LEGAL ETHICS IN THE DIGITAL AGE

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INTRODUCTION—THE ETHICS HOUR

Rules of Professional Conduct

Ethical questions always start with the Rules of Professional Conduct. What are the Rules of Professional Conduct but another set of "Rules"? How are the Rules of Professional Conduct different from the Rules of Evidence, the Rules of Civil Procedure, or the Rule against Perpetuities?

We call our Rules of Professional Conduct rules of "ethics." I'm talking about these rules today because we have a mandatory one-hour "ethics" requirement in our continuing legal education obligation: "Every member of the Bar of Arkansas, except as may be otherwise provided by these rules and, excepting those attorneys granted voluntary inactive status by the Arkansas Supreme Court Committee on Professional Conduct, shall complete 12 hours of approved continuing legal education during each reporting period as defined by Rule 5(A) below. Of those 12 hours, at least one hour shall be ethics, which may include professionalism as defined by Regulation 3.02." *Ark. R. Minimum Con't Legal Educ. Rule 3* (2009)

So what is this ethics hour supposed to be all about, anyway? Here it is:

Rule 3.02. Ethics

> Ethics presentations shall be distinct segments no less than one hour in length, shall be specifically designated separately on the program application and shall be accompanied by appropriate documentation. Likewise, claims for ethics credit shall be designated separately on certificates of attendance submitted to the Secretary.
>
> Ethics shall be defined as follows: "Legal ethics includes, but is not necessarily limited to, instruction on the Model Rules of Professional Conduct and the Code of Judicial Conduct."

> Ethics may include professionalism courses addressing the principles of competency, dedication to the service of clients, civility, improvement of justice, advancement of the rule of law, and service to the community.
>
> Professionalism courses may include a lawyer's responsibility as an officer of the Court; responsibility to treat fellow lawyers, members of the bench, and clients with respect and dignity; responsibility to protect the image of the profession; responsibility generally to the public service; the duty to be informed about methods of dispute resolution and to counsel clients accordingly; and misuse and abuse of discovery and litigation.

Ark. Regulation Con't Legal Bd. Rule 3.02 (2009).

The ethics hour ought to also have something to do with the program.

The rule tells us that the Rules of Professional Conduct and a few related issues are entitled to an hour out of our twelve hour annual continuing legal education requirement. As substantive law, these rules are not all that complex. They are, to be sure, vague, but I'm not sure that they are conspicuously vaguer than some of the other broad rules of general applicability. They are difficult to apply, and frequently there is precious little authority to go on. We could look to the cases in which people get in trouble, but for the most part, with a few exceptions here and there, those seem to be fairly obvious cases. The only thing that bothers me about them sometimes is that I think the committee is too willing to take action on cases that in my opinion, if I were on the committee, I think I'd leave to the legal malpractice bar. If someone lets a statute of limitations run, sure, it's probably a legitimate violation of the rules about competence, but there's always circuit court for those cases. That's just me. I'm not likely to be on the committee any time soon.

Back to the question: What is it about this relatively short set of rules that requires that it dominate one twelfth of our annual continuing legal education requirement?

To understand this requirement, I believe we have to look beyond the letter of the law and seek out its spirit. Unfortunately, that is often an invitation to impose our own values and prejudices on a set of rules, reading things into them rather than taking guidance from them. We cannot read the Rules of Professional Responsibility as a moral code. It is a body of substantive law. We are obliged to comply with the strictures of that substantive law, even if our personal moral code might counsel us to act differently than the rules require. In many

areas a cogent, strong, and principled ethical argument can be made for behavior that would violate the code. But if we are to practice law, we must set our personal moral beliefs to one side and live up to our oath to follow the Code of Professional Conduct. Still, I think the aspiration of the ethics hour is more than that we engage in a dispassionate analysis of the substantive requirements of the Model Rules of Professional Conduct, and that we spend this hour discussing our "ethical" obligations above and beyond the mere obligations imposed by the Model Rules. Which brings us to the question, *are there any moral or ethical obligations above, beyond, or different from those imposed by the rules?*

The drafters of the Preamble to the Model Rules seemed to think so. "The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." Preamble, Arkansas Model Rules of Professional Conduct. Scope. But what is the content of the additional moral and ethical considerations that should inform a lawyer? Reasonable minds can differ, and the minds of lawyers are seldom limited to the ideas that inhabit the hypothetical "reasonable mind."

The Model Rules are a starting point. The Model Rules are the ethical rules that are actually enforced—the violation of which will subject us to sanctions.

Most real ethical quandaries arise out of conflicting ethical obligations. The most common situation in which this occurs is when a conflict of interest arises. We may owe conflicting duties of loyalty to our clients and the legal system. We may owe conflicting legal duties to different people.

A. Current and Upcoming Online Privacy Laws and Their Effect on Legal Practice

According to onlineprivacylaws.com, who ought to know, there is no universal online privacy law. There are a number of laws that impact on online privacy, including the Gramm-Leach-Bliley Act (Financial Services Modernization Act of 1999), HIPAA (the Health Insurance Portability and Accountability Act), and COPPA (Children's Online Privacy Protection Act). The scope of those acts is really beyond what we can cover here.

There is also the Stored Communications Act, Title II of the Electronic Communications Privacy Act. 18 U.S.C. Sec. 2701 *et seq*. The act applies to communications stored on the Internet by third party providers. It generally prevents providers from disclosing their users electronic communications to the government or a third party without a search warrant. It contains several exceptions, but there's not an exception for subpoenas issued in civil matters. *Bower v. Bower*, 808 F.Supp.2d 348, 349-50. For more on this act see Ryan A. Aarda, *Discovering Facebook: Social Network Subpoenas and to the Stored Communications Act*, 24 Harv. J.L. & Tech 563 (2011).

The absence of a universal online privacy law has led the Obama Administration to issue *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* (February 2012). The proposal is detailed, but to summarize the seven principal rights included in the proposed Consumer Privacy Bill of Rights, we have:

> 1. INDIVIDUAL CONTROL: Consumers have a right to exercise control over what personal data companies collect from them and how they use it.
> 2. TRANSPARENCY: Consumers have a right to easily understandable and accessible information about privacy and security practices.
> 3. RESPECT FOR CONTEXT: Consumers have a right to expect that companies will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data.
> 4. SECURITY: Consumers have a right to secure and responsible handling of personal data.
> 5. ACCESS AND ACCURACY: Consumers have a right to access and correct personal data in usable formats, in a manner that is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data is inaccurate.
> 6. FOCUSED COLLECTION: Consumers have a right to reasonable limits on the personal data that companies collect and retain.
> 7. ACCOUNTABILITY: Consumers have a right to have personal data handled by companies with appropriate measures in place to assure they adhere to the Consumer Privacy Bill of Rights.

Id. Appendix A: The Consumer Privacy Bill of Rights, p. 47.

The Federal Trade Commission issued a report in March, 2012 entitled *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*. www.ftc.gov/os/2012/03/120326privacyreport.pdf To give you some idea

how quickly things are changing in this area, there is a list of changes since the preliminary report on the same topic was issued in December of 2010. There are about fifteen separate points.

Obviously, politics being what it is, there is no reason to be confident that any Consumer Privacy Bill of Rights can be enacted, or what shape it will take if it is enacted.

B. ABA Ethics Guidelines for Attorney Use of the Internet

1. Using the Internet for "discovery"

Social networking sites are often a fine source of information. If you know someone's email address you can check to see if he or she is on any one of dozens of social networks (www.spokeo.com). Don't take spokeo.com as a completely reliable source, however. It identified my (now) late Mother-in-Law as an 85 year old African-American man married to a 41 year old European-American woman who—surprisingly—went by her initials, the same initials as my late Father-in-Law. How exactly they gave my in-laws a sex change (my Father-in-Law posthumously) and somehow associated them with each other at an address and indeed in a city where my Father-in-Law had never lived remains a mystery.

You can always look at a public profile, or a public blog, and gather information about an opponent. Hope A Comisky, William M. Taylor, *Don't be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas—Discovery, Communication with Judges and Jurors, and Marketing*, 20 Temp. Pol & Civil Rts. L Rev. 297, 303 (2011).

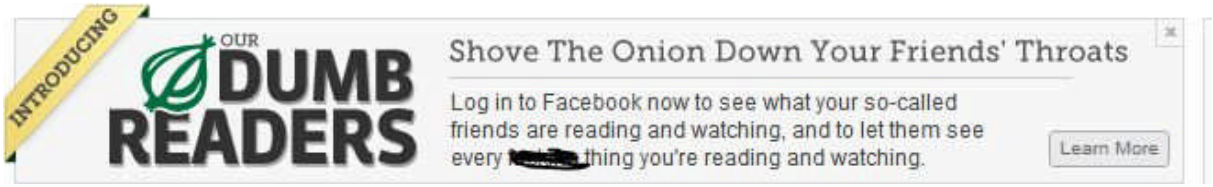
The real question comes down to the private information. And remember, on Facebook "private" information may be shared with a few thousand of your closest friends, and depending on your privacy settings, any of their closest friends. But unfortunately, that exhaustive friend list usually doesn't extend to the lawyer representing someone who is suing you. There is scant authority, but the authority that is out there in general indicates that it is improper to send a friend request to a party you are suing. Philadelphia Bar Ass'n Profesional Guidance Comm., Op. 2009-02 (Mar. 2009). It is also improper to accept a friend request if that party does want to friend the lawyer suing him or her. New York State Bar Ass'n Comm. On Prof'l Ethics Op 843. The rules likewise prevent you from getting someone else to friend

the party. Phila. Op 2009-02, *supra;* Ark. Rule Prof. Conduct 4.1 [Truthfulness], 5.3 [Supervision] and 8.4 [Misconduct to violate the Rules of Professional Conduct through the acts of another].

Are Facebook and similar "private" webpages discoverable? Obviously this is a new area, but there are some cases indicating they might well be. *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (N.Y.S.Ct. 2010) has received a lot of attention. *See Also McMillen v. Hummingbird Speedway, Inc.*, 2010 WL 4403285, 2010 Pa. Dist & Cnty. Dec. LEXIS 270 (C.P. Jefferson, 2010). *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008). There is other authority that places enough of a practical limitation on this discovery that it may be less than effective. In *Patterson v. Turner Const. Co.*, 931 N.Y.S.2d 311 (App.Div., 2011) the court reversed a blanket order and required the party requesting the discovery to provide "a more specific identification of plaintiff's Facebook information that is relevant, in that it contradicts or conflicts with plaintff's [allegations]." *Id.* at 312. *See also Tompkins v. Detroit Metropolitan Airport*, 2012 WL 179320 (E.D. Mich., 2012) (refusing to allow a fishing expedition through the private pages of a litigant, but commenting in dicta that if there was evidence that the Facebook pages might actually be relevant on any point, the result would have been different. A picture of the Plaintiff holding a very small dog [the judge estimated its weight at five pounds] and standing with two other people at a birthday party was not inconsistent with her claims of injury.). In *In re Air Crash Near Clarence Center, New York, on February 12, 2009*, 2011 WL 6370189 (W.D. N.Y. 2012) the Court compelled discovery of plaintiff's decedent's emails, social media accounts, text, messages and instant messages but emphasized that the discovery only applied to the extent the records pertained to a specific issue in dispute. In *B.M. v. D. M.*, 31 Misc.3d 1211(A) (N.Y.S.Ct. Richmond County) the court relied on extensive blogs by the wife about her activity belly dancing, finding it inconsistent with her claim of total disability.

It's amazing what you can find on Facebook. I have taken advantage of the system Facebook has to allow me to download my Facebook activity over the years. It would take hundreds of pages if printed out. Of course, a huge part of this is the listing of everything on my page, which includes about fifteen invitations to play Farmville and other games. There are numerous discussions with friends from high school years to today. But it's not just the

volume. People will post pictures of themselves with guns, with stolen swag, and all other kinds of incriminating evidence. *See Social Networking Evidence in a Self-Surveillance Society*, New York Law Journal, March 10, 2009, p. 5 col.1.



C. Using the Metadata Opposing Side Accidentally Shared Through Electronic Communication

1. Information Inadvertently Disclosed in Discovery

The Arkansas Rules of Civil Procedure contain procedures governing inadvertent disclosure of information.

> (5) Inadvertent Disclosure.
>
> (A) A party who discloses or produces material or information without intending to waive a claim of privilege or attorney work product shall be presumed not to have waived under these rules and the Arkansas Rules of Evidence if the party takes the following steps: (i) within fourteen calendar days of discovering the inadvertent disclosure, the producing party must notify the receiving party by specifically identifying the material or information and asserting the privilege or doctrine protecting it; and (ii) if responses to written discovery are involved, then the producing party must amend them as part of this notice.
>
> (B) Within fourteen calendar days of receiving notice of an inadvertent disclosure, a receiving party must return, sequester, or destroy the specified materials and all copies. After receiving this notice, the receiving party may not use or disclose the materials in any way.
>
> (C) A receiving party may challenge a disclosing party's claim of privilege or protection and inadvertent disclosure. The reason for such a challenge may include, but is not limited to, the timeliness of the notice of inadvertent disclosure or whether all the surrounding circumstances show waiver.

> (D) In deciding whether the privilege or protection has been waived, the circuit court shall consider all the material circumstances, including: (i) the reasonableness of the precautions taken to prevent inadvertent disclosure; (ii) the scope of the discovery; (iii) the extent of disclosure; and (iv) the interests of justice. Notwithstanding Model Rule of Professional Conduct 3.7, and without having to terminate representation in the matter, an attorney for the disclosing party may testify about the circumstances of disclosure and the procedures in place to protect against inadvertent disclosure.

Ark. R. Civ. P. 26(b)(5)(d).

Rule 502(e) of the Arkansas Rules of Evidence adopts this provision by reference:

> (e) Inadvertent disclosure. A disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine does not operate as a waiver if the disclosing party follows the procedure specified in Rule 26(b)(5) of the Arkansas Rules of Civil Procedure and, in the event of a challenge by a receiving party, the circuit court finds in accordance with Rule 26(b)(5)(D) that there was no waiver.

2. Information Inadvertently Disclosed Outside of the Formal Discovery Process

Rule 502(3) has to do with the attorney client privilege. That is going to be the source of most inadvertently disclosed information. What if the disclosure doesn't occur in discovery? What if, for example, defendant's counsel emails plaintiff's counsel with an offer? Plaintiff's counsel forwards the offer to his client with his comments, then the client hits reply-all to respond to his lawyer? What if the client makes a statement to the lawyer that the defense lawyer would really like to use if the case goes to trial? Does the above rule apply?

D. Pitfalls of Interactive Websites: When Does the Attorney-Client Relationship Begin?

A lawyer-client relationship can arise when a potential client manifests to a lawyer his/her intent that the lawyer provide legal services to the potential client and either 1) the

lawyer agrees or 2) the lawyer fails to manifest lack of consent to do so and the lawyer reasonably should know that the potential client is reasonably relying on the lawyer to provided the services. Restatement (Third) of Law Governing Lawyers Sec. 14 (2000). *See also* Ark. Rule Prof. Conduct 1.18 on our duties to prospective clients. There is a strong argument that if you invite people to sign up on your webpage and they take you up on it—they're your clients. That's why almost every website with an interactive request for information now has a disclaimer.

E. What Can Attorneys Say in Blogs and on the Forums?

1. Content

In the only authority on point, you can't call a judge an "evil mean witch." *Florida Bar v. Conway*, 896 So.2d 213, 2008 WL 4748577 (2008) (table; unpublished). For details see http://www.nytimes.com/2009/09/13/us/13lawyers.html?_r=2&hp http://jonathanturley.org/2009/09/30/florida-supreme-court-upholds-sanction-against-lawyer-who-called-judge-a-witch-on-a-blog/

2. Confidentiality

1.6. CONFIDENTIALITY OF INFORMATION.

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the commission of a criminal act;

(2) to prevent the client from committing a fraud that is reasonably certain to result in injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client or,

(6) to comply with other law or a court order.

(c) Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like.

3. Pretrial Publicity

RULE 3.6. TRIAL PUBLICITY.

(a) 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. A statement referred to in this paragraph ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein

a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(b) Notwithstanding paragraph (a) and its sub-paragraphs, a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

4. Improve Legal System

From the Preamble

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of

the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

5. Advertising

RULE 7.2. ADVERTISING.

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written communication.

(b) A copy or recording of an advertisement or communication shall be kept for five years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertisements or communications permitted by this rule and may pay the usual charges for not-for-profit lawyer referral service or other legal service organization; and may pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this Rule shall include the name of at least one lawyer who is licensed in Arkansas and who is responsible for its content, and shall disclose the geographic location of the office or offices of the attorney or the firm in which the lawyer or lawyers who actually perform the services advertised principally practice law.

(e) Advertisements may include photographs, voices or images of the lawyers who are members of the firm who will actually perform the services. If advertisements utilize actors or other individuals, those persons shall be clearly and conspicuously identified by name and relationship to the advertising lawyer or law firm and shall not mislead or create an unreasonable expectation about the results the lawyer may be able to obtain. Clients or former clients shall not be used in any manner whatsoever in advertisements. Dramatization in any advertisement is prohibited.

6. Unauthorized Practice of Law

RULE 5.5. UNAUTHORIZED PRACTICE OF LAW, MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

F. Separating Personal and Professional Identity Online

This is not as easy as it looks if you're planning on going by your name. You probably have the same name in your professional life and your personal life. Some people have nicknames that they use in their personal lives that they don't use in their professional lives. There is also the possibility of using a pseudonym or a screen name. Technically, many online services prohibit the use of pseudonyms, but I've seen a lot of pseudonyms on Facebook and I think most names on MySpace are pseudonyms.

HYPOTHETICALS

O. Will Laquelle is active on Facebook and has a blog for his business (http://runnelaquellehyde.weebly.com/wills-blog.html) and his personal (www.thandarr.com/will) online personas. Will uses his real name and the screen name LaquelleIWill for his business persona. In his business persona, he will occasionally discuss cases he is working on, and will drop names of impressive clients in the process if possible.

Will keeps his personal online persona completely confidential. He does not identify himself or his clients, he does not have any contact information on the site, and he doesn't even tell what state he's in. He also uses the screen name FreeWilly to converse on bulletin boards, answer questions in Yahoo! Answers, state political opinions and occasionally act as an Internet troll. He has never allowed any public connection between his FreeWilly screen name and his true identity, but some people in the legal profession have recognized him.

Although FreeWilly holds himself out as a lawyer, and occasionally discusses his own cases, albeit in an oblique fashion, he is careful not to write anything that would allow his client to be identified, liberally changing facts and details if necessary to hide the identity of his client ("to protect the guilty," as he says). He uses his blog to criticize the criminal justice system, which he sees as draconian and unreasonable.

He also occasionally blogs in his own name on his firm's website. Those blogs are, of course, usually designed to make his firm look good and serve as promotional material for his business, occasionally his frustration shows through.

THE BLOG POST HYPOTHETICAL

Unexpected consequences 09/02/2011

0 Comments

I'm on the sidelines on this case, which is strange because I usually end up in the middle of screwy cases. As you know from our webpage, I represent Bananaberry Enterprises. They have installations and employees all over the world. Well, they transferred one P.A. (I don't know why I'm using initials--the lawsuit and everything I know about it is public record) to Texarkana, Arkansas. Texarkana is a city on the border of Arkansas and Texas, and the city is divided right down the middle by the state line. Anyway, P.A. brought her live-in boyfriend, G.D., with her. They moved into a house on the wrong side of the state line--the Texas side. This violates one of the primary bits of legal advice I always give everyone who asks: **Never move to Texas.** In fact, when Bananaberry Enterprises was deciding where to locate its Texarkana offices, I recommended the Arkansas side.

G. D. found a job in Texarkana, Texas, but after about six months he became one of the unemployed. At that point P.A. called H.R. and asked to add G.D. to her health insurance. That's where we came in. Someone in H.R., who will remain not only nameless but initialless (at least until he is forced to testify in a public hearing) made the change. Neither one really remembers if the H.R. person actually asked whether G.D. and P.A. were married. The paperwork is missing. The computer shows that they're married. The H.R. person was in our Snurdly, North Dakota office. It was all done by phone.

It is alleged that G.D. and P.A. agreed to be married, and held themselves out as being married. There is an allegation that she signed a friend's guestbook as P and A. D. There are allegations they told various friends in Texarkana that they were married.

So what? Well, Texas has this think called common law marriage. If a couple agree to be married, cohabit in Texas, and tell people they're married, that's enough for a common law marriage.

Well, G.D. and P.A. split up. P.A. was unquestionably the more financially stable of the two. G.D. ends up on the Arkansas side. He finds a job, but decides that he would like a little more cash. So he brings a divorce action in Miller County, Texas.

P.A., amazed to learn that she might have been married, is fighting the deal. Under marital property law, G.D. would take a good deal of P.A.'s property acquired during the "marriage." P.A. is denying that a common law marriage ever occurred, and in the process raising all kinds of factual defenses.

One of the big questions is whether they ever held themselves out as man and wife to the

public. Interestingly, the only evidence of holding out occurred in Arkansas. Arkansas doesn't recognize common law marriage. The call asking to put G.D. on the insurance plan was placed from the Bananaberry Phlogiston office in Arkansas, to someone in North Dakota. The guestbook signature was at a wedding that took place in Arkansas. This bar exam of a conflicts of law question has led to a subpoena to us for the "documentation" involving the addition of G.D. to P.A.'s insurance. Of course, our people can't find it. It's also led to a subpoena for testimony of our employee in North Dakota, who understandably would rather not testify. That's my role.

The moral: **Never move to Texas**.

Will

THE ONLINE CHAT HYPOTHETICAL

One day after a contentious trial Will (LaquelleIWill) is relaxing and sees one of his online friends, the Honorable Neville deSaisieve (Herecomedajudge) and engages in the following chat:

LaquelleIWill: Good evening, Judge.
Herecomedajudge: Good evening, counselor. I guess you're feeling pretty proud of yourself today.
LaquelleIWill: Yep. Shouldn't I be?
Herecomedajudge: I think so. I thought your client was as guilty as hell.
LaquelleIWill: Now that the Judgment has been entered—he was.
Herecomedajudge: I think you confused the jury.
LaquelleIWill: Me? I confused myself. That's what a reasonable doubt is.
Herecomedajudge: You certainly confused me, but the jury bought it.
LaquelleIWill: If you think that one's confusing, wait until you hear the one we've got Tuesday.
Herecomedajudge: If I grant your motion to suppress, we won't have one Tuesday.
LaquelleIWill: If my schedule clears out, I could take my favorite judge golfing on Tuesday. ☺
Herecomedajudge: A meritorious argument if I ever heard one. ☺
LaquelleIWill: Look at that Court of Appeals case—*Robinson*—I cited it about ten times in my brief. That ought to do it.
Herecomedajudge: Now you're expecting me to read the brief! 8-)

LaquelleIWill: No, just *Robinson*, 2011 Ark. App. 123 ½, ____S.W.3d ____ (2011). The brief isn't all that good. I was in a hurry and there are lots of typos. But the case controls.
Herecomedajudge: What's this bullhockey you have with Murdock? You know I hate discovery disputes.
LaquelleIWill: It has breasts.
Herecomedajudge: You're going to have to do better than that. I've seen breasts. Is Murdock online? Maybe we can settle this now?
LaquelleIWill: I don't see him.
Herecomedajudge: I don't either. We shouldn't talk about it then.
LaquelleIWill: I understand.
LaquelleIWill: I'm getting tired; I'm going to log off. I'll see you Tuesday, one way or another.
Herecomedajudge: Good night. Sleep well. You earned it today. ;-)

THE FACEBOOK DISCOVERY HYPOTHETICAL (NEXT PAGE)

IN THE CIRCUIT COURT OF PULASKI COUNTY ARKANSAS

ROMEO MONTAGUE PLAINTIFF

V. No. DR 549

JULIET CAPULET MONTAGUE DEFENDANT

MOTION TO COMPEL

Comes the plaintiff, Romeo Montague, by and through his attorney, O. Will Laquelle of Runne Laquelle and Hyde, and for his motion to compel states:

1. This is a case involving the dissolution of the marriage of Romeo Montague and Juliet Capulet Montague. Plaintiff filed his original Complaint in this matter on August 31, 2011.

2. Jurisdiction is properly in this Court.

3. On January 3, 2012, Plaintiff served interrogatories and requests for production on the Defendant.

4. Defendant responded to Plaintiff's interrogatories on January 16, 2012. Defendant objected to and refused to answer Interrogatory No. 17, and Request for Production number 41 and 92 (See Exhibit A) and refused to execute the Authorization for Disclosure of Online Data

5. Plaintiff’s counsel has attempted to resolve this dispute without requiring the intervention of this Court. See Plaintiff’s correspondence (Exhibit B and D). To the extent the tone of the aforesaid correspondence is intemperate, Plaintiff’s counsel offers his apologies, but frankly Plaintiff’s counsel did not imagine that it would be necessary to bring these matters to the attention of the Court at the time the letters were written.

6. Defendant has steadfastly refused to respond to the Interrogatory and has stated his refusal in writing, thus requiring the intervention of the Court. Exhibit C and E.

7. The information sought is material to the issues to be litigated in this matter.

8. Plaintiff is entitled to discovery of the matter sought.

WHEREFORE, Plaintiff moves for an Order requiring Defendant to answer Plaintiff's Request for Production, sign Plaintiff's authorization, and for all other just and proper relief.

Respectfully Submitted

_____

O. Will Laquelle
Attorney for Plaintiff
RUNNE LAQUELLE & HYDE
8317 Ascension Rd.
Little Rock, AR 72204
Telephone: (501) 291-0369
Facsimile (501) 246-8550
will@rlhfirm.com
runnelaquellehyde.weebly.com

CERTIFICATE OF SERVICE

On this _____ day of _____, 2012, I served a copy of the above and foregoing Motion upon counsel for defendant, Matt Murdock, by electronic mail (matt@marvellawfirm.com) and facsimile (501-246-8570).

_____

O. Will Laquelle

EXHIBIT A

INTERROGATORY No. 17: Please state your Facebook password for your Facebook page www.facebook.com/juliecmontague.

RESPONSE TO INTERROGATORY NO. 17: Objection. See Response to Request for Production No. 41 and 92. The same arguments are incorporated herein and adopted.

* * * *

REQUEST FOR PRODUCTION NO. 41: Please provide the Zip file of your Facebook page, www.facebook.com/juliecmontague. Note: In order to do that, log onto your Facebook account by going to Account>Account Settings>Download Your Information and download your content into a .zip file.

RESPONSE TO REQUEST FOR PRODUCTION NO. 41: Objection. This Request is burdensome and oppressive, seeks information that is not properly discoverable, seeks information protected by the attorney-client privilege, the work-product privilege, or any other privilege, protection, or immunity applicable under the governing law. Defendant further objects to this Requests for Production of Documents as it is overly broad, unduly burdensome, oppressive, and/or seeks information that is not relevant to the issues in this lawsuit or reasonably calculated to lead to the discovery of admissible evidence. Further, much of the information is of a private nature and involves confidences of not only Defendant, but acquaintances of hers.

* * *

REQUEST FOR PRODUCTION NO. 92: Please sign the attached Authorization for release of Online Data.

RESPONSE TO REQUEST FOR PRODUCTION NO. 92: Objection. This Request is burdensome and oppressive, seeks information that is not properly discoverable, seeks information protected by the attorney-client privilege, the work-product privilege, or any other privilege, protection, or immunity applicable under the governing law. Defendant further objects to this Requests for Production of Documents as it is overly broad, unduly burdensome, oppressive, and/or seeks information that is not relevant to the issues in this lawsuit or reasonably calculated to lead to the discovery of admissible evidence. Further, much of the information is of a private nature and involves confidences of not only Defendant, but acquaintances of hers. Further, this is not a proper method of discovery under the Arkansas Rules of Civil Procedure.

AUTHORIZATION & CONSENT FOR RELEASE OF INFORMATION

Customer or Client's Full Name | Date of Birth

Customer or Client's Screen Name | Customer or Client's email address

Social Security Number | Driver's License Number

This Authorization and Consent for Release of Information is to comply with the Stored Communications Act, 18 U.S.C. §§ 2701-2712, particularly 18 U.S.C. § 2702(b)(3). Any Internet Service Provider, electronic mail provider, online social network, online dating service, or other provider of electronic data services is hereby requested and authorized to disclose any and all information about me to O. Will Laquelle, Attorney at Law, RUNNE LAQUELLE & HYDE, 8317 Ascension Rd. Little Rock, AR 72204, Telephone: (501) 291-0369, Facsimile (501) 246-8550, will@rlhfirm.com. I authorize the release of the following:

- All stored electronic mail in my account
- All stored electronic messages in my account
- All photographs or files that I have uploaded to my account or my page
    - No matter how embarrassing they may be
    - Yes, even the naked ones
- All content of my "page" or "space."
- Any photographs tagged with my name, whether uploaded by me or by someone else
- Any data about my online activities, including online gaming
- My downloadable Facebook information zip file.

I understand that the purpose of the release of this information is for use in litigation in the case of Montague v. Capulet Montague, *Pulaski Circuit Court No. DR-549.* This understanding does not purport to limit the purposes for which the information may be used. It may be used for any purpose.

A COPY MAY BE ACCEPTED AS A SUBSTITUTE FOR AN ORIGINAL FORM

If not previously revoked, this consent expires on the 31st day of December, 2050.

Client/Customer Signature | Date

EXHIBIT B

RUNNE LAQUELLE & HYDE

8317 Ascension Rd.
Little Rock, AR 72204
Telephone: (501) 291-0369
Facsimile (501) 246-8550
runnelaquellehyde.weebly.com

O. Will Laquelle
will@rlhfirm.com

January 16, 2012

Matt Murdock
Marvel Law Firm
3772 Hotspur Avenue
Gotham City, AR 78787
VIA FACSIMILE: (501) 246-8570

Re: Montague v. Montague, Pulaski Cir. DR-549

Dear Matt:

What the hell is the matter with my Interrogatory No. 19, Request for Production number 41 and 92 and why the hell won't you make your client sign my authorization? Why do you always have to make everything so God-damned difficult?

You know this information is relevant. Your client had been flirting on the Internet with probably dozens of guys and I have it on good authority that she was diddling at least two of them before our clients split. She complains that she can't work, but I'm led to believe there are pictures of her juggling oranges and jousting at the Renaissance Fair on her Facebook page. There are rumored to be several pictures of her in such a state of undress as to approach violating the Facebook Terms of Service. Tell your whore client to comply. She refused to friend either me or my secretary, so I can't get the comments, IM's and pictures any other way.

With warmest personal regards,

O. Will Laquelle

OWL/gs

P.S. Jerome in particular wants to see the pictures. Frankly, I'm not interested. I know how to Google for naked women.

EXHIBIT C

Marvel Law Firm
3772 Hotspur Avenue
Gotham City, AR 78787
(501) 413-7574
Fax: (501) 246-8570

Matt Murdoch
matt@marvellawfirm.com
Extension: 109

January 17, 2012

O Will Laquelle
VIA FACSIMILE: (501) 246-8550

Re: Montague v. Capulet Montague, Pulaski Cir. DR-549

Will:

Yes, I'm serious. This is a complete abuse of the system. There are some things that should be kept confidential. People say all kinds of things on the Internet.

You know that download would encompass all of her private messages, including some from friends that have nothing to do with this divorce. Also, although I've tried to stop her, she keeps IM'ing me about this case and what an intolerable little prick your client is. If you can find a judge stupid enough to grant a motion to compel on this one, go right ahead and try. I think if you file a motion the judge will sanction you under Rule 11 and probably hold you in contempt for insulting his intelligence.

Cordially,

Matt Murdock
Attorney at Law

MM/ss

EXHIBIT D

RUNNE LAQUELLE & HYDE

8317 Ascension Rd.
Little Rock, AR 72204
Telephone: (501) 291-0369
Facsimile (501) 246-8550
runnelaquellehyde.weebly.com

O. Will Laquelle
will@rlhfirm.com

January 18, 2012

Matt Murdock
Marvel Law Firm
3772 Hotspur Avenue
Gotham City, AR 78787
VIA FACSIMILE: (501) 246-8570

Re: Montague v. Montague, Pulaski Cir. DR-549

Dear Matt:

I hereby request that you reconsider your objection to my Request for Production No. 41 and No. 92. Your objections are without merit. The information on a person's social networking page is not protected by privilege. Even if, as you state, your client has communicated with you on Facebook, she has waived the privilege as Facebook is in no way a proper way to communicate in confidence.

It would not be burdensome or oppressive for your client to comply. I have given her instructions, and instructions are available on Facebook's highly informative help pages as well. It would take about a minute to order the file and probably five or so minutes to download it, depending on your client's ISP.

Please forward the requested information so that we can avoid having to bother Judge deSaisieve with this dispute.

With warmest personal regards,

O. Will Laquelle

OWL/gs

EXHIBIT E

Marvel Law Firm
3772 Hotspur Avenue
Gotham City, AR 78787
(501) 413-7574
Fax: (501) 246-8570

January 21, 2012

O Will Laquelle
VIA FACSIMILE: (501) 246-8550

Re: Montague v. Capulet Montague, Pulaski Cir. DR-549

Will:

The answer remains not just no but “hell” no.

There’s not a single reported decision in Arkansas authorizing such a wide-ranging and irrelevant fishing expedition of a divorce litigant’s Facebook account.

Cordially,

Matt Murdock
Attorney at Law

MM/ss

P.S. Don’t think you’re going to get away with not providing your first letter, because if you don’t, I will.