

THE ETHICS OF E-MAIL AND SOCIAL NETWORKING
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I. SOCIAL NETWORKING SITES AND BLOGS

A. “Friending” an Adverse Party

Scenario 1:

Christina Counselor lives on Facebook in her spare time. One evening she discovered that Louis Loser, the adverse party in a custody matter had a Facebook page. She reviewed the limited public information available on Loser’s Facebook page, but wanted to access the much more detailed, private information on Loser’s page. Because many users detail many aspects of their private life on their pages, Counselor suspected that the private information on Loser’s page would contain relevant information regarding his credibility and inability to parent his children. Knowing that many social networking users are less than discriminating when accepting “friend” requests, Counselor decided to have her assistant, Penelope Paralegal, request to be Loser’s “friend.” Counselor decided to have Paralegal do it because she did not think that Loser would recognize Paralegal’s name. Paralegal used her actual name and other truthful identifying information in her attempt to “friend” Loser but did not reveal her affiliation with Counselor or that she was only seeking to be his friend to gain relevant information for use at trial. Loser accepted Paralegal’s friend request. By looking at Loser’s Facebook page, Paralegal gained valuable information for Counselor to use in the custody trial.

Is Christina Counselor’s course of conduct permissible under the Rules of Professional Conduct? *See Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02.*

B. “Friending” a Judge

Scenario 2:

District Attorney Upper Hand knew that Judge Jolly was overly lenient on white collar defendants, especially females. DA Upper Hand was seeking a lengthy jail sentence for a young, single mother of 2 children who embezzled thousands of dollars from her employer, a prominent local company which contributed heavily to the DA’s recent campaign. The case was assigned to Judge Jolly. The defendant retained Christina Counselor to represent her. DA Upper Hand knew that Christina Counselor had a page on Facebook and learned that Judge Jolly was listed as one of her “friends.” On that basis, AUSA Upper Hand filed a motion to recuse Judge Jolly. Should Judge Jolly be “friending” attorneys on Facebook?

C. Posting on a Social Networking Site or Blog

Scenario 3:

Judge Jolly denied the motion for recusal and to avoid appearing lenient with Counselor’s client or appearing to favor Counselor in any way, Judge Jolly sentenced much tougher than he normally would have. He sentenced the first time offender to a state prison sentence which forced her children into foster care. That evening Christina Counselor was extremely upset. She immediately “de-friended” Judge Jolly on her Facebook page and proceeded to post some disparaging remarks about him, referring to him as the jolly jerk who has no compassion and no clue how to be a judge. Prior to her tirade, Christina Counselor had not “de-friended” the judge’s secretary who promptly reported the whole thing to the judge the next morning. Does Christina Counselor have an ethical problem for her statement?

II. COMMUNICATION THROUGH E-MAIL

A. Inadvertent Disclosure

Scenario 4:

(A) Larry Lawyer and Barry Barrister are criminal defense attorneys, each representing a defendant in a multi-defendant drug conspiracy. Larry Lawyer represents the lead defendant, Kenny Kingpin. Barry Barrister represents Kenny Kingpin's son, Junior Kingpin. Larry Lawyer received an e-mail from the Assistant District Attorney prosecuting the conspiracy. The subject line of the e-mail was Kingpin et.al. Larry opened the e-mail and began reading. After a few lines, Larry realized that the e-mail was clearly intended for Barry Barrister and was sent to Larry by mistake. The e-mail confirmed the information Junior Kingpin provided about his father's drug deals and set forth information relating to plea negotiations.

Larry Lawyer is obligated under the Rules of Professional Conduct:

1. To notify the Assistant DA of his mistake.
2. To delete the e-mail and saying nothing to the Assistant DA
3. To forward the e-mail to its intended recipient, Barry Barrister.
4. To discuss the matter with Kenny Kingpin and then decide what to do.

(B) Larry Lawyer read the document and discovered that Junior Kingpin is cooperating. Is Larry Lawyer prohibited from discussing the contents of the e-mail with his client?

(C) Barry Barrister sent an e-mail to his client, Junior Kingpin, to explain his plea options. Junior responded in an e-mail and included some confidential information about his involvement in his father's drug conspiracy. The content of the e-mail caused Barry Barrister to wonder if Kenny Kingpin was still insisting on a trial. Barry Barrister decided to send an e-mail to Larry Lawyer to ask if his client intended to proceed to trial. Instead of clicking the button to send a new e-mail to Larry Lawyer, Barry Barrister accidentally clicked the forward button and sent an e-mail to Larry Lawyer with Junior Kingpin's confidential e-mail at the bottom. Is Junior Kingpin's attorney-client privilege waived?

See The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion 2007-200; Carbis Walker, LLP v. Hill, Barth and King, LLC, 930 A.2d 573 (Pa. Super. 2007).

B. METADATA

Scenario 5:

Paul Partner was representing a plaintiff in a personal injury action. Defense counsel filed a motion for summary judgment which Paul Partner thought may be granted. Paul Partner asked Andrew Associate to draft a brief in opposition to the motion for summary judgment. Andrew Associate drafted the brief using the word processing program on the firm's computer system. Throughout the brief, Andrew Associate inserted notes to Paul Partner with his opinions regarding the doctor's reports and other unfavorable evidence. Partner reviewed a hard copy of the brief, penciled in a few minor changes and crossed out the notes inserted by Associate. At Partner's direction, his secretary made the corrections to the brief which included deleting Associate's notes, published the document to pdf and filed it using the court's electronic filing system. In addition, Partner's secretary served a copy of the brief on Defense Counsel Snoopy by e-mail. When Defense Counsel Snoopy obtained the filed document, he used a program to search for any metadata remaining in the document. Fortunately for Partner's client, Snoopy did not find any metadata remaining.

Does Paul Partner have an ethical obligation with respect to metadata?

Was Snoopy acting unethically in searching for Paul Partner's work product in the metadata?

See The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion 2009-100: "Ethical Obligations on the Transmission and Receipt of Metadata."

C. E-mail and an Employer's Computer

Scenario 6:

Susan Secretary and Allan Assistant worked in a doctor's office. They were hired on the same day, worked the same hours, were paid the same wage and did basically the same job. Both were provided with a computer at their work stations and both were assigned a work related e-mail address. Secretary had her own personal, password-protected Yahoo e-mail account. She loaded Yahoo software onto her work computer so that she could access her personal e-mail during her work day. Secretary found out that Assistant was getting health insurance coverage at the employer's expense. Secretary was never offered health insurance coverage. Secretary surmised that she was being discriminated against because she was a single woman and Allan Assistant had a wife and child. Secretary consulted an attorney who specializes in employment law. Secretary exchanged several e-mails with the employment attorney regarding a potential discrimination suit. Each time she communicated with the attorney using her employer's computer, she used her Yahoo e-mail address and not her work e-mail. Susan Secretary resigned her position and filed suit. During the litigation, her attorney discovered that her prior employer had copies of the e-mails she sent to and received from her attorney on her personal account using her employer's computer.

Discussion:

Did Secretary waive the attorney-client privilege in communicating with her attorney this way?

See Stengart v. Loving Care Agency, Inc., 973 A.2d 390 (N.J. Super. 2009).

What if Secretary had not had a personal e-mail account and used her employer's e-mail account to communicate with her attorney?

See Scott v. Beth Israel Medical Center, Inc., 847 N.Y.S.2d 436 (2007).

See also City of Ontario, California v. Quon, 130 S.Ct. 2619 (2010).