

# Ethical Considerations: Electronic Communications and Use of Social Media

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# Disclaimer

- *Disclaimer: The views in this presentation are those of the author and do not necessarily reflect the official policy or position of the United States Court of Appeals for the Armed Forces (USCAAF), the Department of Defense (DOD), or the United States Government (USG).*

# Goal:

- 60 minutes: CLE for Ethics

OR

- 60 minutes for North Carolina CLE on “Technology Training”

OR

- 60 minutes for Florida CLE on “Technology”

# North Carolina CLE Rules

- “**Technology training**” shall mean a program, or a segment of a program, devoted to **education on information technology (IT)** or cybersecurity (**see N.C. Gen. Stat. §143B1320(a)(11)**), or successor statutory provision, for a definition of “information technology”), including education on an information technology product, device, platform, application, or other tool, process, or methodology.

# NC Definition: Information Technology

- (11) **Information technology or IT.** – Set of tools, processes, and methodologies, including, but not limited to, coding and programming; data communications, data conversion, and data analysis; architecture; planning; storage and retrieval; systems analysis and design; systems control; mobile applications; and equipment and services employed to collect, process, and present information to support the operation of an organization. The term also includes office automation, **multimedia**, **telecommunications**, and any personnel and support personnel required for planning and operations

# Florida CLE Rules

- (g) **Technology**. Credit may be awarded for courses that include information on technology tools, programs, or applications to assist lawyers in their law practice....
- Technology topics must focus on or highlight their use in the practice of law.
- The content of a course on technology is generally eligible for credit if it:
- (2) is **tailored primarily for lawyers** (e.g., **adherence to the Rules of Professional Conduct when using the technology**, the risks and/or benefits or using the technology as a lawyer, and/or teaching about or discussion of situations encountered when a lawyer uses the technology in conjunction with the lawyer's practice); or,

# Sources of Law

- Service Specific Instructions/Regulations
- CAAF Case law
- State bar rules

# AFI 51-110, Professional Responsibility Program

- Attachment 2, Air Force Rules of Professional Conduct
  - Rule 1.1, Competence
  - Rule 1.4, Communication
  - Rule 1.6, Confidentiality of Information
  - Rule 3.3, Candor Toward the Tribunal
  - Rule 4.1, Truthfulness in Statements to Others
  - Rule 5.1, Responsibilities of Supervisory Lawyer



# Prevalence of Social Media

- 2014 ABA legal technology report
  - 96% on LinkedIn
  - 33% on Facebook
  - 10% on Twitter
  - 8% have a legal blog
  
  - 3 still have a MySpace account\*

# How about 2016?

## 2016 Trends in Legal Technology

Law Technology Today December 14, 2016 LTRC, Studies, Surveys and Reviews 0 Comments

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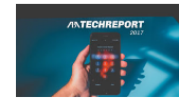
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# Even the ABA has bad links

https://www.americanbar.org/publications/techreport/2016/social\_media\_blogging.html

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# Social Media is an effective tool

## Dale Felton: Texas Lawyers' Facebook friend

BY TERRY CARTER

FEBRUARY 2018

Like 36 Share Tweet in Share submit



Dale Felton. Photo courtesy of the Felton Law Firm.

Dale Felton is a semi-retired Texas plaintiffs lawyer of some distinction, particularly as an insurance law expert in car and truck crashes. In one case, *Arnold v. National County Mutual Fire Insurance Co.*, he prompted the state supreme court to create bad-faith law, though the opinion calls it the "duty of good faith and fair dealing."

Felton has been a breakout star on the Texas Lawyers Facebook page, known to members as TL, even before the flooding of Hurricane Harvey. In 2008, a friend pulled him away from semi-retirement to take about 60 flood claims resulting from Hurricane Ike. Felton studied flood insurance, spending 21 days straight in a law library to learn about federal common law.

He shared tips, insights and advice about flood insurance claims on TL after Harvey. Those included: federal court only, and no jury trials; no provision for attorney fees (the client can't be made fully whole if the lawyer gets paid, but something is better than nothing); flood claims

have a very strict timeline, and Felton determined nine different possible ones with Harvey, recommending the earliest.

"I told everybody to be on the safe side for right now, until FEMA's director resolves that ambiguity," Felton, a longtime Houston resident now living in tiny Navasota, says in an interview.

As the membership and page views grew at TL during and after the storm, so did Felton's reputation within the group.

# Top Army Photo



# Top Navy Photo



# Top Marine Photo





# Previous Top AF Photo



# Next... AF Top Photo



# Finally...21 Feb 2020 Top AF Photo



Paratroopers assigned to the 4th Infantry Brigade Combat Team (Airborne), 25th Infantry Division, U.S. Army Alaska, jump from an Air Force C-17 Globemaster III with the 517th Airlift Squadron during airborne training over Malemute drop zone, Joint Base Elmendorf-Richardson, Alaska, Jan. 9, 2018. (U.S. Air Force photo by Alejandro Pentildea)



# Electronic Communications

## Are they important?

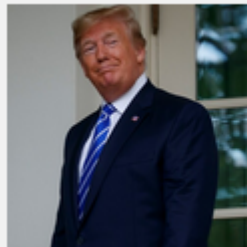


Military judge airs concerns about media leaks in Navy SEAL's war crimes case

February 13



Prosecutors celebrate victory after ruling in Gallagher war crimes case



Trump nixes NAMs for 4 prosecutors tied to SEAL case

July 31 at 6:35 PM



Prosecutors accuse Navy SEAL's attorneys and Navy Times reporter

May 13



May 30

Obama downplays email tracking in SEAL murder case



Navy orders probe into actions of Judge Advocate General Corps leaders

August 1 at 8:04 PM

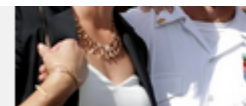


Navy judge rules on war crimes case

June 7

War crimes case collapsed in court but 4 prosecutors still netted NAMs

June 7 at 6:25 PM



# Rule 1.1, Competence

- **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 representation.
- Is this limited to “legal knowledge”?
- What about subject matter knowledge?

# Telephones



# Technological Innovation

- Cordless/Cellphones
  - In early 1990s this was a new fangled invention
  - Several states limited attorney/client discussion on cordless and cellphones
    - Permitted if Attorney used a Scrambler (NH 1991)
    - Permitted if Attorney obtains informed consent from client to include briefing interception risk (MA 1994)
  - Modern rules:
    - Allowed absent extraordinary circumstances suggesting risk of interception (DE 2001)



# Is this any different than a telephone party line?

- During a disciplinary hearing, a research clerk for a Kansas Court of Appeals Judge **tweeted**
- “Why is [PK] smiling? There is nothing to smile about douchebag”
- “It’s over, sorry”
- “naughty, naughty boy”
- Attorney offered apology (and changed her privacy settings)
  - **I didn’t stop to think** that in addition to communicating with a few of **my friends on Twitter** I was also communicating with the **public at large**, which was not appropriate for someone who works for the court system
- Fired!

Let's take a closer look



## Rule 4.3

### DEALING WITH UNREPRESENTED PERSON

- 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.** The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

# Rule 8.4 MISCONDUCT

- It is professional misconduct for a lawyer to:
  - (a) violate or attempt to violate these *Rules*, knowingly assist or induce another to do so, or do so through the acts of another;
  - (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
  - (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
  - (d) engage in conduct that is prejudicial to the administration of justice;
  - (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these *Rules* or other law; or
  - (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
- DISCUSSION
- An Air Force attorney that advises on a lawful investigative activity, including providing guidance on undercover activity that involves the use of subterfuge or misrepresentation by investigators, does not violate subsection (c) of this rule.

# Can you “friend” a witness?

- Attorney has a trial pending
  - Wants to know more about witness in the case
  - Asks paralegal to “friend” the witness on Facebook or other social media
  - Is this ok?
- Rule 8.4 can not engage in dishonest conduct
  - Required to disclose affiliation

# Fake Facebook

- District Attorney for Centre County, PA makes a fake Facebook page, “Brittney Bella” for purpose of liking stores that had sold “bath salts”
- Accepted friend requests
- “Used photos from around the internet of young female individuals to enhance the page’s allure”
- Told Assistant D.A.s and staff that she made the fake page and they could use it to “befriend defendants or witnesses if you want to snoop”
- Also many ex-parte communications with judges via email
- Result: Suspended for a year and a day

# Can you “friend” a judge?

- **Air Force Judicial CANON 3**
- **A JUDGE SHALL PERFORM THE DUTIES OF THE JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY.**
- Does the platform matter?
  - LinkedIn, Instagram, Facebook, Tinder
- Can you be Social Media friends with attorneys?
- When do you have to disclose?

# Ex Parte Communications

- A military judge's **ex parte** interactions with counsel and witnesses may form the basis for **disqualification**; however, certain **ex parte** communications are permissible.
- Disqualification is not required if the record shows that the communication did not involve substantive issues or evidence favoritism for one side.



# Ex Parte by Email

- Yes -- rule is not limited to in person conversations
- Maybe a better practice to include emails between counsel and the military judge in the record of trial
  - *See, United States v. Gutierrez*, No. 201700031, 2017 CCA LEXIS 502, at \*4-5 (N-M Ct. Crim. App. July 31, 2017) (“Under these facts, we find it improbable the military judge conducted *ex parte* communications with the trial counsel via email.”)

# Rule 1.4 COMMUNICATION

- (a) A lawyer shall
  - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
  - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - (3) keep the client reasonably informed about the status of the matter;
  - (4) promptly comply with reasonable requests for information; and
  - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

# Facebook messenger and clients

- Client is in automobile accident
- Other vehicle is driven by employee of SERCO, a company in Texas
- Attorney files suit against Serco in NJ
- Wins default judgment
- Serco appeals and says - - get a map (or words to that effect)
- Default judgment overturned
- Client has questions
- Attorney responds via Facebook (messenger?)

# Attorney's Facebook Responses


## Dec 2010 to April 2015

- “relax”, “I will take care of it”, “I will explain later”, “we are fine”, “we won”, “Be happy. We are in the driver’s seat”, “I’m busy right now”, “u realize we sued the wrong company right? We got the money from a company that had it. The correct company would never have had this type of money to pay our judgment”, “this is complicated”, “we’ve been busting our asses getting ready for this hearing”, “I can’t explain the whole process”, and claimed they will have to write a book to explain it all to him.



- Duties?
  - The formal charges allege that by his actions, respondent violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (**competence**), 3-501.3 (**diligence**), 3-501.4(a) and (b) (**communications**), 3-501.5(b) and (c) (**fees**), and 3-508.4(a) (**misconduct**).
  - Result: 90 day suspension, 1 year probation

# Too Much Communication?

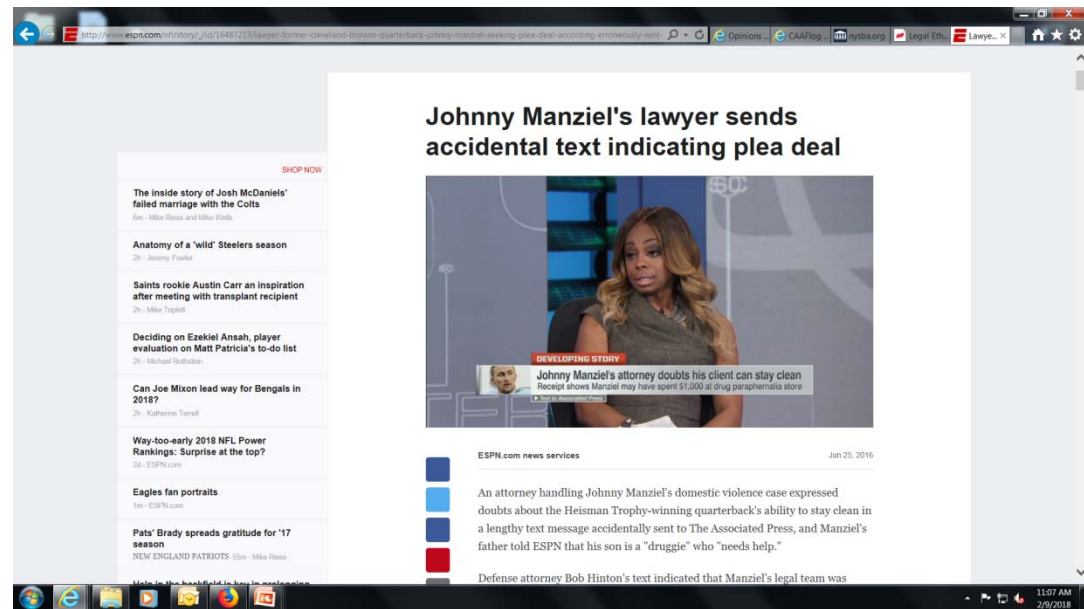
- Las Vegas Attorney A.P.
  - March 2019: Makes 2 Facebook posts referencing a snitch with a picture of a rat emoji
    - 
  - Posted the women's mug shot
    - "This nasty creature is a known snitch"
  - Arrested for intimidation charges
- Later pled guilty to wrongfully providing a cellphone to an inmate (her boyfriend?)
- Disbarred

# Rule 1.6/Confidentiality

- **Rule 1.6. Confidentiality of Information**
- **(a)** Except when required under Rule 1.6(b) or permitted under Rule 1.6(c), **a lawyer shall not**, during or after termination of the professional relationship with the client, **use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.**
- **(c)** A lawyer **may use or reveal**:
  - (1) confidences or secrets when permitted under these Rules or **required by law or court order**;
  - (3) confidences or secrets necessary to establish or collect the lawyer's fee or **to defend the lawyer** or the lawyer's employees or associates against an **accusation of wrongful conduct.**

# Bad Day for the Attorney

- Johnny Manziel involved in a hit-and-run crash
- One of his Attorneys sends text to AP
- “Heaven help us if one of the conditions is to pee in a bottle.”
- Attorney meant to send the text message to another attorney on the case
- Attorney asserted that the contents were protected by attorney-client privilege
- Threatened to sue the AP if reported the contents
- Follow Up:
  - Attorney is released from the case





# The Bad Review and TMI

- 5 Feb 2013: Client posts a bad review on AVVO
  - 7 & 8 Feb: Atty emails client requesting delete
  - Client agrees if Atty refunds fees and provides files
  - April (?) 2013: AVVO removes the negative review
- 10 April 2013: Client posts 2<sup>nd</sup> negative review
- Atty responds
  - reveals client confidential information
  - Exceeds what is necessary to respond to complaint
- Result: Reprimand

# The Email Dump

- Atty represent Client in divorce proceeding
- Potential Settlement reached
  - Atty withdraws from representation
  - Client tries to withdraw from settlement
    - Claims Atty coerced her into settling
- Attorney responds by sending opposing counsel >500 pages of Atty & client emails
  - No court order
  - Did not redact client's personal info
- Result: Reprimand

# Blog too much

- Judge Maggio, Circuit Court Judge
  - aka geauxjudge on tiggerdroppings.com
- Posts about closed adoption by actress
  - Nonpublic information
  - “a friend who is a judge did her adoption today”
  - Q “are you a judge too”
    - A “Yes”
- “I have a bunch of public intox cases in 20 minutes and just can’t wait to slam the gavel”
- Results: 10 years in jail
- Took a bribe to reduce a verdict of \$5.2M to \$1M
- Ethics Violation: Permanent bar from judicial service

# What was I thinking?



# Courtroom selfies

- Waukesha, WI criminal defense attorney wins acquittal at re-trial for client earlier convicted of intentional homicide
  - Takes a selfie with his client in the courtroom and posts it on Facebook
  - Judge finds out and orders attorney to explain in person
  - Judge: “To me it’s undignified”
- WI Supreme Court Rule 20:3.5, Impartiality and decorum of the tribunal. Subsection (d) says a lawyer shall not, “engage in conduct intended to disrupt a tribunal.”
- WI Supreme Court Rule 62
  - Officials in a courtroom will conduct themselves in a manner which **demonstrates sensitivity** to the necessity of preserving **decorum** and the integrity of the judicial process

# Send Lawyers, Guns and Money

- After trial DA and police officer post photo holding the evidence
- Problem?

You should take the plea..



# #Killinnazis

- Xarelto trial for German based drug company
- “Week 6. Day 1. Fingers crossed. #Killinnazis.”
  - Along with photo of courtroom
- “When they attack the messenger and not the message they lose the debate.’ Fighting the good fight with a team of my heroes.”
  - #killinnazis and another photo of courtroom
- \$27.8 Million verdict
- Case overturned (due to evidentiary issues)
- Judge: “beneath the dignity of the legal profession”
- Pro hac vice admission revoked!
- Off the next 6 Xarelto trials in Pennsylvania

# Same Xarelto trial

- Attorney takes photo with judge on the bench in the background
  - Posts it on Instagram
  - Used in advertising materials
- Results:
  - \$2,500 fine
  - 25 hours of community service



# #Killinnazis

- Xarelto trial for German-based drug company
- “Week 6. #Killinnazis.”
  - Along with #killinnazis
- “When you fight with the good and not the messengers, you are fighting the good fight with the good.”
  - #killinnazis courtroom
- \$27.8 Million
- Case overturned (due to evidentiary issues)
- Pro hac vice admission revoked!



G?

# Rule 3.3

## Candor towards Tribunal

- (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;
  - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of an accused in a criminal matter that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in a criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

## Maybe your definition of “family emergency” is different than mine?

- Judge sets deadline of 26 November for plaintiff’s attorney to file a motion
- Attorneys miss deadline and file motion with belated request for extension on 6 December
- Explanation: Family emergency– had to fly to Mexico City on 21 November to 8 December

# Ooops!



- Instagram account
  - Eating Thanksgiving dinner with friends in NYC
  - MOMA event on 1 Dec
  - Miami on 3 Dec
    - “Not a bad place to work. Not bad at all. # Miami”
  - Judge: “misrepresentations to the court clearly constitute bad faith and were unreasonable and vexatious, not simply a misunderstanding or well-intentioned zeal”
  - \$10,000 in attorney’s fees to opposing counsel



## “Just Clean it Up”

- Virginia Atty representing H in personal injury and wrongful death of W against A. Concrete
- A. Concrete issued discovery request of H’s Facebook pages, pictures, profile, etc.
- Atty emails paralegal to tell client/H to clean it up
- Deletes 16 photos to include one of H holding a beer and wearing a “I ‘heart’ Hot Moms” shirt
- \$542,000 sanction against Atty
- Suspended for 5 years

# Additional Resources

- *Attorney Ethics & Social Media*, Julie Tappendorf, 2015 ABA Annual Meeting
- *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, Michael E. Lackey Jr. & Joseph P. Minta, 28 *Touro L. Rev* 149 (2012)

# Questions?

