

SOCIAL MEDIA: ETHICAL EVIDENCE COLLECTION & USE

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MEDICAL BACKGROUND INVESTIGATIONS
SOCIAL MEDIA INVESTIGATIONS
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R U L E 1 . 1 : C O M P E T E N C E

- For purposes of this rule, “competence” in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
- If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, (ii) acquiring sufficient learning and skill before performance is required

COLLECTING EVIDENCE COMPETENTLY: SOCIAL MEDIA IS A MUST



➤ Facebook: 2.4 billion active monthly users

➤ Instagram: 1 Billion monthly active users

○ Self-deleting stories set to outpace feeds in 2019



➤ Twitter: 1.3 billion registered users, 330 million monthly users

➤ Snapchat, Tic Toc, LinkedIn, Pinterest, Flickr, YouTube, Reddit, Tumblr, VK, and on and on...



COLLECTING EVIDENCE COMPETENTLY: EFFICIENCY

➤ Surveillance vs. Social Media

- SMI produces at a minimum, the same types of intel as surveillance, and frequently it produces even better intel
- SMI makes surveillance more productive
- SMI is often the most cost effective investigative solution

➤ SMI finds pertinent information or leads to other evidence

- Find doctor reviews
- Find relationships to witnesses

COLLECTING EVIDENCE COMPETENTLY: PROPER PRESERVATION/ AUTHENTICATION

- NO SCREEN PRINTS/ SCREEN SHOTS!!!
- Moroccan oil vs. Marc Anthony Cosmetics – Screen shots of Facebook posts are inadmissible
- How do you know an account wasn't hacked or that it's not a fake profile?
- Document who found the evidence, when they found it, and how they found it

COLLECTING EVIDENCE COMPETENTLY: PROPER PRESERVATION/ AUTHENTICATION

- **Post/User ID**
- **Review account for “specific indicia”**
 - **Tienda vs. State of Texas - Specific indicia used to authenticate social media evidence**
 - **Photos, friends, family, specific details of their life**
- **Extract metadata**
 - **The who, when, and where of the post**
 - **Hash = 32 character hexadecimal string AKA digital fingerprint**
- **Obtain IP address/ registrant information (for fake accounts)**

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

- A lawyer shall not suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce
- Attorneys have a duty to preserve any evidence that would be relevant to the case whenever litigation is reasonably foreseeable

SUPPRESSION OF EVIDENCE: SOCIAL MEDIA IS EVIDENCE

- **Do not instruct clients to delete content**
 - Lester vs. Allied Concrete Co., a Virginia state court reduced a jury award by over \$4 million dollars and ordered the plaintiff and his counsel to pay the defendants over \$700,000 in fees and expenses, because of deliberate deletion of Facebook photos responsive to discovery requests
- **Duty to Preserve Social Media Evidence**
 - Preserve and Archive Profile
- **Clients should be advised to preserve Social Media Posts**



R U L E 4 . 2 C O M M U N I C A T I O N W I T H A R E P R E S E N T E D P E R S O N

- In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer
- Does this apply to viewing an individual's social media Profile?
- What about private profiles?

COMMUNICATION WITH A REPRESENTED PARTY WHAT ABOUT FRIEND REQUESTS?

➤ Bar Opinions

- San Diego Bar Association – NO. 2011-2

➤ Richards vs. Hertz

- There is no expectation of privacy for SM content, regardless of privacy settings

➤ Represented vs. Unrepresented

FOR THOSE WHO THINK THEIR FACEBOOK CONTENT IS “PRIVATE”

Searching for “non-public” content

<https://findmyfbid.com>

www.facebook.com/search/usernumber/photos-of

www.facebook.com/search/usernumber/photos-commented

www.facebook.com/search/usernumber/stories-by

www.facebook.com/search/usernumber/stories-tagged

BOOLEAN SEARCH OPERATORS

➤ Characters to filter search results

- Joseph Jones Private Investigator – 36,800,000 Results
- “Joseph Jones” + “Private Investigator” – 1,650 Results
- "Joseph Jones" (NEAR15) "Private Investigator" – 834 Results

➤ Take known email or social media handles and search in google; so if email is surferdude123@hotmail.com, search “surferdude123”

➤ If subject has common name, but known family member does not, search family member first and then look at their friends/followers

**R U L E 1 . 6 C O N F I D E N T I A L
I N F O R M A T I O N O F A C L I E N T
R U L E 3 . 6 T R I A L P U B L I C I T Y**

- A lawyer must maintain the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client
- 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 (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter

RULE 1.6 CONFIDENTIAL
INFORMATION OF A CLIENT
RULE 3.6 TRIAL PUBLICITY

Don't be Stupid



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ADDITIONAL RESOURCES

- Case Summaries for all things SMI

www.boscolegal.org/case-law-relevant-social-media-investigations

- In depth article including additional case law

<https://www.boscolegal.org/social-media-investigations-the-facts>

- Comparison of Surveillance and SMI

<https://www.boscolegal.org/files/2016/04/The-New-Surveillance-v5.jpg>

ADDITIONAL RESOURCES

- **Google Subpoena Information Link:**
<https://support.google.com/faqs/answer/6151275?hl=en>
- **Facebook Subpoena Information Link:**
<https://www.facebook.com/help/473784375984502>
- **Instagram Subpoena Information Link:**
(Same as Facebook now that it owns Instagram)
- **Twitter Subpoena Information Link:**
<https://support.twitter.com/articles/41949>