

SHOOK
HARDY & BACON

Lawyer Ethics: E-Communications, Social Media, & the Internet

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Ethical Challenges from Social Media

- Mistakes amplified and easy to make
 - Informal and unguarded communication
 - Instantaneous expectations
 - Myth of privacy and impermanence
- Addictive—temptation to provide TMI



What Not to Do



A screenshot of a Twitter profile for Steve Regan Esq. The profile picture is a blue square with a white egg shape inside. The name is "Steve Regan Esq" and the handle is "@SteveRegan4". The bio reads: "Real estate lawyer specializing in real estate finance, acquisition, disposition, leasing and oil and gas transactions. Pittsburgh, PA". The statistics show 2,093 tweets, 542 following, and 116 followers. A "Follow" button is visible.

Steve Regan Esq
@SteveRegan4
Real estate lawyer specializing in real estate finance, acquisition, disposition, leasing and oil and gas transactions.
Pittsburgh, PA

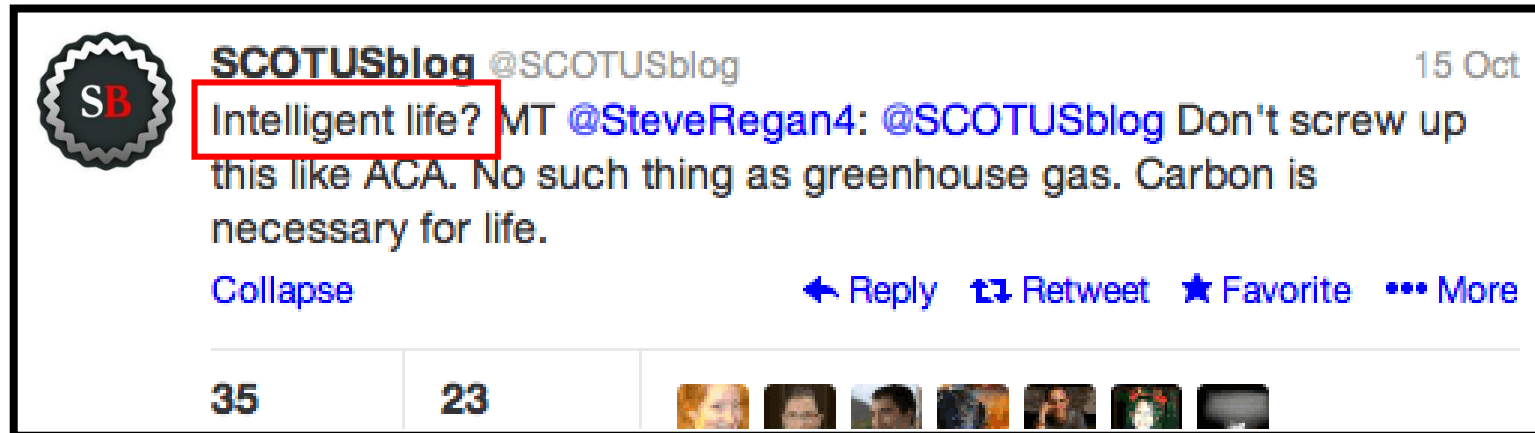
2,093 TWEETS 542 FOLLOWING 116 FOLLOWERS

[Follow](#)



What Not to Do

“**@SteveRegan4: @SCOTUSblog** – Don’t screw up this like [Affordable Care Act]. No such thing as greenhouse gas. Carbon is necessary for life.”



A screenshot of a tweet from the account SCOTUSblog (@SCOTUSblog), dated 15 Oct. The tweet text is "Intelligent life? MT @SteveRegan4: @SCOTUSblog Don't screw up this like ACA. No such thing as greenhouse gas. Carbon is necessary for life." The words "Intelligent life?" are enclosed in a red rectangular box. Below the text are interaction options: "Collapse", "Reply", "Retweet", "Favorite", and "More". At the bottom, there are statistics for 35 replies and 23 retweets, followed by a row of seven small profile picture icons.

What Not to Do



The image shows a screenshot of a Twitter profile for SCOTUSblog. The profile picture is a circular logo with the letters 'SB' in red and white. The name 'SCOTUSblog' is displayed in bold black text with a blue verification checkmark to its right. Below the name is the handle '@SCOTUSblog'. In the top right corner of the profile area, there is a 'Follow' button with a blue bird icon. The profile bio is empty. The date '8:51 PM - 15 Oct 2013' is visible below the bio. At the bottom of the profile, it shows '20 RETWEETS' and '34 FAVORITES' in bold black text. To the right of these statistics are three icons: a left-pointing arrow, a circular refresh icon, and a star icon.

Mis-Tweet by Reed Smith Partner Highlights Social Media Ethics Issues

by Micah Buchdahl



Legal Cheek

Reed Smith partner tells blogger to 'Go f@ck yourself and die' in Twitter meltdown

By Alex Aldridge on Oct 18 2013 9:23am



Reed Smith Atty Charges Into Social Media Minefield

By Andrew Strickler

Law360, New York (October 21, 2013, 8:50 PM EDT) -- A Reed Smith partner's inadvertent master class on how not to use social media when tweeting on controversial political and legal topics and hurled profanity on Supreme Court blog — another sign that many attorneys remain clueless about online behavior, experts say.

BUSINESS INSIDER

BigLaw Firm Takes Measures To Deal With Partner's Vulgar Tweet At Blog

Erin Fuchs | Oct. 22, 2013, 10:55 AM | 3,021



Strategist

The FindLaw Law Firm Business Blog

'Go F Yourself and Die': Lawyers Really Shouldn't Rage Tweet

By William Peacock, Esq. on October 16, 2013 11:57 AM

There's a running Twitter joke with our friends at @SCOTUSblog. Because their name is so similar to the nation's high court, many people mistake them for the real thing and express their anger.

Taking the Heat for a Tweet

You'd think that attorneys, more than anyone, would know to avoid social media land mines. Turns out they don't.



Tweets of Wrath: Unethical or Just Hilarious?

by Brian Focht | Oct 17, 2013 | Social Media | 1 comment

Pittsburgh Post-Gazette

Pittsburgh lawyer aims outburst at top court, misfires

News



Reed Smith partner in swearsy Twitter rant
18 October 2013

A partner at Reed Smith has attracted controversy

The Case of the Kansas Research Attorney



Sarah @sparklylillife

9h

Holy balls. There are literally 15 cops here for the Phil Kline case today. Thus, I actually wore my badge.

Expand



Sarah @sparklylillife

7h

You can watch that naughty naughty boy, Mr. Kilein, live!

live.kscourts.org/live.php

Expand



Sarah @sparklylillife

6h

Why is Phil Klein smiling? There is nothing to smile about, douchebag.

Expand



Sarah @sparklylillife

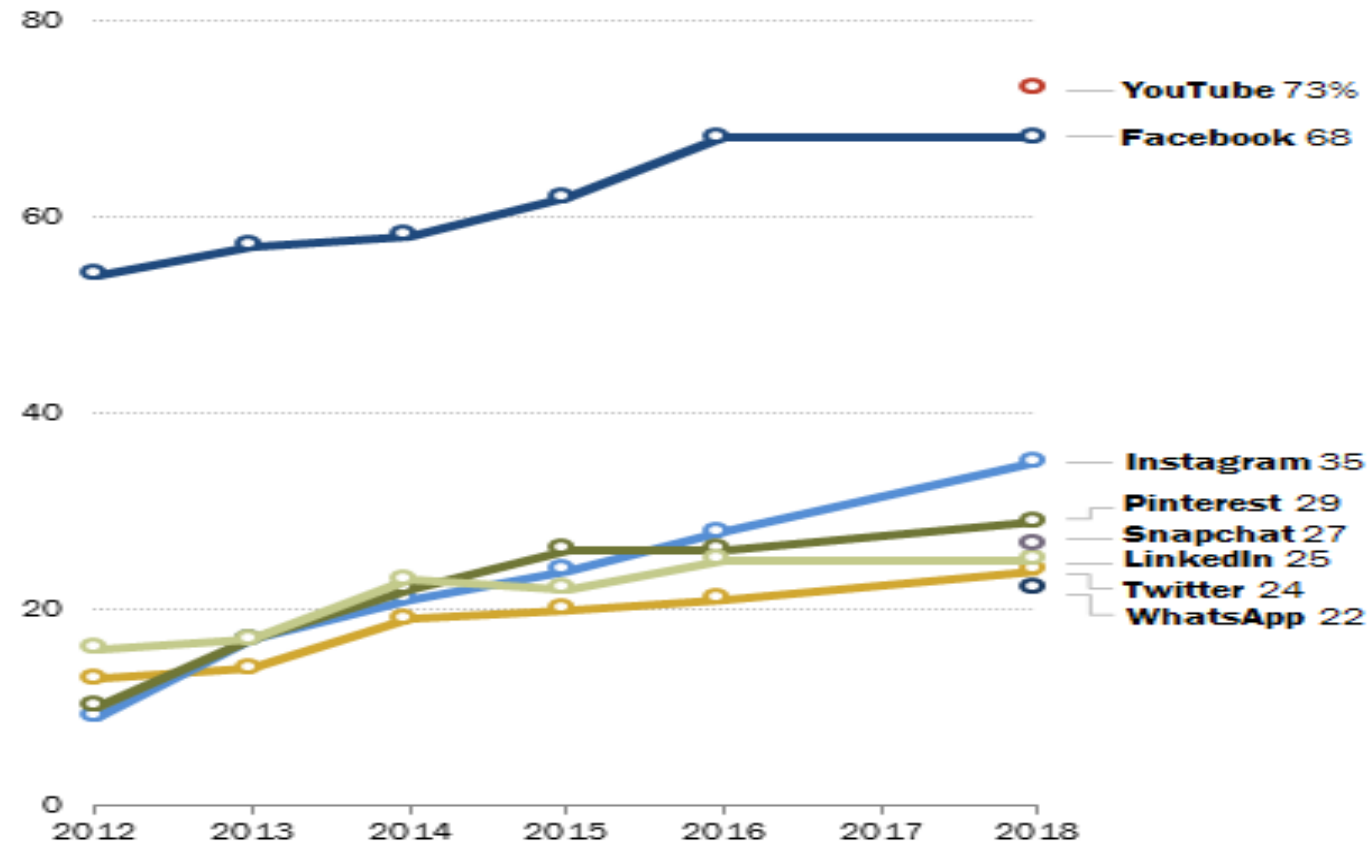
4h

[@awright922](#) I predict that he will be disbarred for a period not less than 7 years.

[View conversation](#)

Majority of Americans now use Facebook, YouTube

% of U.S. adults who say they use the following social media sites online or on their cellphone



Note: Pre-2018 telephone poll data is not available for YouTube, Snapchat or WhatsApp.
Source: Survey conducted Jan. 3-10, 2018. Trend data from previous Pew Research Center surveys.

"Social Media Use in 2018"

PEW RESEARCH CENTER



5 Billion Views/Day



2.072 Billion Users



800 Million Users

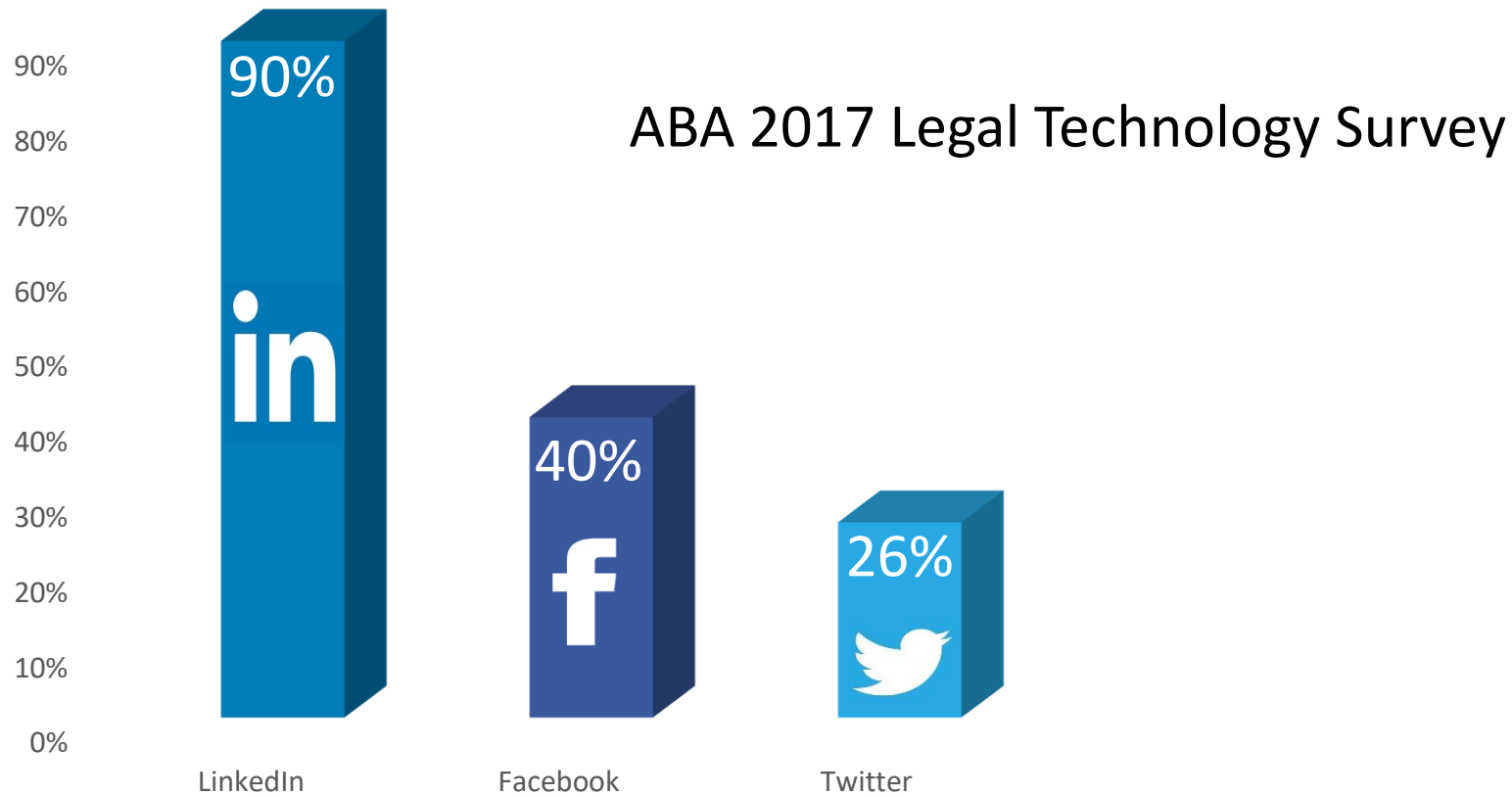


500 Million Tweets/Day



500 Million Members

Lawyer Use of Social Media



//////////////////// Clients Use The Internet to Hire Attorneys!

35%

39%

2x

62%

CLIENT ACQUISITION THROUGH DIGITAL IS ONLY INCREASING

- In 2015, 35% of lawyers reported landing clients from social media.
- In 2015, 39% of lawyers reported landing clients through blogging.
- B2B law firms that use Twitter get 2x the client leads.
- 62% of legal searches online are non-branded, meaning the consumer is looking for information on who to hire (and why).

ABA Model Rule 1.1 - Competence

- **Rule:** A lawyer shall provide competent representation to a client. . . .
- **Comment 8:** To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the **benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

ABA Model Rule 1.1 - Competence

“[T]o comply with Rule 1.1 . . . , attorneys should both have an understanding of how social media and social networking websites function, as well as be equipped to advise their clients about various issues they may encounter as a result of their use of social media and social networking sites.”

West Virginia Legal Ethics Opinion 2015-02

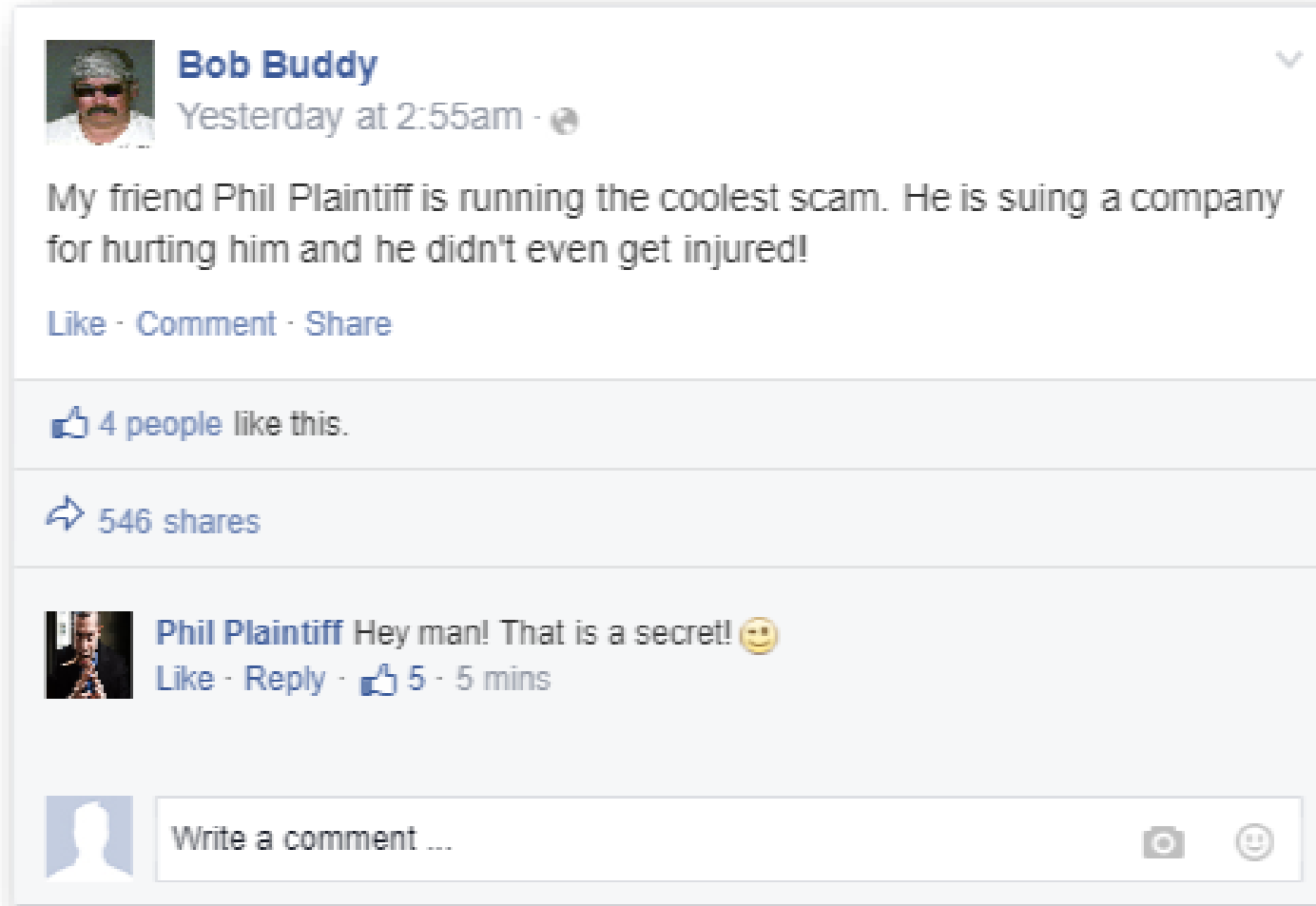
Ethics of Social Media—Elements of Competence


- Confidentiality
- Communication with third parties
- Decorum to the tribunal/ex parte communications
- Jury research
- Evidence development and preservation
- Advertising and solicitation

Hypo # 1

Friending on Facebook


Hypo #1 – Friending on Facebook





 **Bob Buddy** Yesterday at 2:55am · 🌐


My friend Phil Plaintiff is running the coolest scam. He is suing a company for hurting him and he didn't even get injured!




[Like](#) · [Comment](#) · [Share](#)

 4 people like this.

 546 shares

 **Phil Plaintiff** Hey man! That is a secret! 😊

[Like](#) · [Reply](#) ·  5 · 5 mins

 Write a comment ...  

Questions for Hypo #1

- Is this deception implicating Model Rule 8.4?
- Are Model Rules 4.1, 4.2, or 4.3 implicated?
- Since the receptionist knows the witness, what is the harm if the witness responds?
- If the lawyer's client successfully "friends" the witness without the lawyer's knowledge, does the analysis change?



Why research social media accounts?



20.4
MILLION
FULL BIRTH
DATE



4.8
MILLION
WHEN
THEY'RE
LEAVING
THE HOUSE



4.7
MILLION
IF THEY
LIKE A
PAGE
ABOUT A
HEALTH
CONDITION



4.6
MILLION
DETAILS
ABOUT
THEIR LOVE
LIFE



2.6
MILLION
STORIES
ABOUT
ALCOHOL
USE

Source:
Mashable.com
June 2012

ABA Model Rule 4.1 – Truthfulness to Others

In the course of representing a client a lawyer shall not knowingly:

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

ABA Model Rule 4.2 – Communication with Person Represented by Counsel

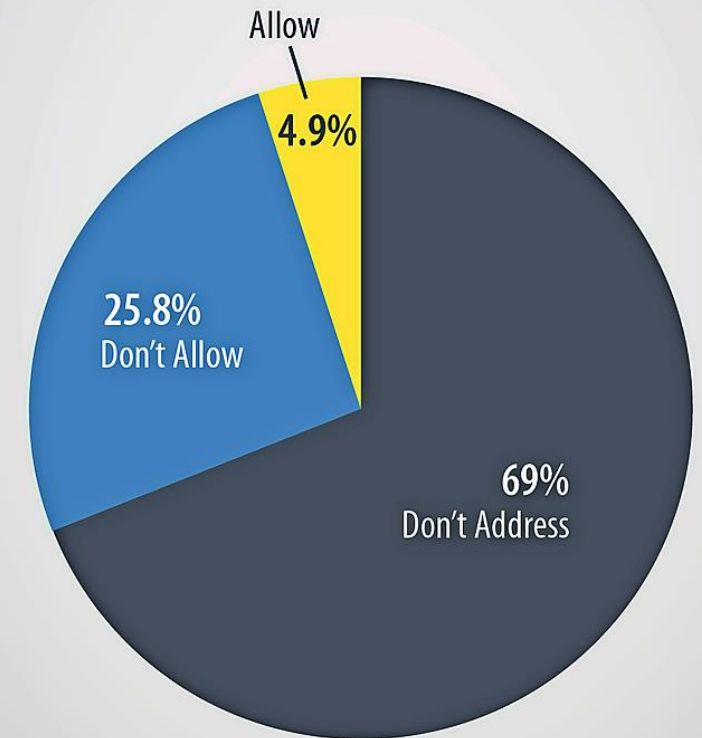
In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter

ABA Model Rule 4.3 – Unrepresented Persons

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

Federal Judges Permission for Lawyers to Search Social Media

(Fed. Judicial Ctr. Rept. 2014)



a Bloomberg BNA graphic

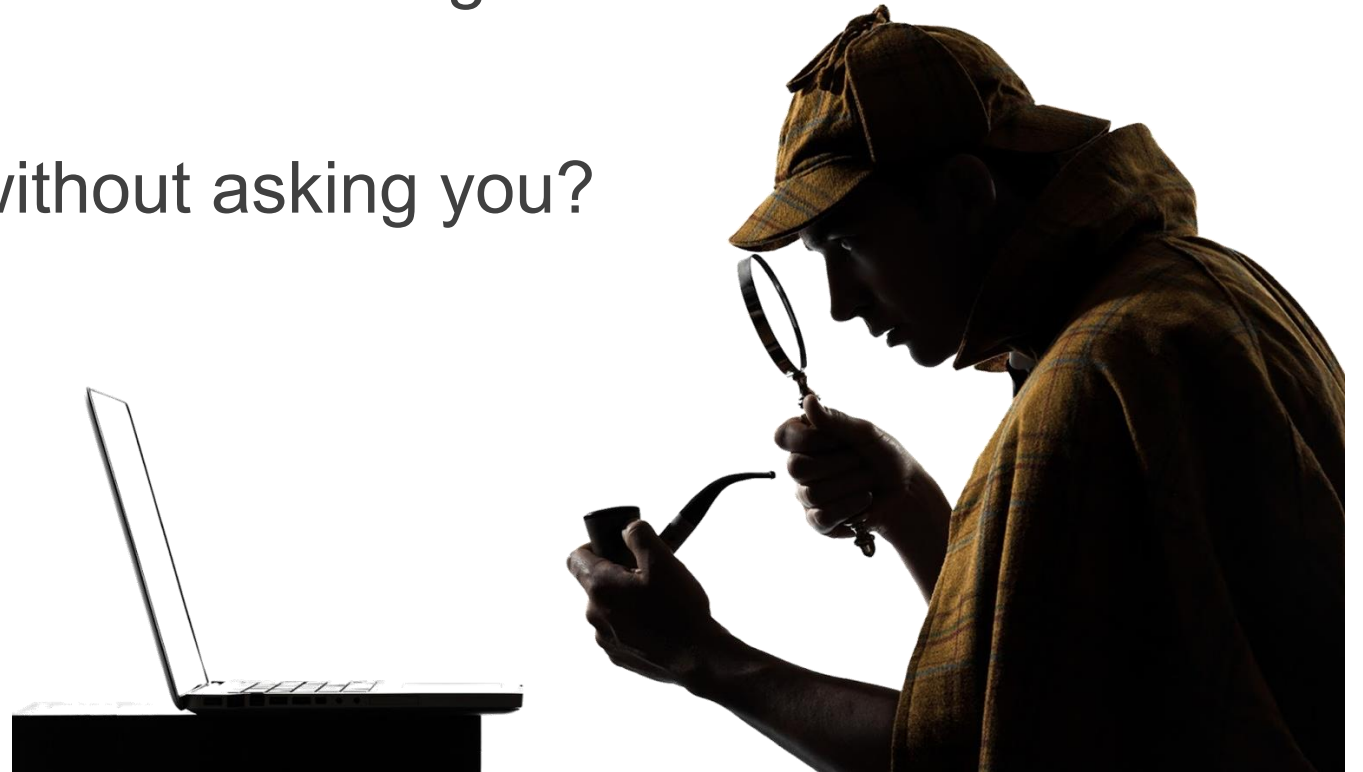
ABA Model Rule 8.4 - Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . .
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice

Can a staff member or a client do it?

- If your staff member does it without asking are you ok?
- What if your client does it without asking you?



Robertelli v. New Jersey

- Attorneys instructed paralegal to “friend” a represented adverse party on Facebook
- Attorneys then tried to use the evidence they found at trial
- New Jersey State Bar Ethics Office filed an official complaint against both attorneys

Uber's Cautionary Tale—*Meyer v. Kalanick*

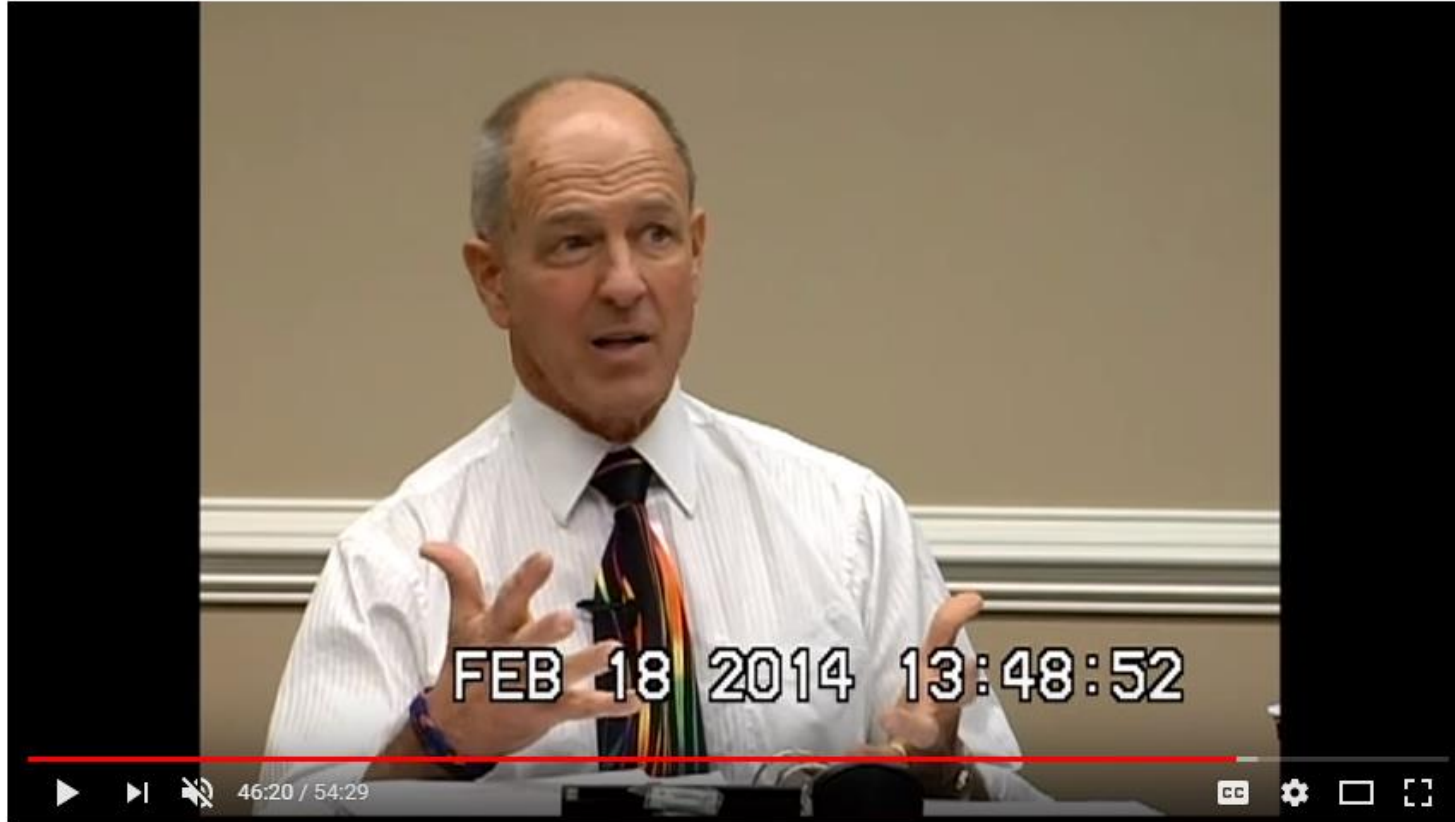
- Uber hired private investigator to get information on the plaintiff
- Investigator posed as academic researcher in interviewing the plaintiff's friends and colleagues
- Uber precluded from using any information from investigation



Hypo # 2

Posting a Videotaped Deposition Online

Hypo # 2 - Posting an Videotaped Deposition Online



This deposition of plaintiffs' expert proves that my client Local Coal Co. did nothing wrong!

5,876 views

👍 17 💬 1 ➦ SHARE ☰ ⋮

Questions for Hypo #2

- Is this an extrajudicial statement prohibited under Model Rule 3.6?
- When does a deposition become a public record?



ABA Model Rule 3.6(a) – Trial Publicity

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



ABA Model Rule 3.6 – Trial Publicity cont'd



"Your Honor, we feel the trial failed to deliver on its pretrial publicity."

(b) Notwithstanding paragraph (a), a lawyer may state . . .

(2) information contained in a public record;

Hypo # 3

Researching a Jury Pool

Hypo #3 – Researching a Jury Pool

You are representing a large nuclear power company in a personal injury suit based in a rural community. You have an upcoming jury trial. You have one of your colleagues do social media research on every juror in the jury pool.



Questions for Hypo #3

- What communications may a lawyer have with a potential juror?
- Can a lawyer send an access request to a potential juror?
- What if social media platform automatically sends information to the juror about inquiries being made of the juror's name?



ABA Model Rule 3.5 – Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) **communicate ex parte** with such a person during the proceeding unless authorized to do so by law or court order . . .

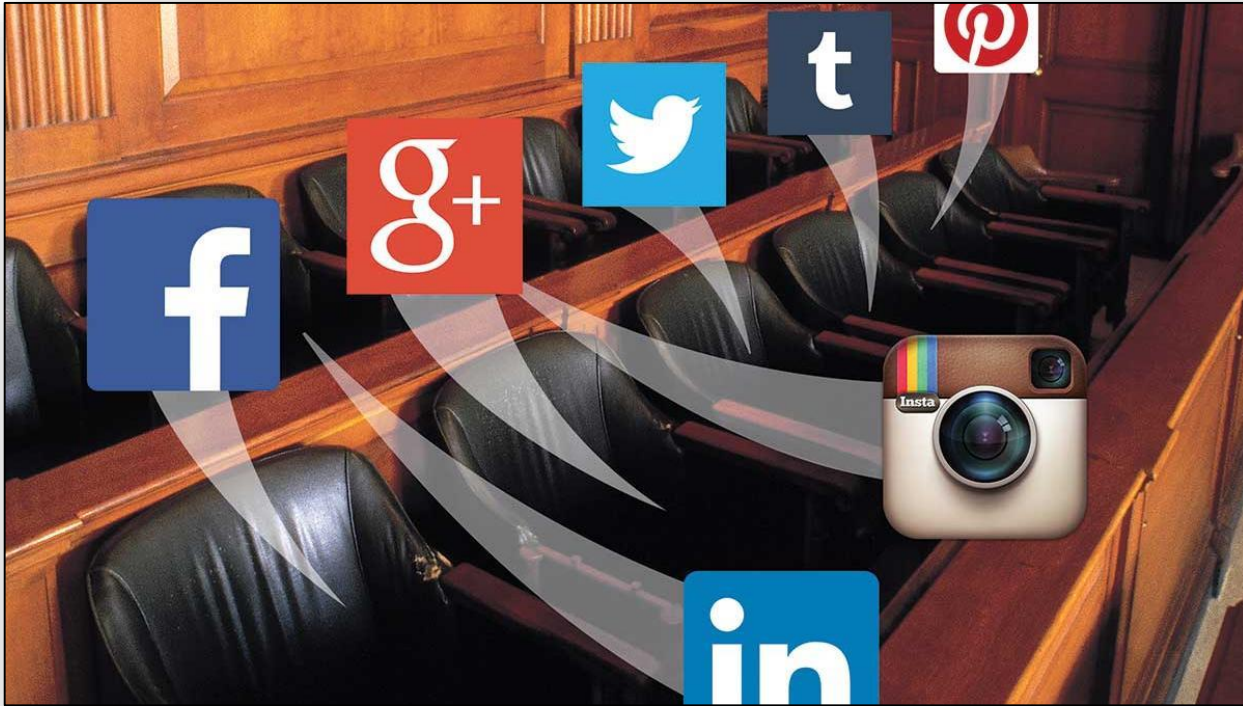
ABA Formal Opinion No. 466

- You may research a juror's internet presence
- You may not communicate directly with a juror or use someone else to do so
- You may not send an access request (a request to see non-public information) to a juror
- It is not a communication just because a juror becomes aware that a lawyer is reviewing the juror's internet presence

Hypo # 4

Juror Postings on Social Media

Hypo #4 – Juror Postings on Social Media



 **Robert Juror**
Yesterday at 2:55am · 🌐

Don't contact me for awhile. I am a juror in a trial in state court. It's a case against the local nuclear power company. I think we all know dangerous those things are.

[Like](#) · [Comment](#) · [Share](#)

 3 people like this.


 2 shares



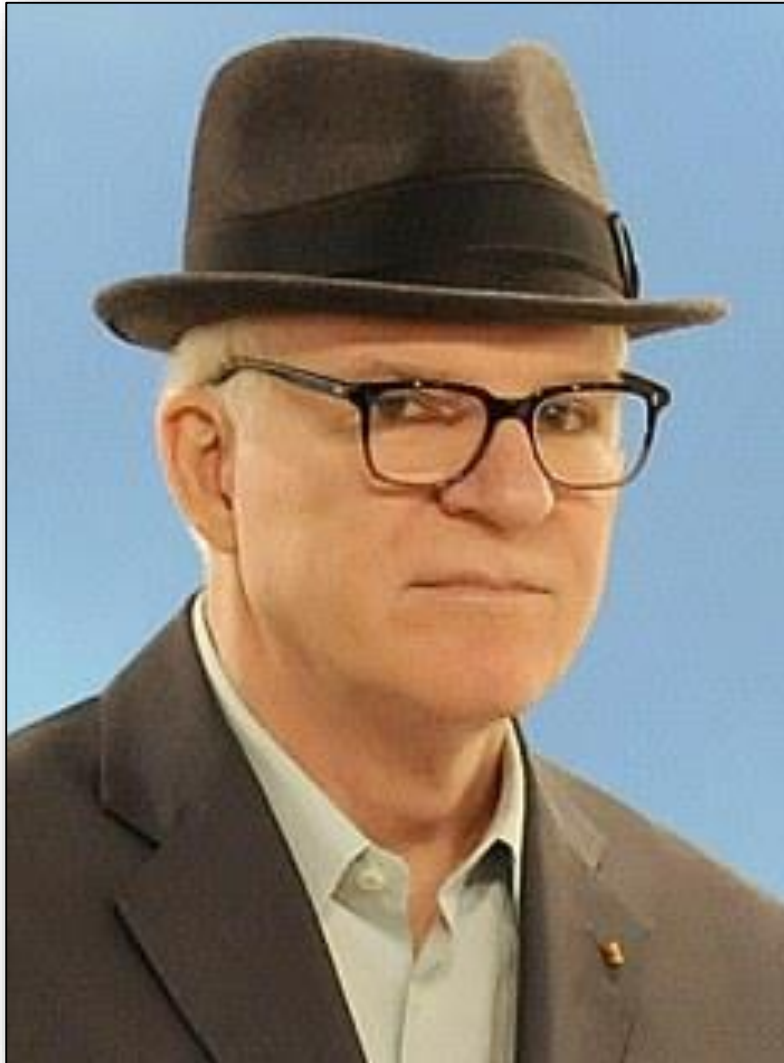


Gary Ludwig

May 28 

This is brutal! Wow, gotta stay awake. At Jury duty and watching movies on my phone, but keep dozing off. C'mon lunch break!!

Share



[@SteveMartinToGo](#)

Steve Martin

REPORT FROM JURY DUTY: defendant looks like a murderer. **GUILTY.** Waiting for opening remarks.

20 Dec via web [☆ Favorite](#) [↻ Retweet](#) [↩ Reply](#)



[@SteveMartinToGo](#)

Steve Martin

REPORT FROM JURY DUTY: Attorneys presenting “evidence.” Since when are security photos, DNA, and testimony evidence? Trusting intuition.

58 minutes ago via web [☆ Favorite](#) [↻ Retweet](#) [↩ Reply](#)



Michigan juror on Facebook

What if you learn something?

Must take reasonable remedial measures including disclosure to the tribunal if you discover evidence of juror misconduct that is criminal or fraudulent

Trending Topic

Lawyers increasingly are using jurors' social-media posts as a reason to appeal convictions and acquittals.

Facebook post by Juror No. 1 in a 2010 case in Sacramento, Calif.:

'Back to jury duty can it get any more BORING than going over piles and piles of metro pcs phone records... uuuuuughhhh.'

In a recent survey, 30 federal judges discussed which action they took when social media were used by a juror.

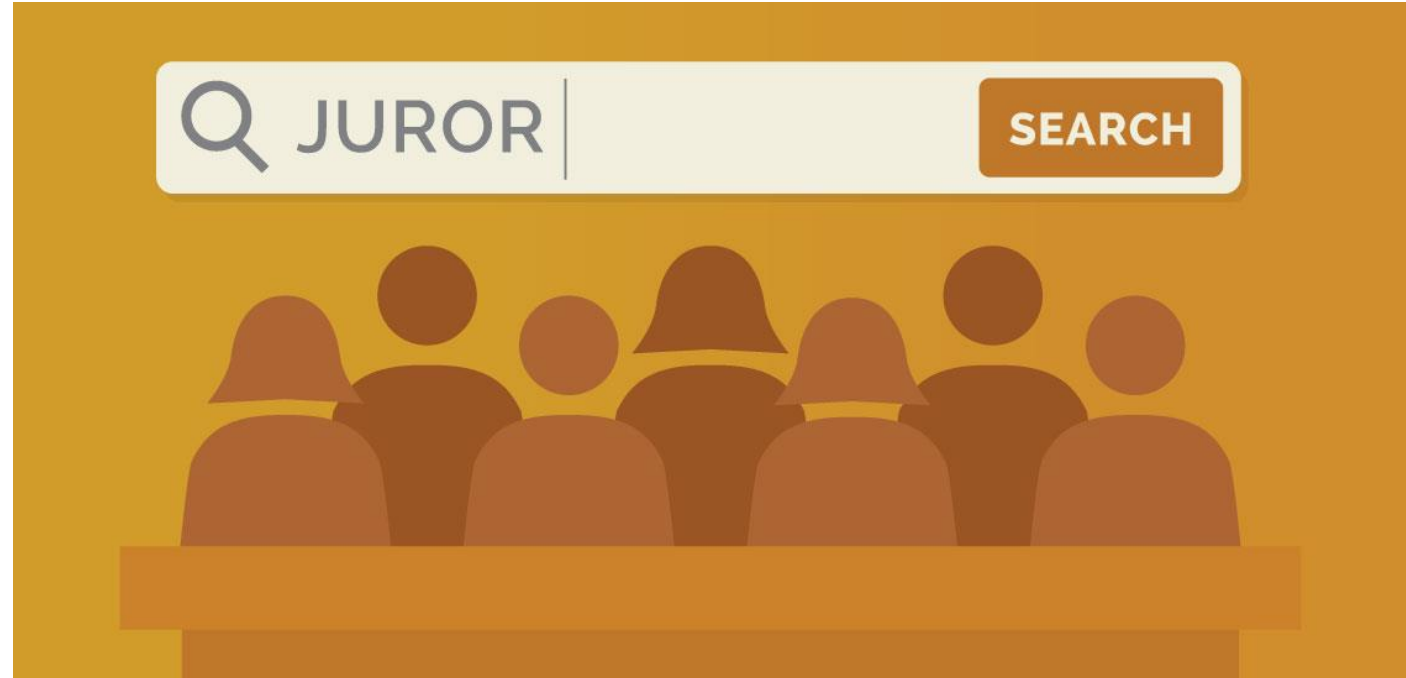


Source: Federal Judicial Center

The Wall Street Journal

Johnson v. McCullough, 306 S.W.2d 551 (Mo. 2010)

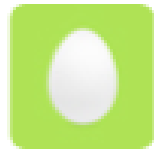
- Duty to research jurors?
- In light of new technology and greater access to information, parties have greater burden to research jurors early in the trial process



Hypo # 5

Tweeting for Clients

Hypo # 5 – Tweeting for Clients



Mike Attorney

@Mike-SuperAttorney



Follow

Check out my big CERCLA victory.

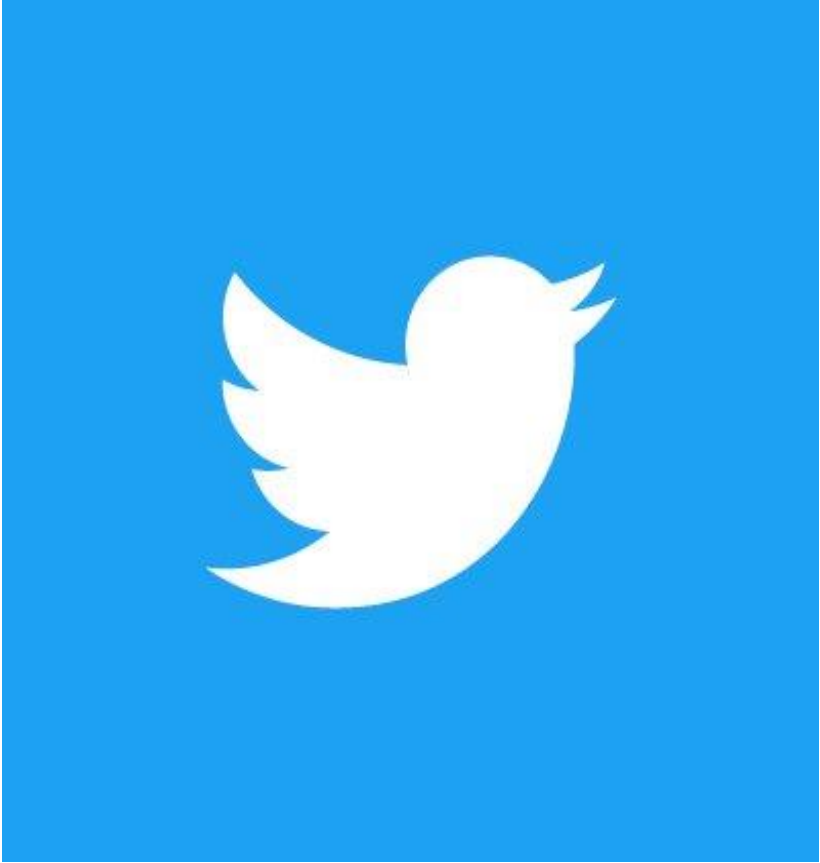
MikeatLaw.com/CERCLAVictory

@MoneyBagCorp



2:48 PM - 6 May 2015

Questions on Hypo #5



- Are the tweets “advertising”?
- Are the tweets “solicitations”?
- What is the impact of Twitter’s 140-character limit in the analysis?
- Let’s change the facts. Does membership in LinkedIn constitute advertising?
- Do you need to include disclaimers?

ABA Model Rule 7.2 – Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment . . .

(c) Every . . . electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

Are Tweets Advertising?

New York Bar says they are advertising, but not solicitations

Missouri Bar says they are solicitations and Twitter's character limit does not allow for Missouri's disclaimer language

Florida Bar says tweets are advertising but you can abbreviate advertising requirements to fit within character limit





What about your LinkedIn Profile?

- Can you include basic information such as education and work history?
- Can you describe your area of practice or state you have a particular set of skills?
- Do you have to include disclaimers?
- Does it matter if your purpose is not to advertise?



What about your LinkedIn Profile?



Hey James F.

Frustrated with having an empty sales calendar?
Exhausted with prospecting?
Want to DOUBLE your clients and customers without the grind?

Join us for a LIVE DEMO on "[How to Lock In Lucrative Business Clients DAILY With 100% Done-For-You LinkedIn Lead Generation Services](#)"



Should we add a disclaimer?

James F. Thompson • 2nd
Environmental and Energy Law Partner
Shook, Hardy & Bacon • United States

Disregard this solicitation if you have already engaged a lawyer in connection with the legal matter referred to in this solicitation. You may wish to consult your lawyer or another lawyer instead of me (us). The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this solicitation is general and that your own situation may vary. This statement is required by rule of the Supreme Court of Missouri.

...and energy companies
...ings. I also assist corporate clients in
...abilities and financial benefits from Brownfields initiative
...have negotiated cleanup cost-cap and property transfer insurance

OVERVIEW

PRACTICE AREAS



-  **50% Animal Law**
15 years, 4,528 cases
-  **20% Ethics / Professional Responsibility**
20 years, 9,231 cases
-  **20% Criminal Defense**
2 years, 789 cases
-  **10% Admiralty / Maritime**
1 year, 1 case

FEES AND PAYMENT TYPES

Fees


Hourly (\$2000-\$5000/hour)

Payment types

Cash

CONTACT INFORMATION

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Office: 612-234-5823
[View map](#) | [Edit this address](#)

-  [Email this lawyer](#)
-  [Visit lawyer's website](#)

-  [Facebook](#)
-  [Twitter](#)

Hypo # 6

Lawyer Interactions on Social Networking Sites



Hypo 6 – Lawyer Interactions on Social Networking Site



Mike General

5/15, 1:17pm

Hey I know this is probably not the best way to do this, but we need a quick response. Some of our employees spilled a small amount of oil near a pipeline. We don't need to report it, right, since it's a small amount?



Janet Local

5/15, 1:17pm

I don't think that is a problem.



Questions for Hypo #6

- Has the lawyer forgotten about clearing conflicts of interest? (M.R. 1.7)
- What does it take to establish an attorney-client relationship?
- Did the attorney violate her duty of competence?



This or That?



New York State Bar Opinion 899

A lawyer “may provide general answers to legal questions from laymen on real-time or interactive Internet sites such as chat rooms, but the lawyer may not engage in ‘solicitation’ in violation of Rule 7.3. If a person initiates a request on the site to retain the lawyer, the lawyer may respond with a private written proposal outside the site so that those who did not request it cannot see it.”

Eight-Word Social Media Policy



Forbes

- ❑ Don't lie
- ❑ Don't cheat
- ❑ Don't steal
- ❑ Don't reveal

<https://www.forbes.com/sites/davidcoursey/2012/02/27/this-8-word-social-media-policy-could-save-your-job/#750320dc5005>

Questions/Comments

Q&A



SHOOK
HARDY & BACON

Lawyer Ethics: E-Communications, Social Media & The Internet

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