients lose but I cannot invent positive facts for clients when they are not there. ***I feel badly for him but his own actions in beating up a female coworker are what caused the consequences he is now so upset about.***"

Tsamis

- Charged with violating:
  - Rule 1.6 – confidentiality
  - Rule 8.4 – conduct that is prejudicial to the administration of justice.
- Tsamis counters that she was entitled under ethics rules to defend herself against the client's accusation stating "The public feels entitled to slander a lawyer and they don't realize they've blown their privilege when they do."
- Rule 1.6(b)(5) allows a lawyer to reveal confidential information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."

Tsamis

- Hearing Board Decision:
  - Tsamis' April 11, 2013 reply contained information relating to her representation and exceeded what was necessary to respond to the accusations.
  - Reprimanded for revealing confidential client information in a public forum.

In re Petition against Allison Carlson
833 N.W.2d 402 (Minn. 2013)

- Carlson represented the husband in a contentious divorce. Carlson had a difficult relationship with opposing counsel, (OC), Posing as a fictitious former client of OC, Carlson posted a very negative review of OC on AVVO. AVVO shared the review with OC. At OC's request, AVVO determined the review came from Carlson's computer.
- Carlson says: Last summer, in the midst of a particularly high conflict family law case, I had a lapse of judgment and posted a fake review of opposing counsel (OC) on AVVO. It was a terrible, immature thing to do. The post was made on a Friday evening and removed by the following Monday morning. Although it does not appear that anyone saw the post besides OC and me, the damage was done. I reported myself to the Office of Lawyer's Professional Responsibility as did OC.

Carlson

- Carlson resigned after OC notified her employer and stipulated to a public reprimand and costs, imposed by the court. Carlson's posting was found to have involved dishonesty and gratuitously burdening a third person, in violation of Rules 4.4(a) and 8.4(c).
- http://minnesotalawyering.com/2013/10/october-2013-minnesota-ethics-update
- http://www.avvo.com/attorneys/55102-mn-allison-carlson-1662875.html

In the Matter of Peshek
No. 6201779 (Ill. 2009)

- Kristine Peshek was a 19 year public defender who wrote an internet blog that discussed her work, her health issues and hobbies.
- In posts, Peshek referred to one judge as "Judge Clueless" and another as "a total asshole".
- Peshek posted details of cases sometimes with jail identification numbers including - "This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch.' "
- In another post, Peshek wrote that "Laura" testified in court that she was drug free and received a light sentence with just five days' jail time, and then complained to Peshek that she was using methadone and could not go five days without it. Peshek wrote that her reaction was, "Huh? You want to go back and tell the judge that you lied to him, you lied to the presentence investigator, you lied to me?"

Peshek

- Peshek is fired.
- Suspended from the practice of law for 60 days.
- Charged with violating:
  - Rule 1.6 – confidentiality
  - Rule 3.3 – filing to disclose a material fact
  - Rule 8.4 – conduct that is prejudicial to the administration of justice.

Ex Parte Communications

- Rule 3.5(b) - A lawyer shall not communicate ex parte with a judge, juror, prospective juror or other official except as permitted by law.
- Friending Judges, Commission Members and other Adjudicators is acceptable.
- Discussing specific matters is prohibited.
- ABA Formal Opinion 462 – Judge's Use of Electronic Social Networking Media (February 2013)

In re Joyce Nanine McCool
No. 2015-B-0284 (Sup. Ct. La. 6/2015)

- McCool helped start an on-line petition and social media campaign urging people to flood the offices of two judges with communications about a child custody case, which they did.
- McCool was unhappy with prior rulings.
- McCool found to have violated numerous ethical statutes including soliciting others to make ex parte contact with the judges in an effort to influence their decisions.
- McCool was disbarred.

Florida Bar v. Scheinberg

No. SC11-1865, Supreme Court of FL (June 2013)

- Scheinberg was lead prosecutor in a 1st degree capital murder case which led to a guilty verdict and imposition of the death penalty.
- During the trial Scheinberg and the Judge exchanged 471 text messages. Text messages were personal but gave rise to an appearance of impropriety.
- Guilty verdict vacated, Scheinberg suspended from the practice of law for 2 years. Ethics case still pending against the Judge.

Chace v. Loisel,

2014 WL 258620, Case No. 5D13-4449, Fla. 5th Dist. Ct. App. (Jan. 2014)

- Family Court divorce proceeding presided over by Judge Linda Schoonover
- During the proceedings, the Judge sends a Facebook friend request to the wife.
- Upon advice of counsel, wife does not respond.
- Final judgment is entered allocating the wife "most of the marital debt" and giving the husband a large alimony award.

Chace

- Wife's counsel appeals citing similar conduct by this same Judge (See *Hachenberger v. Hachenberger*, 2014 WL 470639 Fla. 5th Dist.Ct.App. (Feb. 2014))
- Appellate Court disqualifies Judge stating that the "friending" of a party in a pending case raises far more concern than a Judge's Facebook friendship with a lawyer.
- Further, wife had a "well founded fear of not receiving a fair trial."

Candor Before The Tribunal

- Rule 3.3(a) - A lawyer shall not knowingly:

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

Caught in a Lie…

- Judge Susan Criss of Galveston, Texas friends all attorneys.
- Attorney who appeared before her and was her "Friend" asked for a continuance due to the death of her father and the need to attend services.
- During the week of the alleged services, Attorney posted a string of status updates on Facebook, detailing her week of drinking, going out and partying.
- On her return to Criss' court, the attorney asked for another continuance – Criss denied it, presented Attorney with print outs from Facebook and reported her to the State Bar.
- http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago/

Maintaining Integrity of the Judicial System

- Rule 8.2(a) – Judicial and Legal Officials -A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer.
- Rule 8.4(d) Misconduct - Engage in conduct that is prejudicial to the administration of justice

Florida Bar v. Sean William Conway
No. SC08-326 (Fla. 2008)

- Broward County criminal defense lawyers created a blog.
- Conway was frustrated with Judge Cheryl Aleman and her giving defense lawyers only one week to prepare for trial.
- Conway created a post titled: "Judge Aleman's New (illegal) One Week to Prepare Policy."

Conway

- Conway made derogatory comments about the Judge.
  - Referred to her throughout the posting as "EVIL UNFAIR WITCH" OR EUW.
  - Stated that
    - she was "seemingly mentally ill"
    - had an "ugly condescending attitude"
    - "is clearly unfit for her position" and
    - "there's nothing honorable about that malcontent"
- Public Reprimand and Costs of $1,200. Violations:
  - Behavior contrary to honesty and justice
  - Statements regarding qualifications of Judge
  - Conduct that is prejudicial to the administration of justice.

Matter of O'Hare
2013 NY Slip Op. 05320 (App. Div. 2013)

- James O'Hare is a New York attorney who was a top lawyer for Children's Services.
- Using his work computer, he created a "sham" profile on a lesbian dating site using the identity of a college acquaintance.
- Acquaintance was getting strange phone calls from individuals who had gotten her information from the site and wished to date her. She contacted police and they tracked the postings to the IP address of O'Hare's work computer.
- O'Hare was terminated from his position and was suspended from the practice of law for one year for "highly inappropriate behavior that adversely reflects on the legal profession."

Anya Cintron Stern

- Public defender in Miami-Dade.
- During a trial break, the family of her client brings him fresh clothing including a pair of leopard print briefs.
- Stern takes a picture of the briefs and posts them on her Facebook page with the caption "Proper attire for Trial"
- Stern posts pictures for Friends only, but a Friend notifies the Judge who declares a mistrial.
- Stern is fired from her position with the Public Defender.
- http://www.abajournal.com/news/article/lawyer_puts_photo_of_clients_leopard-print_undies_on_facebook_murder_mistri/

In the matter of Sarah Peterson Herr
Supreme Court – Kansas (2013)

- Peterson was employed as a Research Attorney for a Kansas Court of Appeals Judge. Peterson is watching in her office at the court the live streaming of the Kansas Supreme Court ethics hearing of former Attorney General Phill Kline.
- Peterson live tweets
  - "Why is Phil Klein smiling? There is nothing to smile about douchebag."
  - "I appreciate the question…but I refuse to answer it. So here's a picture of a pony. – Phil Klein"
  - "I predict that he will be disbarred for a period of not less than seven years."

Peterson

- Peterson thought her tweets were just going out to her followers.
- The next day, she is terminated from her position.
- Peterson charged with professional misconduct:
  - - engaging in conduct involving dishonesty, fraud deceit or misrepresentation
  - - engaging in conduct that is prejudicial to the administration of justice
  - -engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Peterson

- Hearing Panel:
  - Violations sustained – noted that her tweet predicting seven years disbarment was not based on any legal or factual basis.
  - Informal admonition imposed.

Jeffrey Cox

- Indiana Deputy Attorney General
- Engaged in tweets with a reporter on his personal time.
- Cox followed a Mother Jones report on twitter. In response to the reporter's tweet that riot police had been ordered to clear protestors from Wisconsin's capitol, Cox tweeted
  - "use live ammunition" then
  - "you're darn right I advocate deadly force."
- Cox fired; AG says public servants are held to a higher standard.
- http://www.wthr.com/story/14086148/report-indiana-deputy-ag-urged-cops-shoot-protesters

Bruce Raticoff / Gary Sheres

- Raticoff and Sheres were Assistant Public Defenders in Broward County Florida.
- Raticoff posts on Facebook (in part) that "Palestinians" are "the cockroaches of the world."
- Sheres liked the comment and added that "They are the filthy swine they don't eat."
- Both are fired with the Public Defender stating that [public servants] have a higher calling and cannot engage in hate speech.
- http://www.abajournal.com/news/article/two_public_defenders_fired_over_hate_speech_in_facebook_comments

Shirvell v. Dept of Attorney General
308 Mich.App. 702 (2015)

- Andrew Shirvell was an Assistant Attorney General who was blogging about a student leader at the University of Michigan.
- The blog contained various postings concerning the student, his sexual orientation, and his "radical homosexual agenda" referring to him as a "privileged pervert." Another entry contained a rainbow flag with a swastika posted next to a photograph of the student's face.
- Shirvell was terminated for "conduct unbecoming a state employee." He appealed the decision all the way to the Court of appeals which upheld the termination.
- Extensive discussion of public employees first amendment rights in the opinion.

Trouble in New Orleans:

U.S. v. Bowen, 969 F.Supp. 2d 546 (2013)

- Jim Letten, former U.S. Attorney for the Eastern District of Louisiana, resigned in December 2012 during an investigation concerning his top deputies posting anonymous online comments which discussed pending cases, presiding judges, and attacked the objects of their office's investigations.
- Letten, a 2001 appointee of President George W. Bush, was the country's longest-tenured U.S. Attorney before his office was implicated in the investigation into the sources of anonymous online criticism of Fred Heebe, a local landfill owner under federal investigation. Sal Perricone, one of Letten's top deputies, resigned in March 2012 when he was sued by Heebe for defamation consisting of hundreds of online posts regarding Heebe and his company on NOLA.com (the website of The New Orleans Times-Picayune) under the pseudonym "Henry L. Mencken 1951."
- In November of 2012, Letten confirmed that First Assistant U.S. Attorney Jan Mann had also posted numerous comments on the same website; according to Heebe, Mann used the website repeatedly to criticize him and others. Following the filing of a lawsuit by Heebe against Mann, Letten demoted Mann who subsequently retired.
- *John G. Browning, Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media, 3 St. Mary's J. Legal Mal. & Ethics 204, 225 (2013)*

Bowen

- Hundreds of postings by AUSAs on nola.com as comments to news stories. Comments were posted using various screen names and concerned DOJ cases, DOJ investigations, the New Orleans Police department and local judges and officials.
- Long time postings by USAO Senior Litigation Counsel Sal Perricone and First AUSA Jan Mann.
- Six postings by "taint" counsel AUSA Karla Dobinski during the trial encouraging pro-prosecution comments. Taint counsel is responsible for protecting defendant Bowen's constitutional rights and is not to assist the prosecution.
  - "She personally fanned the flames of those burning to see him [defendant Bowen] convicted." p.65

Bowen

- Perricone – "there is an old Italian proverb – the fish rots from the head down."
  - "I did nothing wrong. . . .The right to comment anonymously and the right to allow people to comment anonymously are substantial constitutional rights which are enshrined in our basic law." p. 113 n.120
- Mann – "Fender Lizards" – derogatory term for police groupies
  - Mann asserts that she has dual capacities – a "personal" capacity which allowed her to comment on-line at will and an "official" capacity which did not. p.113 n. 120.

Bowen

- Judge Engelhardt: "Try as it might, the Court cannot fathom why at least three highly intelligent, experienced and respected officials of DOJ thought posting comments publicly online was a good idea, other than to have their corrosive opinions on public display for all to see, read and accept as correct." p.124.
- "[G]rotesque prosecutorial misconduct" p. 7.
- Guilty verdicts vacated and new trial ordered.
- Affirmed by the Fifth Circuit on August 18, 2015.

Best Practices

1. The Internet is not anonymous, nor does it forget. If you can find it, so can others.
2. There is no clear line between your work life and your personal life. Always be honest and respectful in both capacities.
3. Social Media may be subject to Public Records law and also has Open Meeting law implications.
4. Avoid hazardous materials (links to defamatory, harassing or indecent material).
5. Maintain confidentiality.
6. Humor fails, often.

More Best Practices

7. Always trackback (give credit to original sources).
8. Identify yourself, but do not use your title unless it is official business.
9. Do not pat yourself on the back or promote successes.
10. Do not blog, post, tweet when you are angry, frustrated or intoxicated.
11. Do not return fire.
12. Do not offer or appear to offer legal advice.

- http://www.bakerdstreamingvid.com/publications/Baker_Daniels_Social-Media-Policy.pdf/
- http://naag.org/a-deputy-tweet-an-attorney-generals-headache-balancing-personal-social-media-with-public-service.php