

Legal Ethics and Social Media for School Lawyers

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Legal Ethics and Professional Conduct Sources of authority

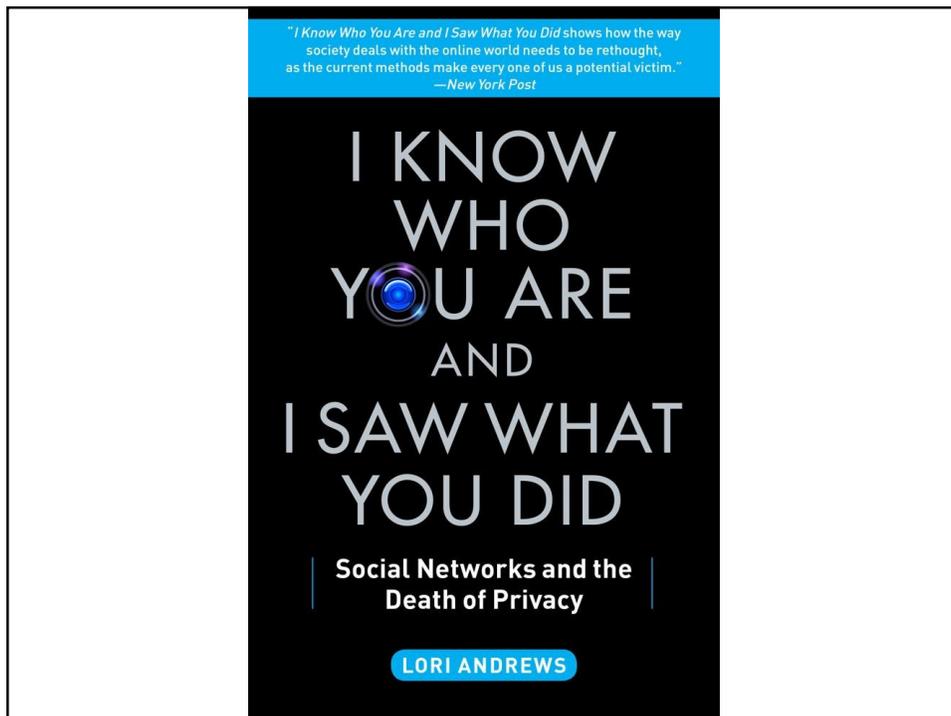
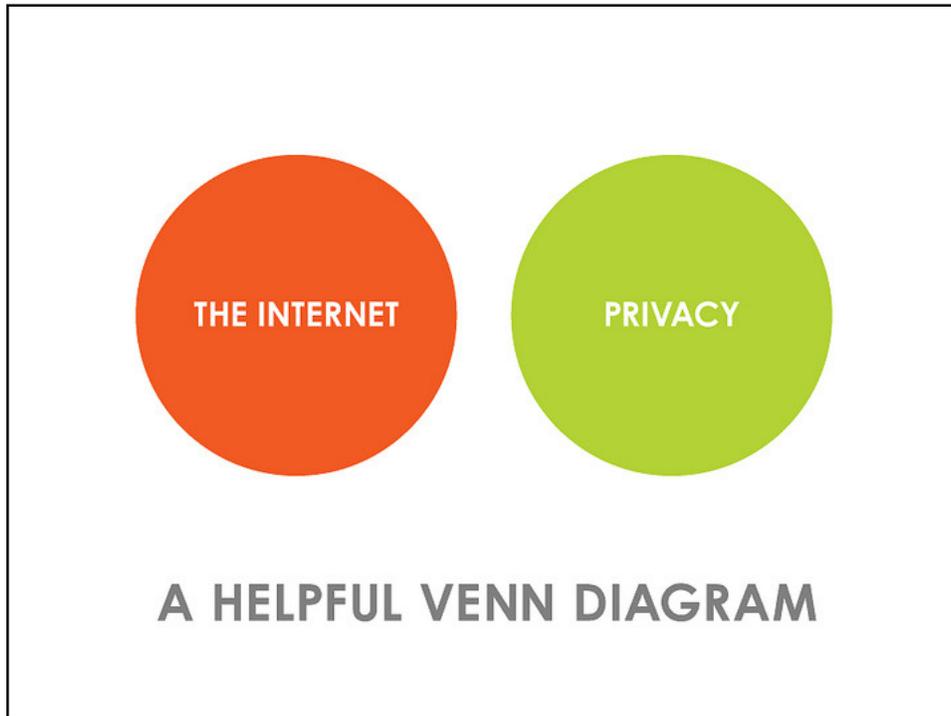
- ABA Model Rules of Professional Conduct
- State Rules of Professional Conduct (Supreme Court, some agencies)
- Comments to Rules
- Ethics Opinions (advisory)
- Case law—disciplinary matters

Social media benefits

- Communication: global, local, general, targeted
- Access to information
- Crowdsourcing
- Meeting/connecting with people interested in what you have to offer
- Staying in touch with many people at once

Benefits for lawyers

- Become known in your field through publishing and linking to news, articles, and comments
- Learn by watching and asking others
- Investigate and perform due diligence
- Find, meet, and help friends, colleagues, and potential clients
- Keep in touch: remind others where you are and what you have to offer



Founded 2004

The image shows the Facebook logo, which consists of the word "facebook" in a white, lowercase, sans-serif font, centered within a dark blue rectangular background.

1.35 billion active users

864 million daily users

72% adults are monthly visitors

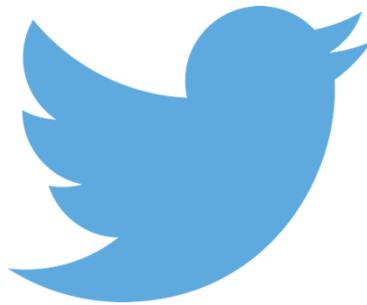
(Source: Facebook quarterly report)



“Your privacy is very important
to us.”

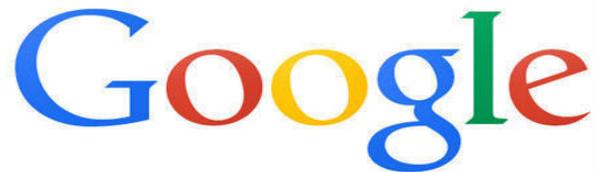
Facebook on privacy

Founded 2006
284 million monthly active users



WhatsApp

- Acquired by Facebook 2014
- 500 billion users worldwide
- Daily usage: 700 million photos, 100 million videos
- “Respect for your privacy is coded into our DNA.” (Source: WhatsApp.com)



- 12 billion searches per month (3/2014)
- 1.17 billion searchers (2/2013)
- 425 million Gmail users (2/2013)
- 66% open Gmail on a mobile device (2/2013)
- Source: <http://expandedramblings.com/index.php/by-the-numbers-a-gigantic-list-of-google-stats-and-facts/2/>

Google Privacy Policy:

- “When you use our services or view content provided by Google, we may automatically collect and store certain information in server logs.”
- “your phone number, calling party number, forwarding numbers, time and date of calls, duration of calls”
- “date and time of your request and referral URL”
- “cookies that may uniquely identify your browser or your Google Account”

Google Privacy Policy:

- “When you use a location-enabled Google service, we **may collect and process information about your actual location**, like GPS signals sent by a mobile device.”

Google Privacy Policy:

- “We will share personal information with companies, organizations or individuals outside of Google if we have a good-faith belief that access, use, preservation or disclosure of the information is reasonably necessary to:...protect against harm to the rights, property or safety of Google, our users **or the public** as required or permitted by law.”

To Read All Of The Privacy Policies You Encounter, You'd Need To Take A Month Off From Work Each Year

- Source: Techdirt.com (4/23/2012), citing Aleecia M. McDonald and Lorrie Faith Cranor, “The Cost of Reading Privacy Policies,” *I/S: A Journal of Law and Policy for the Information Society*, 2008 Privacy Year in Review issue

Facebook Data Use Policy:

- “We receive data about you whenever you use or are running Facebook.”
- Look at another person's timeline
- Send or receive a message
- Search for a friend
- Click on or view things on Facebook
- Use a Facebook mobile app
- Buy stuff through Facebook

Facebook Data Use Policy:

- “We receive data whenever you visit a game, application, or website that uses [Facebook Platform](#) or visit a site with a Facebook feature (such as a [social plugin](#)), sometimes through [cookies](#). This may include the date and time you visit the site; the web address, or URL, you're on; technical information about the IP address, browser and the operating system you use; and, if you are logged in to Facebook, your User ID.”

Twitter Terms of Service:

- “What you say on Twitter may be viewed all around the world instantly. You are what you Tweet!”

Twitter Terms of Service:

- “By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).”

Twitter Terms of Service:

- “You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services....”

Twitter Terms of Service:

- “We may modify or adapt your Content in order to transmit, display or distribute it over computer networks and in various media and/or make changes to your Content as are necessary to conform and adapt that Content to any requirements or limitations of any networks, devices, services or media.”

WhatsApp: The **Message Info** screen shows you who has seen your message and when. (Source: Mashable, WhatsApp FAQ.)



Washington Post, 8/4/2014

- **“Yes, the Facebook Messenger app requests creepy, invasive permissions. But so does every other app.”**

Some commonly requested app permissions:

- Permission to view your Wi-Fi network and other devices connected to it
- Permission to read your contacts and call log
- Recording your location, your device ID, and your incoming calls
- (Source: Washington Post, 8/4/2014)

Government demands for user info have risen 150% over the last five years

- Source: Google Public Policy Blog, 9/15/2014
(http://googlepublicpolicy.blogspot.com/2014/09/transparency-report-government-demands_15.html)

National Security Letters

- “The National Security Letter provision of the Patriot Act radically expanded the FBI's authority to demand personal customer records from Internet Service Providers, financial institutions and credit companies **without prior court approval.**”
- “The provision also allows the FBI to **forbid or "gag" anyone who receives an NSL from telling anyone** about the record demand.”
- Source: ACLU.org

So how does this affect school lawyers?



RPC 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.”

Model Rule 1.1, Cmt. [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....**”



Hawver appears at Kansas Supreme Court dressed as Thomas Jefferson

--Topeka Capital-Journal, 9/12/2014

**Kansas Supreme Court disbars
defense attorney Dennis Hawver for
'inexplicable incompetence'**

-Wichita Eagle, 11/14/2014

“The respondent failed to track the cell phone to determine Cheatham's location at the time of the murders.”

Order of disbarment, Kansas
Supreme Court, p. 19 (In re Hawver,
11/14/2014)

Hawver explained to the Kansas Supreme Court why he didn't get cellphone records for an alibi defense. “I had no idea that cellphones had GPS capabilities at that time.”

--ABA Journal, 11/17/2014

ISBA Ethics Op. 12-15 (May 2012)

- Bar association listserv
- Consulting with other lawyers: Aid to RPC 1.1 obligation
- Disclosing information: Caution re RPC 1.6 obligation

RPC 1.6, Confidentiality of Information

- “Client information.”

RPC 1.6, cmt. [4]

- Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

You never know who's on a listserv.



Supervisory responsibilities

- Rule 5.1: Responsibilities of partners, managers, and supervisory lawyers
- Rule 5.3: Duties with respect to nonlawyer assistants
- Bottom line: Can't use others to do what you can't.

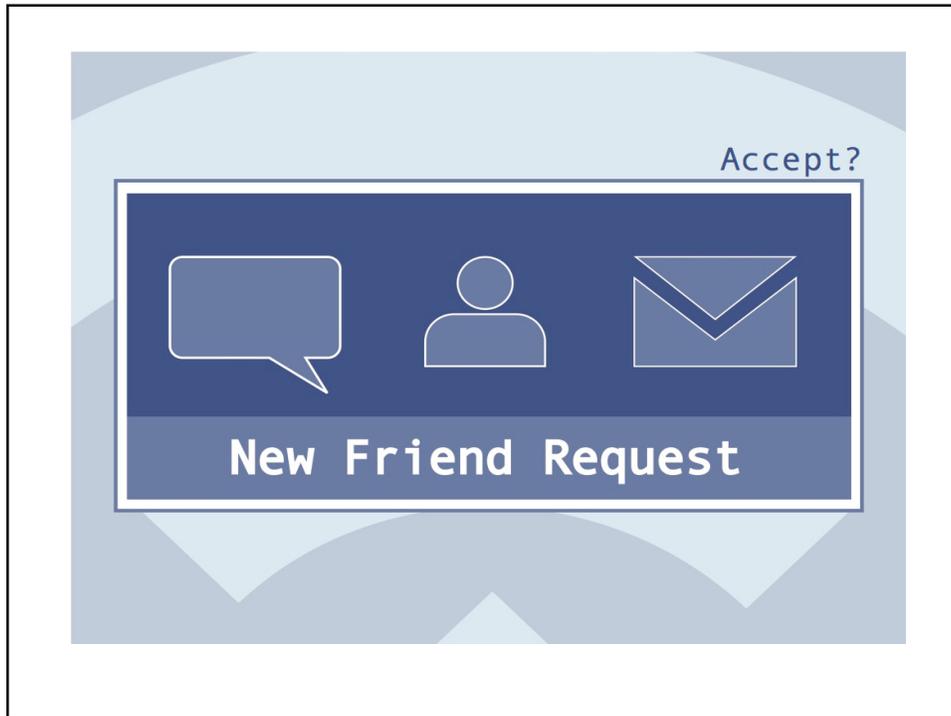
Rule 2.1: Duty to exercise independent professional judgment and render candid advice to client

- Bullying on social media
- Social media and school district hiring and disciplinary processes
- Social media activities of school district and administrator clients

Investigation and Due Diligence

- Employment matters
- Litigation—Discovery
- Expert qualifications
- Research judge
- Research jurors

Getting the dirt: learning about
your opponent and others



Rule 8.4: Misconduct

- Forbids lawyers from engaging in “conduct involving dishonesty, fraud, deceit, or misrepresentation.”

Ethics opinions

- Connecticut, Oregon, Philadelphia, New York City, San Diego—none yet from Illinois
- **Bottom line:** Generally **OK** to search out **publicly available** information, **not OK** to use **deceit or subterfuge** to get it. Division on whether OK to friend an adverse party or witness without disclosing that you have an interest in a matter that concerns the person.

Hiding the dirt

Rule 3.3: Candor Toward the Tribunal

- No false statements to tribunal
- No offering false evidence
- Must take reasonable remedial measures, up to and including disclosure, on learning that client has engaged in fraudulent conduct

Rule 3.4: Fairness to Opposing Party and Counsel

- A lawyer shall not:
- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;.....

Facebook Spoliation Costs Lawyer \$522,000; Ends His Legal Career

- [Lester v. Allied Concrete Company and William Donald Sprouse, 736 S.E.2d 699 \(Va. 2013\)](#)

Lester v. Allied Concrete

- Defense counsel looked at plaintiff's publicly available Facebook page.
- Plaintiff's counsel told his client to remove photos. His client was ordered to pay an additional \$180,000 for obeying the instructions.
- \$8.5 M jury award slashed by \$4 M, reinstated on appeal

Lester v. Allied Concrete

- Plaintiff: \$180,000 sanction for obeying lawyer's instructions.
- Plaintiff's lawyer: \$542,000 sanction, ended up remitting nearly \$600K
- \$8.5 M jury award slashed by \$4 M, reinstated on appeal
- 5-year suspension for plaintiff's lawyer, violations of Rules 3.3, 3.4, 8.4

Advising your client

- New York County Ethics Op. 745 (2013)
http://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf

Bottom line

- **OK** to advise client to put best social media foot forward
- **Not OK** to advise client to destroy records posted on social media website reasonably foreseeable to be requested in discovery

Researching jurors

- Rules 1.1, 3.5, 8.4
- Court rules, judge's orders
- Some social media sites generate notifications if you peek
- Generally OK to search for publicly available information on social media as long as you do not let potential jurors know you're looking at their profiles

Settlements and confidentiality agreements

- Gulliver Schools, Inc. v. Snay, 137 So.3d 1045 (Fla.App. 3 Dist.,2014)

Gulliver Schools v. Snay

- “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT”

Client relationships

- How to respond to negative online reviews?

RPC 1.6(b)(5)

- Comment [10]

Don't trash your client!

In re Tsamis (Illinois ARDC)

- Lawyer response to unfavorable AVVO review resulted in reprimand for violation of RPC 1.6.

Louima v. City of New York, No. 98CV5083(SJ), 20 Law. Man. Prof. Conduct 402 (E.D. N.Y. Oct. 5, 2004)—

- Not an electronic media case, but sanctioned lawyers who committed breaches of confidentiality by speaking to press without their client Louima's consent.

Los Angeles County Bar Association
Ethics Op. 525 (2012)

- Lawyer may respond, but response must be measured and only say what is necessary to counter false allegations.

Publicizing good results

- Rule 1.6
- **Get your client's consent!**
- Horace Frazier Hunter v. Virginia State Bar, Supreme Court of Virginia, 285 Va. 485, 744 S.E.2d 611 (2013) (cert. denied)

Resources

ABA/BNA Lawyers' Manual on Professional Conduct

http://www.americanbar.org/groups/professional_responsibility/publications/aba_bna_lawyers_manual_on_professional_conduct.html

ETHICSearch

ethicsearch@americanbar.org

1-800-285-2221 (option 7)

ABA Center for Professional Responsibility

http://www.americanbar.org/groups/professional_responsibility.html

Illinois Rules of Professional Conduct 2010

http://www.state.il.us/court/SupremeCourt/Rules/Art_VIII/default_NEW.asp

ISBA Professional Conduct Advisory
Opinions

<http://www.isba.org/ethics/byyear>

Association of Professional
Responsibility Lawyers (APRL)

<http://aprl.net/>