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LINK

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The IRS and the “Other” Trust Account Lawyers Can’t Afford to Ignore

by Karen Lapekas, JD, LLM

“State Bars have frequently found that a lawyer’s failure to remit employment taxes constitutes a violation of professional rules of ethics.”

A lawyer is only as good as his word, and his license to practice law is only as good as his trust accounting. Month after month the last pages of The Florida Bar News are full of stories of lawyers being suspended or disbarred from practicing law for failing to account for or diverting client trust funds. The stories are consistent reminders of the dire importance of holding inviolate a client’s funds. Not so frequent, however, are the reminders of the trust account many lawyers must maintain for someone who is not their client: the IRS.

Any lawyer who pays wages to employees—including wages to himself—is required to collect and withhold amounts and keep such amounts in a “special fund *in trust* for the United States.” (Internal Revenue Code § 7501(a)). Lawyers, as employers, are responsible for making either monthly or semiweekly deposits of employment taxes. Employment taxes include (1) employee income tax withholdings; (2) employee FICA tax (Social Security and Medicare) withholdings; and (3) the employer’s share of FICA taxes. The first two amounts, which are withheld from an employee’s wages, are held “in trust” for the IRS and thus referred to as “trust fund taxes.” Any “responsible person” who willfully fails to collect,

truthfully account for, and pay over trust fund taxes, or who willfully attempts to evade or defeat the tax or payment thereof is subject to, *in addition to other penalties provided by law* (e.g. criminal liability), a “trust fund recovery penalty.” The trust fund recovery penalty is equal to the total amount of tax evaded or not collected, accounted for, and paid over. “Responsible person” is not a defined term, but is generally someone who has authority to exercise control over a company’s finances—regardless of whether he did in fact exercise such control. An employer may have several “responsible persons.” Accordingly, an individual may be liable for the trust fund recovery penalty regardless of whether he is a partner, associate, legal assistant, or bookkeeper.

It is not uncommon for law firms—like any other employer—to fail to timely remit employment taxes. However, unlike other employers’ “responsible persons,” lawyers within the delinquent firm must consider the potential consequences to their professional licenses. State Bars have frequently found that a lawyer’s failure to comply with his employment tax obligations constitutes a violation of professional rules of ethics.

A lawyer’s occasional inability to timely pay income taxes may subject him to tax penalties, but not necessarily compromise his license to practice. This failure may be due to a lawyer’s

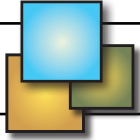
unforeseen financial, business, family, or health problems. A lawyer’s failure to pay employment taxes, however, may implicate his fitness to practice law. This is an understandable difference. The first is a failure to pay a creditor; the second is a failure to remit trust funds to a beneficiary.

A lawyer who controls, or has the ability to control, the financial decisions of his firm should regularly review the firm’s employment tax obligations. It is not only a wise cost-saving measure, but potentially a career-saving measure as well.

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MESSAGE FROM THE CHAIR

by **Damon Glisson**
2015 – 16 GPSSF Section Chair

The business of practicing law is important to all of us, and technology is rapidly becoming the cornerstone of the legal business. If you are practicing solo or in a small firm – and seeking resources and CLEs that will further your practice and increase your tech skills – the Solo & Small Firm Section is the place for you. The key to success for a section that represents attorneys from vastly different practice areas and backgrounds is to create avenues for networking and leadership. To meet this challenge, we need more “new blood” and innovative ways to recruit section members who want to pursue active roles. As your 2015-16 section chair, it is one of my goals to increase participation from our far flung and diverse membership by offering new opportunities for collegiality and advancement. We are in the process of expanding our committees and leadership structures, building attendance at our annual technology conference, and offering local chapter opportunities. There are numerous Florida Bar issues on which our section should represent our membership, and I will consider

presenting any comments you may have at our Executive Council meetings and even to include you on an agenda for timely issues. If you have a suggestion or wish to volunteer, please email me at damon@glisson1.net. I promise each message will get a response. I welcome your ideas and input.

Our section offers a myriad of benefits:

- **Seminars.** The GPSSF Section annually offers five outstanding CLE programs on cutting-edge topics that benefit solo and small firm practitioners. The Solo & Small Firm Technology Conference, the Florida Law Update, an Ethics Update and an Agricultural Law seminar. We also host out-of-state/country CLE seminars in destinations such as Alaska (2015) Ireland, St. Kitts and San Francisco.
- **Publications.** The quarterly LINK newsletter is full of informative articles, useful forms, section news, practice management tips and legal news. Quick-LINK is a bi-weekly e-newsletter

containing five topics in five minutes – including tech tips – to benefit your practice.

- **Solo & Small Firm Conference.** Our annual tech conference has become a can't miss event for solo and small firm practitioners. Next year's conference, “Wild, Wild Tech: Taming the Technology Beast,” features interactive sessions for guests to learn about new software, hardware, gadgets and apps.

We also hope to see you at an upcoming post-EC-meeting reception. When we're in your area for a GPSSF Executive Council meeting, you are invited to join us for a cocktail reception to network with EC members and your local colleagues. Voluntary bar solo and small firm sections and committees will be invited to participate in activities we are holding in your area. This is a great opportunity for you to meet our section's leadership and learn more about how you can get involved.

Thank you for the opportunity to serve.



The Florida Law Practice LINK is prepared and published by The Florida Bar General Practice, Solo & Small Firm Section.

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The Florida Bar Continuing Legal Education Committee, the General Practice, Solo & Small Firm Section, the Environmental & Land Use Law Section, and the Agricultural Law Committee present

Agricultural Law Update 2015

COURSE CLASSIFICATION: INTERMEDIATE LEVEL



Live Presentation: Friday, November 20, 2015

Florida Farm Bureau Federation Building • 5700 SW 34th Street
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Course No. 2012R

7:30 a.m. – 8:00 a.m.

Late Registration

8:00 a.m. – 8:35 a.m.

Welcome

*Michael T. Olexa, Professor and Director, UF/IFAS
Center For Agricultural and Natural Resource Law,
Gainesville*

John Hoblick, President and CEO, FFBF, Gainesville
*Jack Payne, Senior Vice-President for Agriculture and
Natural Resources, UF/IFAS, Gainesville*
*Damon C. Glisson, Chair General Practice, Solo and
Small Firm Section, Apollo Beach*

8:35 a.m. – 9:25 a.m.

Tax and Succession Planning for Agricultural Businesses

Michael D. Minton, Ft. Pierce
Dana M. Apfelbaum, Ft. Pierce

9:25 a.m. – 10:15 a.m.

Employment Laws Affecting Farm Operations

Michael G. Prendergast, Jacksonville

10:15 a.m. – 10:30 a.m.

Break

10:30 a.m. – 11:20 a.m.

Ethics of Real Estate Practice in Farm Land Sales

Eugene E. Shuey, Gainesville

11:20 a.m. – 12:10 p.m.

Amendment One: The Water and Land Conservation Initiative

Stan Bronson, West Palm Beach

12:10 p.m. – 1:00 p.m.

Agricultural Legislative Update

Adam Basford, Gainesville

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ONE LOCATION: (094) FLORIDA FARM BUREAU, GAINESVILLE (FRIDAY, NOVEMBER 20, 2015)

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The Friendly and “Un”Friendly Nature of Social Media in Law Practice

Ten years ago social media was practically non-existent.¹ Today, everywhere you turn people have their heads buried in their phones or computers scrolling through social sites. It is addictive.² Social media has become an instrumental tool for businesses and consumers alike.³ It is an innovative way to reach segments of the population that were previously not easily accessible. In particular, social media use can be an inexpensive way for attorneys to market their firms and quickly communicate with clients.⁴ However, social media has the potential to lead an attorney down the road of malpractice suits and bar grievances. It is extremely important for lawyers to take the necessary precautions to avoid issues such as inadvertent disclosures of confidential information, the unauthorized practice of law, and the creation of unintended attorney-client relationships to avoid the filing of malpractice suits. Lawyers are under a microscope 24 hours per day, 7 days per week, and need to be conscious of the Model Rules of Professional Conduct at all times. This paper will discuss the friendly, and un-friendly consequences associated with social media use and introduce lawyers to methods that will help them remain ethical, maintain the integrity of the profession and prevent lawsuits or bar discipline.

Part I of this paper will define social media. In addition, this section will discuss various social media sites including, but not limited to, those tailored specifically to the legal profession. Part II of this paper will outline the advantages and disadvantages associated with law firms' social media usage. Part III discusses ways to avoid legal malpractice and the types of disciplinary action that can be taken if an attorney violates the rules of ethics while using social media. Part IV of this paper will provide ways to use social media as an end to achieve the means of increasing firm's marketability without

negatively impacting the law practice. Part V will conclude this paper.

I. WHAT IS SOCIAL MEDIA?!

According to Webster's Dictionary, the first known use of social media was in 2004.⁵ Social media is defined as “forms of electronic communications (as Websites for social networking and micro blogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).”⁶ The Law Dictionary refers to social media as “[a]ny cell phone or internet based tools and applications that are used to share and distribute information.”⁷ Additionally, social media can be defined as “a social instrument of communication.”⁸ Social media gives individuals an opportunity to form relationships based on personal interest, mutual friends, academics, and business sectors.⁹

There are a variety of social media websites.¹⁰ Some focus on building personal relationships, while others focus on building business relationships and provide information specific to various professions.¹¹ For instance, one of the most popular social media sites, Facebook, is a place to communicate with friends and family by sharing photos and comments.¹² Facebook has certain features that allow individuals to hold private chats, post to the walls of friends, create support groups, and business pages, which in turn enables an individual to use the site to market their business.¹³ Facebook's audience includes a multitude of individuals from all walks of life.¹⁴

Other popular social sites are Instagram and Twitter. Instagram¹⁵ allows users to share photos, while Twitter¹⁶ has the capacity to allow a person to consistently post what are called “Tweets”¹⁷ every second of the day, non-stop. Aside from social media sites that are frequented by persons based on their personal interests, there are sites like LinkedIn that are

focused on networking and building business relationships.¹⁸ In addition to the social sites previously mentioned, there are websites and blogs¹⁹ that cater to the needs of those in search of legal advice, such as, *Avvo*,²⁰ *Defending People*,²¹ and *Technology & Marketing Law Blog*.²² These law specific social media platforms help lawyers attract potential clients and display their legal knowledge.²³

II. FRIENDLY OR NOT SO MUCH

There are many reasons to love social media. On the flip side, there are just as many reasons to hate it. But at the end of the day, people seem to be unable to function without social media, which is a benefit for attorneys knowledgeable in the use of social media sites. It is in the best interest of every attorney to take full advantage of opportunities provided by social media use. Nevertheless, it is also in an attorney's best interest to identify the potential pitfalls presented by social media interaction.

A. SOCIAL MEDIA ADVANTAGES

a. Inexpensive Marketing Tool

Social media is an alternative to law firms' traditional way of marketing.²⁴ It is a cost effective way for firms to reduce their expenditures,²⁵ especially since most social media sites are completely free.²⁶ The Model Rules of Professional Conduct (“MRPC”) permits firms to advertise their services via social media.²⁷ In addition, the MRPC authorizes spending a reasonable amount on advertisements.²⁸ There are however limitations on the context of statements a lawyer can make both on and off social media.²⁹ For example, a lawyer must refrain from making false or misleading statements.³⁰ Lawyers who deviate from this rule run the risk of increasing the likelihood of

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discipline from their state bar, as well as potential law suits from disgruntled clients. One caveat to using social media for marketing and advertising is the possible solicitation violations.³¹ Lawyers are prohibited from directly soliciting employment via social media, if the lawyer seeks pecuniary gain, or the prospective client has told the lawyer not to contact her.³² However, a lawyer could avoid ethical violations by waiting thirty (30) days after a person is involved in an accident to solicit employment, or the lawyer can wait for a referral.³³ If the lawyer fails to follow the MRPC she can be disciplined.³⁴

b. Break the Ice

Social media is an avenue that has the potential to break the ice and make the initial in person attorney client contact pleasant.³⁵ Opening up to a complete stranger can sometimes be awkward, especially during a time when a person is experiencing turmoil. An attorney's social media account allows a potential client to gauge the attorney and can eliminate nerves.³⁶ It presents the lawyer as approachable and human. Perhaps lawyers simply based on their line of work intimidate some prospective clients. A social media account has the potential to eradicate this notion, which can be helpful to both the client and the lawyer.³⁷ Social media serves the purpose of easing the anxiety of clients.³⁸

c. Recover the Discoverable

A competent lawyer should exhaust all resources when representing a client, including information on social media.³⁹ There is an overwhelming amount of discoverable evidence on Facebook, Instagram and Twitter.⁴⁰ Lawyers who do not use social media to research run the risk of committing malpractice.⁴¹ Social media has made it easy for lawyers to investigate the activities of their clients, opposing parties, jurors, and witnesses.⁴² For instance, a California prosecutor was able to obtain a jail sentence rather than probation for a woman convicted in a drunk driving accident that killed

her passenger when information from her social media account was presented to the judge and showed her party lifestyle.⁴³ The MRPC requires an attorney to competently represent clients.⁴⁴ In addition to malpractice, a lawyer runs the risk of being found incompetent per the MRPC if all available avenues including social media are not being used to gather crucial information.⁴⁵

B. SOCIAL MEDIA DISADVANTAGES

a. Keeping It Confidential

The simplicity and accessibility of social media makes it an attractive way to communicate with clients. Phone calls and office visits can sometimes last longer than intended. But, with the advent of social media, a lawyer can send a quick email to a client, which saves the client money and the lawyer time. However, there is a downfall to using social media as opposed to the more conventional way of attorney-client communication.⁴⁶ Once a message is sent there is practically no way to intercept it before it reaches the recipient. Lawyers are humans and humans make mistakes. Social media has the tendency to increase missteps. For example, a lawyer can inadvertently post confidential information to the Facebook wall of a client instead of in their inbox, or disclose privileged information without the client's consent.⁴⁷ The inevitable happened in Illinois. An Illinois public defender betrayed client confidence and revealed identifiable confidential information about the case on her blog.⁴⁸ She also made the mistake of bad mouthing two judges.⁴⁹ This lawyer lost her job and was suspended from the bar for 3 months.⁵⁰ Of course, a client can also post confidential information on their social media sites and risk waiving the attorney-client privilege.⁵¹ As such, it is of vital importance that an attorney advises clients on the potential of accidentally harming their case through the use of social media. Nonetheless, the benefits of social media outweigh its shortcomings, which can be reduced if proper care is taken.

b. Creation of Attorney-Client Relationship

Attorneys should be cautious of

forming unintended attorney-client relationships through social media. Social media, in particular "blawg"⁵² websites, makes it extremely likely for attorneys to form unintended client relationships.⁵³ Attorney-client relationships can be formed when an attorney begins to answer specific legal questions of blawg followers, which could lead a reasonable person in the follower's position to believe the attorney represents them.⁵⁴ The same can happen on Facebook, YouTube, or Instagram. One would presume an attorney-client relationship is not formed until the attorney agrees to the representation.⁵⁵ This is not necessarily accurate. An attorney-client relationship is formed when "[t]here is a mutual understanding that the client is going to confide in the attorney and the attorney is going to listen."⁵⁶ It is the sole responsibility of the attorney to either decline or accept representation of a potential client.⁵⁷ Failure to do so can result in unintentionally creating an attorney-client relationship. Equally important, speaking with individuals via social media has the potential to disqualify a whole firm from representing a client because of conflicts of interest.⁵⁸ Moreover, this includes the destruction of relationships a lawyer or firm has with a current or past client. Another pitfall is obtaining confidential information from a person who a lawyer cannot represent due to conflicts.⁵⁹ Further, lawyers place themselves at risk of malpractice if they lead a person to believe he or she represents them.⁶⁰ Lawyers must be cautious when providing legal advice on social media.⁶¹

c. Blurred Lines

Lines can become blurry⁶² when an attorney offers legal advice to someone via social media without fully assessing the situation.⁶³ Social media easily allows attorneys to connect with individuals in every state and all over the world. What may be sound advice for a person in one state may be the complete opposite in another state or even another country.⁶⁴ Detrimental outcomes may occur if someone from another state relies on information given to them by an attorney who knows nothing about the laws in their states and is not authorized

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SOCIAL MEDIA

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to provide advice in their state. The MRPC forbids an attorney from engaging in the unauthorized practice of law.⁶⁵ Simply communicating with a client in another state places an attorney in jeopardy of being disciplined.⁶⁶ There really is no way to get around the unauthorized practice of law in a state, unless local counsel is engaged or permission is given by the state for the lawyer to practice law there temporarily,⁶⁷ but if the lawyer plans to practice in that state often it is best to get licensed there.

III. AVOIDING MALPRACTICE & DISCIPLINE

The potential negative implications of using social media in a way that is contrary to the MRPC can be serious.⁶⁸ A lawyer is required to engage in conduct that reflects positively on the profession and any illegal, dishonest, fraudulent or deceitful behavior is forbidden.⁶⁹ Attorneys should remain cautious. It is imperative to maintain the integrity of the profession in addition to promoting one's own law practice. A lawyer is not exempt from the MRPC when using social media. Furthermore, a lawyer is obligated to report misconduct she observes on social media.⁷⁰ Failure to do so is a violation of the MRPC.⁷¹ It would not be wise for lawyers to post themselves

participating in negative activity, as this would reflect negatively on the profession. At a minimum, a lawyer can be reprimanded. The Florida Bar reprimanded a lawyer after he wrote a blog about a judge's mistreatment of lawyers and her unreasonable rulings.⁷² Lawyers can also be placed on probation or suspended.⁷³ Even worse an attorney could be disbarred.⁷⁴ Nevertheless, malpractice and discipline can be avoided by obeying the MRPC.

IV. THE MORE YOU KNOW, THE MORE YOU OWE: RECOMMENDATIONS

The public has a somewhat cynical view of lawyers.⁷⁵ Social media is a forum with the capacity to promote individual law practices while maintaining and promoting the integrity of the legal profession. First and foremost, lawyers must be aware of the rules and limitations that apply to social media usage. In addition, a lawyer is prohibited from doing indirectly what she cannot do directly. For example, a lawyer cannot befriend or communicate with jurors in person, which in turn means she cannot friend and communicate with jurors via social media.⁷⁶ It is difficult to sometimes determine when a lawyer has crossed the line because there are no specific MRPC dealing with social media use.

At all cost a lawyer should have a duty to keep abreast of updates to the MRPC because they are doing their clients a disservice if they do not.

Lawyers should consider creating a social media team devoted to monitoring proposed and adopted ethics rules to ensure they are aware of changes made to the MRPC. It would also be beneficial to host social media etiquette seminars within the firm to educate all staff members. Ultimately an attorney is responsible for the actions of their subordinates.⁷⁷ These seminars can highlight the importance of not speaking of cases outside of the law firm. Confidential information could be unintentionally exposed to a third party if they have access to an employee's, social media account. Therefore, it is in employee's best interest to refrain from communicating firm business on social media unless they are positive their work area is secure. If by chance a lawyer learns one of their subordinates has exposed confidential information on social media, the lawyer should act with reasonable diligence and promptness to remedy the harm. It may be necessary for the lawyer to terminate the employee who released the confidential information. Also, the firm should keep clients well-informed of what has transpired.⁷⁸ Notably, clients are just as likely to reveal confidential information as firm employees.⁷⁹

Thus, it is wise for lawyers to educate their clients on social media usage when litigation is pending.⁸⁰ Likewise, it is imperative that lawyers act with extreme cautiousness when advising clients on social media usage, as one mistake can be costly.

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SOCIAL MEDIA

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A Virginia lawyer learned the hard way.⁸¹ In *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013),⁸² a lawyer along with his client received hefty sanctions for removing content from the client's social media page.⁸³ Another Virginia attorney was suspended for five (5) years after advising a client to clean their Facebook page up, which resulted in the removal of information that was requested by opposing counsel.⁸⁴ The Florida Bar Ethics Committee does not forbid advising clients on social media usage, it does however caution on destroying evidence.⁸⁵ So long as a lawyer preserves social media evidence in the same manner as print evidence there will be no issues.⁸⁶ Privacy settings are not the enemy, but destruction of evidence is. Therefore, lawyers should make it a priority to advise their clients on social media use during their initial meeting because failure to do so calls into question the lawyer's competency.⁸⁷ Social media use can seem complex when legal aspects are considered. But as lawyers begin to peel away the layers by educating themselves on legal ethics as it pertains to social media the complexity disappears.

Furthermore, lawyers must remember when using social media in their capacity as counselor and advisor they cannot interact with "friends"⁸⁸ in the same manner they did before being licensed. Almost every person on a lawyer's social media account is a potential client, which presents potential conflict issues. Lawyers can rid themselves of conflict⁸⁹ issues by taking a few moments to run potential clients through a conflict check before they respond to any legal inquiries. A lawyer could sever ties with current clients and prevent their firm from representing attractive clients in the future due to conflicts. Lawyers can use the mutual friend features on social media sites as a way to perform conflict checks in conjunction with running a search through their firm's database.⁹⁰ Simple awareness can prevent an attorney from experiencing conflict of interest issues.

V. CONCLUSION

Social media should be viewed as a way to enhance the overall performance of a law firm while remaining ethical, representing clients, and avoiding legal malpractice. It is hard to imagine life without social media and social media will probably never disappear. The legal issues we see today will probably be minute compared to the issues that will arise in the years to come as technology continues to progress. The law is exacting and ever changing. It is the primary responsibility of lawyers to stay current on new laws. Initially social media is friendly, it only becomes unfriendly when a lawyer defies all rules of ethics and disregards the integrity of the profession. Others will not respect lawyers if they do not show respect for their own niche. Blocking social media out of law practice is not the answer, embracing it with restraints may suffice. Though rules limit what a lawyer can and cannot do, social media is still necessary for lawyers to adequately represent their clients and market their firms.

Endnotes:

- 1 Renee, *Were We Really Living Without Social Media 10 Years Ago?*, CONTENTEQUALSMONEY.COM BLOG (Apr. 2, 2012), <https://contentequalsmoney.com/were-we-really-living-without-social-media-10-years-ago/> (discusses how social media did not exist more than 10 years ago).
- 2 This article analyses the results of a study that found social media is more "difficult to resist than cigarettes or alcohol." Zach Epstein, *Facebook and Twitter are More Addictive Than Cigarettes or Alcohol, Study Finds*, FOX NEWS, <http://www.foxnews.com/tech/2012/02/06/facebook-and-twitter-are-more-addictive-than-cigarettes-or-alcohol-study-finds/> (last visited Mar. 9, 2015).
- 3 Maria Kantzavelos, *Social Media: Marketing Your Practice via Social Media*, 4 ILL. B.J. 180 (2013) (discussing how social media is a way for lawyers to connect with potential clients, other attorneys and build their network.).
- 4 *See generally id.* (discussing how lawyers can gain more referrals and communicate with potential clients by increasing their presence on social media.).
- 5 MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Feb. 28, 2015).
- 6 *Id.*
- 7 THE LAW DICTIONARY, *What is Social Media?*, <http://thelawdictionary.org/social-media/> (last visited Feb. 28, 2015).
- 8 ABOUT TECH, *What is Social Media*, <http://webtrends.about.com/od/web20/a/social-media.htm> (last visited Feb. 28, 2015).
- 9 Steven C. Bennett, *Ethics of Lawyer Social*

Networking, 73.1 ALB. L. REV. 113, 115 (2009).
10 EBIZMBA, *Top 15 Most Popular Social Networking Sites*, <http://www.ebizmba.com/articles/social-networking-websites> (last visited Mar. 9, 2015); see generally Nicola A. Boothe-Perry, *The "Friend"Ly Lawyer: Professionalism and Ethical Considerations of the Use Of Social Networking During Litigation*, 24 U. FLA. J.L. & PUB. POL'Y 127, 130-31 (2013) (stating "[t]he number of social networking users is estimated to exceed 2 billion.").

11 ABOUT TECH, *supra* note 8.

12 *See generally id.*

13 ABOUT TECH, *Facebook Profile: What is Facebook? Why Should You Use Facebook*, <http://webtrends.about.com/od/profiles/fr/facebook-profile-what-is-facebook.htm> (last visited Mar. 9, 2015).

14 *Id.*

15 "Instagram is a fun and quirky way to share your life with friends through a series of pictures." INSTAGRAM, <https://instagram.com/about/faq/> (last visited Mar. 3, 2015).

16 "Twitter is an information network made up of 140-character messages called Tweets. It's an easy way to discover the latest news related to subjects you care about." TWITTER, *Getting Started With Twitter*, <https://support.twitter.com/articles/215585-getting-started-with-twitter> (last visited Mar. 3, 2015).

17 MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/tweets> (last visited Mar. 3, 2015) (defining a "tweet" as "a post made on the Twitter online message service").

18 "LinkedIn is especially important for those in recruiting, marketing/sales and service industries, ranging from financial to health/medical to legal, as those are the top industries on the site." Laura Shin, *How to Use LinkedIn: 5 Small Steps to Career Success*, FORBES (June 26, 2014), <http://www.forbes.com/sites/laurashin/2014/06/26/how-to-use-linkedin-5-smart-steps-to-career-success/> (last visited Mar. 22, 2015).

19 A.B.A.J., *The 2014 ABA Journal Blawg 100*, <http://www.abajournal.com/blawg100/> (last visited Feb. 28, 2015).

20 AVVO, http://www.avvo.com/about_avvo (last visited Mar. 9, 2015) (a blog where people can find lawyers in their area to help resolve their legal issues).

21 Defending People, <http://blog.bennettandbennett.com/disclaimer> (last visited Mar. 9, 2015) (blog website dedicated to providing information to people charged with criminal offenses).

22 TECHNOLOGY & MARKETING LAW BLOG, <http://blog.ericgoldman.org> (last visited Feb. 28, 2015).

23 INTERNET LAVA, <http://www.internetlava.com/AttorneyLawyer/SocialMediaMarketing.aspx> (last visited Mar. 22, 2015) (stating social media allows attorneys to promote their practice online while attracting new clients and networking with other legal professionals); see also Chris Vaughn, *5 Ways Social Media Can Enhance Your Practice*, ATTORNEY AT LAW MAGAZINE, <http://www.attorneyatlawmagazine.com/triangle-edition/5-ways-social-media-can>

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enhance-your-practice/ (last visited Mar. 23, 2015).

24 “Social media is generally free to use and it provides attorneys a means to attract clients without spending precious marketing dollars.” Thomas Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong*, WISCONSIN LAWYER, <http://www.wisbar.org> (last visited Mar. 8, 2015); see also Boothe-Perry, *supra* note 10 at 131 (concluding “[w]ith billions of people producing and consuming media content through [social network sites], there has been a growing trend of law firms’ use of [social network sites] as a marketing tool and litigators’ inclusion of discovery from [social network sites]”; as a part of their discovery protocol.”).

25 *Id.*

26 *Id.*

27 MODEL RULES OF PROF’L CONDUCT R. 7.2 (2013) (dealing with advertising).

28 *Id.*; see also MODEL RULES OF PROF’L CONDUCT R. 7.4 (2013) (dealing communication of fields of practice).

29 MODEL RULES OF PROF’L CONDUCT R. 7.1 (2013) (dealing with communication of lawyer’s services).

30 *Id.*

31 MODEL RULES OF PROF’L CONDUCT R. 7.3 (2013) (providing “A lawyer shall not by in-person,

live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted: is a lawyer; or has a family, close personal, or prior professional relationship with the lawyer.”) [hereinafter *MRPC* 7.3].

32 *See id.*

33 *See id.*

34 *See id.*

35 Carolyn Elefant & Nicole Black, *Smart Marketing: Ideas You Can Use to Get Your Firm Back in the Game*, LAW PRACTICE, http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v36_is3_pg40.html (last visited Mar. 9, 2015) (explaining how social media conversations can make you seem like you have known a person for years, which breaks barriers leading up to in-person meetings.). See also Vaughn, *supra* note 23.

36 *Generally see id.*

37 MODEL RULES OF PROF’L CONDUCT R. 1.4 (2013) (dealing with communications) [hereinafter *MRPC* 1.4].

38 Elefant, *supra* note 35.

39 Carole Levitt & Mark Rosch, *Social Media Evidence: Ignore at Your Own Risk*, ABA LAW PRACTICE TODAY (Feb. 13, 2015), <http://www.lawpracticetoday.org/article/social-media-evidence/> (last visited Mar. 9, 2015).

40 A lawyer was able to locate an individual who had been evading service through the woman’s Facebook profile. The article also

discusses how another attorney was able to locate a witness through a third parties social media profile.

41 *See id.* (discussing lawyer’s duty to be aware of useful information on social media to competently represent clients).

42 An attorney learned a juror had lied about his prior litigation history after a verdict was rendered upon doing a electronic search. The court set aside the verdict and told counsel the burden is on him to conduct thorough reviews of potential jurors, which include internet research. Maryt Fredrickson, *Social Media: Competence, Diligence and Other Ethical Issues*, 37 APR WYO. LAW. 28, 29-30 (2014).

43 Levitt, *supra* note 39.

44 MODEL RULES OF PROF’L CONDUCT R. 1.1 (2013) (dealing with competence) [hereinafter *MRPC* 1.1].

45 Fredrickson, *supra* note 42 at 28 (providing lawyers “[s]hould keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”).

46 Kevin O’Keefe, *Law Firms Curtail Traditional and Embrace Digital Marketing: Survey*, REAL LAWYERS HAVE BLOGS (Aug. 20, 2012), <http://kevin.lexblog.com/2012/08/20/law-firms-curtail-traditional-and-embrace-digital-marketing-survey/> (last visited Mar. 2, 2015).

47 An Illinois assistant public defender was suspended from practice for 60 days for blogging that a client committed perjury. Christina Vassiliou ET AL., *10 Tips for Avoiding Ethical Lapses When Using Social Media*, BUSINESS LAW TODAY, http://www.americanbar.org/publications/blt/2014/01/03_harvey.html (last visited Mar. 30, 2015).

48 Helen Gunnarsson, *Friending Your Enemies, Tweeting Your Trials: Using Social Media Ethically*, 99 ILL. B.J. 500 (2011), available at <http://www.isba.org/ibj/2011/10/frinding-yourenemiestweetingyourtri> (discussing ways lawyers can ethically use social media).

49 *Id.*

50 *Id.*

51 Jennifer Neumann, *United States: Potential Loss of Attorney Client Privilege Yet Another Social Media Blogging Concern for Employers*, FOLEY & LARDNER (Feb. 2, 2011), <http://www.mondaq.com/unitedstates/x/121758/Potential+Loss+Of+AttorneyClient+Privilege+Yet+Another+Social+Media+Blogging+Concern+For+Employers> (last visited Mar. 22, 2015); see also MODEL RULES OF PROF’L CONDUCT R. 1.6 (2013) (holding a client can voluntarily waive the attorney-client privilege).

52 MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/blawg> (last visited Mar. 2, 2015) (defined as “a blog that focuses on legal issues and stories.”).

53 Generally, on blawg websites attorneys provide generalized legal advice on various areas of law. AVVO, *supra* note 20.

54 Evan Loeffler, *How to Avoid the Surprise Attorney-Client Relationship*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org> (last visited Feb. 28, 2015).

55 *Id.*

56 *Id.*

57 *Id.*

58 MODEL RULES OF PROF’L CONDUCT R. 1.7, 1.10 (2013) (dealing with client conflicts) [hereinafter *MRPC* 1.7].

59 *See id.* (prohibits a lawyer from representing a client with a concurrent conflict that will adversely affect the interest of another client).

60 MODEL RULES OF PROF’L CONDUCT R. 1.18, 1.2 (2013) (dealing with the attorney-client relationship).

61 *See id.*

62 THE FREE DICTIONARY, <http://www.thefreedictionary.com/blurred> (last visited Mar. 2, 2015) (a blurred line is defined as “[s]omething that is hazy and indistinct to the sight or mind.”).

63 A lawyer is prohibited from practicing law in a state where they are not licensed. It is the lawyer’s responsibility to ensure the advice she gives pertains to the state she is licensed in. If it is not, she should abstain from offering advice. MODEL RULES OF PROF’L CONDUCT R. 5.5 (2013) [hereinafter *MRPC* 5.5].

64 There are grave disparities in the way property is distributed in California and Florida. California is a community property state and Florida is an equitable distribution state. Thus, a prospective client in Florida seeking divorce advice from an attorney via social media can be detrimental if the lawyer is licensed in California because the laws are different. See generally LEGALZOOM, <http://info.legalzoom.com/divorcing-california-vs-florida-21278.html> (last visited Mar. 9, 2015).

65 *MRPC* 5.5, *supra* note 63.

66 *Id.*

67 *Id.*

68 MODEL RULES OF PROF’L CONDUCT R. 8.4 (2013) (dealing with misconduct) [hereinafter *MRPC* 8.4].

69 *Id.*

70 MODEL RULES OF PROF’L CONDUCT R. 8.3 (2013) (dealing with attorney’s duty to report misconduct).

71 *Id.*

72 Keith Kanouse Jr., *Balancing Judicial Criticism Rules With First Amendment Protections in the Internet Age*, TECHNOLOGY AND JUSTICE, (Aug. 13, 2013), <http://technologyandjustice.com/tag/judicial-criticism/> (last visited Mar. 26, 2015) (the lawyer violated the Rule Regulating the Florida Bar 3-4.2, 3-4.3, 4-8.2(a), 4-8.4(a), 4-8.4(d)).

73 ABA, *Model Rules for Lawyer Disciplinary Enforcement*, http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_10.html (last visited Mar. 9, 2015).

74 *Id.*

75 *See generally* Boothe-Perry, *supra* note 10 at 129 (mentioning the poor perception the public has of lawyers.).

76 ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 466 (2014) (permitting lawyers to passively review juror’s social media accounts while prohibiting them from directly communicating with jurors.). See also MODEL RULES OF PROF’L CONDUCT R. 3.5(b) (2013).

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77 MODEL RULES OF PROF'L CONDUCT R. 5.1 (2013) (governing the responsibilities of a partner or supervisory lawyer); *see also* MODEL RULES OF PROF'L CONDUCT R. 5.2 (2013).

78 MRPC 1.4, *supra* note 37 (holding a lawyer should keep their client reasonably informed on matters concerning their case to ensure the client makes informed decisions regarding their representation).

79 Neumann, *supra* note 51 (mentioning a client in California who voluntarily waived the attorney-client privilege when she disclosed her attorney's litigation plan via email, blogs and the internet); *see also* Maryt, *supra* note 42 at 29 (advising attorneys to warn clients that the attorney-client privilege can be waived if they post conversations had between the lawyer and client on social media).

80 Lawyers should refrain from having their clients destroy evidence, but lawyers are encouraged to advise clients on increasing their privacy setting during litigation. *See* Professional Ethics of the Florida Bar, 14-1 Proposed Advisory Op. (proposed Jan. 23, 2015), *available at* [http://www.floridabar.org/DIVEXE/RRTFBResources.nsf/Attachments/8E73C71636D8C23785257DD9006E5816/\\$F](http://www.floridabar.org/DIVEXE/RRTFBResources.nsf/Attachments/8E73C71636D8C23785257DD9006E5816/$F)

ILE/14-01%20PAO.pdf?OpenElement [hereinafter PEFB].

81 R. REGULATING FLA. BAR 4-3.4(a) (2015) (holding a lawyer is prohibited from “[u]nlawfully obstruct[ing] another party’s access to evidence or otherwise unlawfully alter[ing], destroy[ing], or conceal[ing] a document or other material that the lawyer knows or reasonably should know is relevant . . .”).

82 Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. 2013); *see also* Jett Hanna, *Social Media, Lawyer Liability and Ethics*, <http://www.aceds.org/wp-content/uploads/2013/04/Jett-Hanna-Social-Media-Lawyer-Liability-and-Ethics-Paper.pdf> (last visited Mar. 25, 2015) (discussing how a Facebook ip log can be requested from opposing parties to show when content has been deleted from Facebook and when the account was deactivated).

83 A lawyer was fined \$542,000 and his client was fined \$180,000 after the lawyer lied in a discovery request by saying the client did not have social media accounts after he had already instructed the client to deactivate all accounts. *See id.*; *see also* Debra Weiss, *Lawyer Agrees to Five-Year Suspension for Advising Client to Clean Up His Facebook Photos*, A.B.A. J. (Aug 7, 2013), http://www.abajournal.com/news/article/lawyer_agrees_to_five-year_suspension_for_advising_client_to_clean_up_his_f/ (last visited Mar. 26, 2015) (mentioning the Virginia lawyer in *Allied Concrete Co. v.*

Lester was suspended from practice for 5-years for violating the MRPC governing “[c]andor toward the tribunal, fairness to opposing party and counsel, and misconduct.”).

84 In the Matter of Matthew B. Murray, No. 11-070-088405, 2013 WL 5630414, at *1 (Va. St. Disp. July 17, 2013).

85 “The committee is of the opinion that the general obligation of competence may require the inquirer to advise the client regarding removal of relevant information from the client’s social media pages, including whether removal would violate any legal duties regarding preservation of evidence . . .” PEFB, *supra* note 80.

86 *See id.*

87 MRPC 1.1, *supra* note 44.

88 A social media friend is a person added to your social media website. SHEAR ON SOCIAL MEDIA LAW, <http://www.shearsocialmedia.com/2010/01/legal-definition-of-facebook-friend.html> (last visited Mar. 8, 2015).

89 MRPC 1.7, *supra* note 58.

90 Thomas Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, 85 WISCONSIN LAWYER 5 (2012) (suggesting that lawyers should make sure they know who they are communicating with before rendering legal advice; make sure the person is who they say they are and no conflict exist).



2015-2016

CALENDAR

GENERAL PRACTICE, SOLO & SMALL FIRM SECTION

<u>November 6, 2015</u> Executive Council Meeting <i>Tampa</i>	<u>February 26, 2016</u> Executive Council Meeting <i>Tallahassee</i>
<u>November 20, 2015</u> Agricultural Update <i>Gainesville</i>	<u>April 8-9, 2016</u> Long Range Planning Meeting <i>Nashville, TN</i>
<u>January 22-23, 2016</u> Solo & Small Firm Conference <i>Orlando</i>	<u>May 25-30, 2016</u> Out of Country CLE Trip <i>Amsterdam, Holland</i>