Ethics: Why Not Take The Gloves Off When You Turn The Computer On

John Jerry Glas
Deutch Kerrigan & Stiles (New Orleans, LA)

jglas@dkslaw.com | 504.593.0627
http://www.dkslaw.com/attorney/bio?id=22

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The practice of law has changed. Forty years ago, a lawyer sitting at home had access to a rotary dial telephone and a set of World Book Encyclopedias. Today, that same lawyer has access to the internet.

It is difficult to grasp the amount of information available on the internet. As of March 2012, Facebook had more than 901 million active users per month, and more than 300 million photos were being uploaded every day. In the month of April 2012, Google alone performed 17.1 billion explicit core searches.[1]

By May 26, 2012, YouTube had 490 million users worldwide; and more video were being uploaded in 60 days than the three U.S. Networks (combined) created during the past 60 years. Wikipedia (English) had 3,963,128 content articles and more than 27 million pages. Twitter had more than 100 million active users, and 500,000 were being added every day.[2]

The proliferation of social media has turned trial lawyers into online investigators; and, as we stand at the crossroads, every lawyer should stop and consider how our ethical and professional standards both restrict and require online investigation.

A lawyer should fight hard for a client, but a lawyer should never "take off the gloves" that our profession requires us to wear.

That philosophy is easily stated, but it will be tested every time a lawyer uses social media for investigative research. Whereas a lawyer can resist the temptation to violate the "golden rule" during a closing argument while standing in a courtroom before a cranky judge, it is much harder to resist the temptation to send a "friend request" while sitting in a basement before a personal computer. But that is the better measure of the lawyer and the legal profession.

The following is a list of fifty (50) increasingly common questions regarding online investigation and communication. After the list, each question is separately addressed, usually by quoting the ABA Model Rule(s) of Professional Conduct, or other sources, that either answer the question, or must be considered before answering the question.[3]

Duty To Investigate Online (General):

1. Are social networking sites such as Facebook, Twitter and YouTube potential sources of evidence for use in litigation?
2. Does a lawyer have an obligation to investigate online?
3. What is the scope of a lawyer's obligation to investigate?
4. Does a lawyer have an obligation to keep abreast of online public information?
5. Does a lawyer have an obligation to perform an online investigation right away?
6. Does a lawyer have a duty to use the results of an online investigation to zealously advocate for a client?
7. In what practice area will the duty to perform an online investigation probably be defined most thoroughly?
8. What is the standard that governs ineffective assistance of counsel claims in criminal cases?
9. Has any court found that an attorney provided ineffective assistance of counsel for failing to perform a Google search?
10. Has a pro se party in a civil litigation ever argued ineffective assistance of counsel based on a lawyer's failure to investigate online?

Online Communication:

1. May I send a Facebook "friend" request to a plaintiff?
2. May I accept a Facebook "friend" request sent to me by a plaintiff?
3. Should I send a Facebook "friend" request to a represented co-defendant?
4. May I send a Facebook "friend" request to an unrepresented third party without disclosing my true purpose for "friending"?
5. Has any Bar Association held that a lawyer can send a Facebook "friend" request to an unrepresented third party if the lawyer uses his or her real name?
6. Should I accept a Facebook "friend" request sent to me by a represented co-defendant?
7. What if I am uncertain whether a communication with a represented party is permissible?
8. May I order my Associate to send a Facebook "friend" request that the ABA Model Rules prohibit me from sending?
9. What is my obligation if I learn that a lawyer under my direct supervision is about to engage in an unethical online communication?
10. Do I have a duty to teach lawyers under my direct supervision about the ethical limitations governing online communication?
11. What is my obligation as an equity partner toward attorneys at the firm who may be investigating online?
12. Does our law firm have a duty to establish written policies and procedures to prevent attorneys from engaging in unethical online communication?
13. What if I am directed by my supervising lawyer to engage in an online communication that I know is unethical?
14. What if I am directed by my supervising lawyer to engage in an online communication that I did not recognize was unethical?
15. As a supervising lawyer, may I assume responsibility for deciding to engage in an online communication when the matter involves professional judgment as to ethical duty?
16. May I order my paralegal, secretary or assistant to send a Facebook "friend" request that the ABA Model Rules prohibit me from sending?
17. What is my obligation if I learn that the paralegal or assistant under my direct supervision is about to engage in an unethical online communication?
18. Do I have a duty to teach paralegals and assistants under my direct supervision about the ethical limitations governing online communication?
19. What is my obligation as an equity partner toward paralegals and assistants at the firm who may be investigating online?
20. Does our law firm have a duty to establish written policies and procedures to prevent paralegals and assistants from engaging in unethical online communication?
21. May I order a private investigator to send a Facebook "friend" request that the ABA Model Rules prohibit me from sending?
22. May I request that a witness refrain from communicating, online or otherwise, with another party?
23. Because I am not a state actor (i.e., a prosecutor), may I use methods of obtaining evidence that violate the legal rights of a third person?

Online Cleaning

1. May I take action to remove online information, video, entries, posts, or comments that have potential evidentiary value?
2. May I counsel my client to remove online information, video, entries, posts, or comments that have potential evidentiary value?
3. May I counsel my client to change a profile page to "private"?
4. May I counsel my client against future online communications, including posts, blogs, and Facebook entries?

Pre-Trial Posting:

1. May I counsel my client to post misleading or inaccurate information online to deceive or confuse counsel?
2. May I post inaccurate information online about myself?
3. May I post inaccurate information online about an investigation or litigation in which I am participating?
4. May I post online about an investigation or litigation in which I am participating when that post will have a substantial likelihood of materially prejudicing an adjudicative proceeding?
5. What may I post online about an investigation or litigation in which I am participating?
6. What may I post online to protect my client from recent publicity that I did not initiate?
7. What may I post online about an investigation or litigation being handled by another attorney in my firm?

Online Investigation Of Potential Jurors:

1. May I perform an online investigation of potential jurors during voir dire?
2. May I send or accept a Facebook "friend" request to jurors during the trial?

3. Do I have an obligation to my client to recognize the danger of online jurors?
4. Is there an instruction that I can ask the trial court to give to reduce the likelihood of online jurors?
5. May I monitor jurors' publicly available blog or Facebook pages?
6. What if I learn that a juror is communicating online or tweeting about the trial, and I know that juror's opinion is favorable to my client?

Duty To Investigate Online:

Are social networking sites such as Facebook, Twitter and YouTube potential sources of evidence for use in litigation?

"Lawyers increasingly have turned to social networking sites, such as Facebook, Twitter and YouTube, as potential sources of evidence for use in litigation. In light of the information regularly found on these sites, it is not difficult to envision a matrimonial matter in which allegations of infidelity may be substantiated in whole or part by postings on a Facebook wall. Nor is it hard to imagine a copyright infringement case that turns largely on the postings of certain allegedly pirated videos on YouTube. The potential availability of helpful evidence on these internet-based sources makes them an attractive new weapon in a lawyer's arsenal of formal and informal discovery devices. The prevalence of these and other social networking websites, and the potential benefits of accessing them to obtain evidence, present ethical challenges for attorneys navigating these virtual worlds." The Association Of The Bar Of The City Of New York Committee On Professional And Judicial Ethics, Obtaining Evidence From Social Networking Websites, Formal Opinion 2010-2.

Does a lawyer have an obligation to investigate online?

ABA Model Rule 1.3 states: "A lawyer shall act with reasonable diligence and promptness in representing a client." That duty includes the obligation to undertake research and to collect documents to support or defend against the complaint. See Attorney Grievance Com'n of Maryland v. Patterson, 421 Md. 708, 737, 28 A.3d 1196 (Md. 9/21/11)(accepting as not clearly erroneous Judge Souder finding that Respondent violated Rule 1.3 when he "neglected to perform any kind of services or undertake research, to collect documents to support the complaint").

What is the scope of a lawyer's obligation to investigate?

ABA Model Rule 1.1 states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The commentary to Rule 1.1 provides that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem." Id., comment ¶ 5 (underline added). "The history of Rule 1.1 notes that the rule and accompanying commentary was unchanged from the Rules' adoption by the ABA in 1983 through 2001. The commentary accompanying the 2002 amendments provides that the evaluation of evidence is "required in all legal problems." Bozeman v. Bazzle, 07-01344, at fn. 15 (D.S.C. 7/24/08)(citing Model Rules of Prof'l Conduct R. 1.1 cmt. ¶ 2 (2002)), 2008 WL 3850703, rev'd & remanded, 364 Fed.Appx 796 (C.A. 4 (S.C.) 2/9/10), cert denied, 131 S.Ct. 174, 178 L.Ed.2d 104 (2010).

Does a lawyer have an obligation to keep abreast of online public information?

Comment 6 to ABA Model Rule 1.1 states that lawyers should keep abreast of changes in the law and its practice. U.S. v. Kwan, 407 F.3d 1005, 1016 (C.A. 9 (Cal.) 2005)("It is a basic rule of professional conduct that a lawyer must maintain competence by keeping abreast of changes in the law and its practice.")(citing ABA Model Rules of Professional Conduct, Rule 1.1[6]), amended on rehearing, 03-50315 (C.A. 9 (Cal.) 2005), 05 Cal. Daily Op. Serv. 6388. This Rule is usually applied to require lawyers to comply with continuing legal education requirements, but the use of the conjunction "and" could result in the rule being applied to require lawyers to keep abreast of changes in the practice of the law. Picture a lawyer testifying that he does not know what the internet is, and performed no online investigation (including Westlaw®) of expert witnesses.

Does a lawyer have an obligation to perform an online investigation right away?

Comment to Rule 1.3 in the 2006 edition of the Maryland Rules of Professional Conduct explains that the "lawyer must act with the commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." The comment further reads that "(a) client's interests often can be adversely affected by the passage of time or the change of conditions." Is that true of the internet? Even if every deleted post can be recovered, a lawyer who visits the site six months after the post is deleted may not recognize the need to file a subpoena duces tecum.

Does a lawyer have a duty to use the results of an online investigation to zealously advocate for a client?
Comment 1 to ABA Model Rule 1.3 states that a lawyer should "act… with zeal in advocacy upon the client's behalf."

In what practice area will the duty to perform an online investigation probably be litigated and defined first?
The increase in mediations and arbitrations has led to a decrease in the percentage of civil trials each year. Unfortunately, there is no shortage of criminal cases, and the duty of a lawyer to investigate online will probably be litigated most often during criminal appeals and post-conviction relief proceedings, where claims of ineffective assistance of counsel are investigated and briefed.

What is the standard that governs ineffective assistance of counsel claims in criminal cases?
Ineffective assistance of counsel claims are governed by Strickland v. Washingon, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prove that criminal defense counsel was ineffective, the defendant must meet the two-pronged test enunciated by the Supreme Court in Strickland. First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that this deficiency prejudiced the outcome of the trial. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his defense attorney failed to meet the level of competency normally demanded of attorneys in criminal cases.

Has any court found that an attorney provided ineffective assistance of counsel for failing to perform a Google search?
In State v. Hales, (Utah, 1/30/07), 152 P.3d 321, the Utah Supreme Court granted a defendant's claim of ineffective assistance of counsel because his attorneys failed to retain a qualified expert to examine CT scans of the victim's brain injuries. In support of that motion, Defendant attached an affidavit by a pediatric neuroradiologist interpreting the CT scans; the court found that an expert opinion consistent with that post-trial affidavit could have been obtained before trial, and stated in support of that conclusion: "In fact, the State noted in its argument on a separate point of appeal that Dr. Barnes's testimony did not meet the standard for new evidence because Dr. Barnes was a prominent physician in his field whom the defense could have discovered with a "30–second" search on "Google"." Id., at 342. This case begs the question: what could most lawyers discover in most cases after a 30-second search on Google?

Has a pro se party in a civil litigation ever argued ineffective assistance of counsel based on a lawyer's failure to investigate online?
In K.M. v. C.A.F., 2012 WL 329688 (N.J.Super.A.D., 2/3/12), the pro se defendant C.A.F. appealed from entry of a final restraining order issued against him and in favor of plaintiff K.M. under the Prevention of Domestic Violence Act of 1991, and incorrectly argued "ineffective assistance of counsel" based in part on his attorney's "failing to submit facebook posting by plaintiff's family indicating that this was an ongoing effort to 'bring down Defendant."" Id., at *3. The court denied that claim stating: "defendant's claim of ineffective assistance of counsel is not cognizable as this is a civil, not criminal, case and the issue is raised for the first time on appeal, without a record on which to properly evaluate it. Even if cognizable, we reject the claim because defendant has failed to make a prima facie showing of ineffective assistance of counsel in accordance with the standards set forth in Strickland…" Id., at *4.

Online Communication:

May I send a Facebook "friend" request to a plaintiff?
ABA Model Rule 4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

May I accept a Facebook "friend" request sent to me by a plaintiff?
Comment 3 to ABA Model Rule 4.2 states: "The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule."

Should I send a Facebook "friend" request to a represented co-defendant?
Comment 2 to ABA Model Rule 4.2 states: "This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates."

May I send a Facebook "friend" request to an unrepresented third party without disclosing my true purpose for "friending"?
ABA Model Rule 4.1(a) states:" In the course of representing a client a lawyer shall not knowingly… make a false statement of material fact or law to a third person." Comment 1 to Rule 4.1 states: "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts." (underline added).

ABA Model Rule 4.3 states, in pertinent part: "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."(underline added).

Comment 1 to Rule 4.3 states, in pertinent part: "An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person."

Philadelphia Bar Association Opinion 2009-02 concluded that it would be unethical for a non-lawyer personnel to attempt to "friend" a non-party witness for the purpose of accessing information on the witness' Facebook page; unless employee disclosed identity and purpose of "friending".

Has any Bar Association held that a lawyer can send a Facebook "friend" request to an unrepresented third party if the lawyer uses his or her real name?
"Consistent with the policy, we conclude that an attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request. While there are ethical boundaries to such "friending," in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. See, e.g., id., 8 N.Y.3d at 512, 836 N.Y.S.2d at 530 ("Counsel must still conform to all applicable ethical standards when conducting such [ex parte] interviews [with opposing party's former employee]." (citations omitted))." The Association Of The Bar Of The City Of New York Committee On Professional And Judicial Ethics, Obtaining Evidence From Social Networking Websites, Formal Opinion 2010-2.

"Rather than engage in "trickery," lawyers can -- and should -- seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful "friending" of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line. Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence." The Association Of The Bar Of The City Of New York Committee On Professional And Judicial Ethics, Obtaining Evidence From Social Networking Websites, Formal Opinion 2010-2.

Should I accept a Facebook "friend" request sent to me by a represented co-defendant?
Comment 2 to ABA Model Rule 4.2 states: "This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates."

Comment 3 to ABA Model Rule 4.2 states: "The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule." If you get a "friend" request from a represented co-defendant, pick up the phone and call his or her counsel before you click anything.

What if I am uncertain whether a communication with a represented party is permissible?
Comment 6 to ABA Model Rule 4.2 states: "A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a

communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury."

May I order my Associate to send a Facebook "friend" request that the ABA Model Rules prohibit me from sending?
ABA Model Rule 5.1(c)(1) states: "A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if… the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved."

What is my obligation if I learn that a lawyer under my direct supervision is about to engage in an unethical online communication?
ABA Model Rule 5.1(c)(2) states: "A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if… the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." Comment 5 to Rule 5.1 states: "Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact."(underline added).

Do I have a duty to teach lawyers under my direct supervision about the ethical limitations governing online communication?
ABA Model Rule 5.1(b) states: "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Comment 1 to Rule 5.1 states: "Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm. See Knisley v. U.S., 817 F.Supp. 680 (S.D. Ohio, 4/1/93)("It is interesting to note that the ethics of being a supervising attorney or organization is largely ignored in the older ABA Model Code. In the new Model Rules which the ABA now suggests be adopted, supervising attorneys are required to "make reasonable efforts to ensure that [those attorneys they supervise] conform to the Rules of Professional Conduct.")(citing Model Rule 5.1(b)).

What is my obligation as an equity partner toward attorneys at the firm who may be investigating online?
ABA Model Rule 5.1(a) states: "A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."
Comment 1 to ABA Model Rule 5.1 states: "Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm."

Does our law firm have a duty to establish written policies and procedures to prevent attorneys from engaging in unethical online communication?
Comment 2 to ABA Model Rule 5.1 states: "Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct."

What if I am directed by my supervising lawyer to engage in an online communication that I know is unethical?
ABA Model Rule 5.2(a) states: "A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person."

ABA Model Rule 8.4 states: "It is professional misconduct for a lawyer to… violate or attempt to violate the Rule of Professional conduct, knowingly assist or induce another to do so, or do so through the acts of another…" (underline added).

What if I am directed by my supervising lawyer to engage in an online communication that I did not recognize was unethical?
Comment 1 to Rule 5.2 states: "Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct

a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character."

As a supervising lawyer, may I assume responsibility for deciding to engage in an online communication when the matter involves professional judgment as to ethical duty?

ABA Model Rule 5.2(b) states: "A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Comment 2 to ABA Model Rule 5.2 states: "When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly."

May I order my paralegal, secretary or assistant to send a Facebook "friend" request that the ABA Model Rules prohibit me from sending?

ABA Model Rule 5.3(c)(1) states: "With respect to a nonlawyer employed or retained by or associated with a lawyer… a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved."

ABA Model Rule 8.4 states: "It is professional misconduct for a lawyer to… violate or attempt to violate the Rule of Professional conduct, knowingly assist or induce another to do so, or do so through the acts of another…" (underline added)

ABA Model Rule 4.1(a) states: "In the course of representing a client a lawyer shall not knowingly… make a false statement of material fact or law to a third person."

The Philadelphia Bar Association, Professional Guidance Committee, issued Opinion 2009-02 (March 2009) involving an "inquirer [who] proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and Myspace websites, contact the witness and seek to 'friend' her, to obtain access to the information on the pages." Id., p. 2 of 6. The Committee concluded that the proposed conduct would violate Pennsylvania Rule of Professional Conduct 5.3(c)(1) and Rule 8.4, and Rule 4.1. The Committee considered whether the conduct would also violate Rule 4.3 (Dealing With An Unrepresented Person).

What is my obligation if I learn that the paralegal or assistant under my direct supervision is about to engage in an unethical online communication?

ABA Model Rule 5.3(c)(2) states: "With respect to a nonlawyer employed or retained by or associated with a lawyer… a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:… the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Do I have a duty to teach paralegals and assistants under my direct supervision about the ethical limitations governing online communication?

ABA Model Rule 5.3(b) states: "A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Comment 2 to Rule 5.3 states: "Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer."

What is my obligation as an equity partner toward paralegals and assistants at the firm who may be investigating online?

ABA Model Rule 5.3(a) states: "With respect to a nonlawyer employed or retained by or associated with a lawyer… A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer."

Comment 1 to Rule 5.3 states: "Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns,

and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline."

Does our law firm have a duty to establish written policies and procedures to prevent paralegals and assistants from engaging in unethical online communication?
Comment 2 to Rule 5.3 states: "Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1."

May I order a private investigator to send a Facebook "friend" request that the ABA Model Rules prohibit me from sending?
Rule 5.3(c)(1) states: "With respect to a nonlawyer employed or retained by or associated with a lawyer… a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved."

ABA Model Rule 8.4 states: "It is professional misconduct for a lawyer to… violate or attempt to violate the Rule of Professional conduct, knowingly assist or induce another to do so, or do so through the acts of another…" (underline added)

ABA Model Rule 4.1(a) states: "In the course of representing a client a lawyer shall not knowingly… make a false statement of material fact or law to a third person."

The Philadelphia Bar Association, Professional Guidance Committee, issued Opinion 2009-02 (March 2009) involving an "inquirer [who] proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and Myspace websites, contact the witness and seek to 'friend' her, to obtain access to the information on the pages." Id., p. 2 of 6. The Committee concluded that the proposed conduct would violate Pennsylvania Rule of Professional Conduct 5.3(c)(1) and Rule 8.4, and Rule 4.1. The Committee considered whether the conduct would also violate Rule 4.3 (Dealing With An Unrepresented Person).

May I request that a witness refrain from communicating, online or otherwise, with another party?
ABA Model Rule 3.4(f) states: "A lawyer shall not... request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."

Because I am not a state actor (i.e., a prosecutor or a police officer), may I use methods of obtaining evidence that violate the legal rights of a third person?
ABA Model Rule 4.4(a) states: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

Comment 1 to Rule 4.4 states: "Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship."

Online Cleaning:

May I take action to remove online information, video, entries, posts, or comments that have potential evidentiary value?
ABA Model Rule 3.4(a) states, in pertinent part: "A lawyer shall not... unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." Whether or not deleted videos, blogs, Facebook entries, and posts can be electronically recovered, the question is whether the deletion "obstructs" or "conceals" the information.

May I counsel my client to remove online information, video, entries, posts, or comments that have potential evidentiary value?
ABA Model Rule 3.4(a) states, in pertinent part: "A lawyer shall not... 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." Again, whether or not deleted videos, blogs, Facebook entries, and posts can be electronically recovered, the question is whether the deletion "obstructs" or "conceals" the information.

ABA Model Rule 8.4 states: "It is professional misconduct for a lawyer to… violate or attempt to violate the Rule of Professional conduct, knowingly assist or induce another to do so, or do so through the acts of another…"

May I counsel my client to change a profile page to "private"?
ABA Model Rule 3.4(a) states, in pertinent part: "A lawyer shall not... unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." Changing a profile page to private does not alter or destroy evidence. The question is whether it obstructs or conceals evidence.

May I counsel my client against future online communications, including posts, blogs, and Facebook entries?
In a criminal case, a defendant has a constitutional right against self-incrimination that is guaranteed by the Fifth Amendment; and a criminal defense lawyer may advise his client of that right. In civil cases, a civil lawyer has the right to advise his client not to speak with anyone about the case, and to refrain from any communication, online or otherwise, which is contrary to his or her interests.

Pre-Trial Posting Online:

May I counsel my client to post misleading or inaccurate information online to deceive or confuse counsel?
ABA Model Rule 3.4(b) states: "A lawyer shall not… falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."

ABA Model Rule 8.4 states: "It is professional misconduct for a lawyer to… engage in conduct involving dishonesty, fraud, deceit or misrepresentation…"

May I post inaccurate information online about myself?
Once a lawyer claims or creates a profile, it must comply with the ethical rules on advertising. A lawyer can be responsible for inaccurate or misleading information posted on her profile, even if posted by a third party. If the lawyer or firm claims the profile, it is the ethical responsibility of each attorney to ensure that the information in the profile, and all comments posted to the profile, are not misleading and untrue

May I post inaccurate information online about an investigation or litigation in which I am participating?
ABA Model Rule 4.1(a) states: "In the course of representing a client a lawyer shall not knowingly... make a false statement of material fact or law to a third person." Comment 1 to Rule 4.1 states: "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false."

May I post online about an investigation or litigation in which I am participating when that post will have a substantial likelihood of materially prejudicing an adjudicative proceeding?
ABA Model Rule 3.6(a) states: "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. Comment 5 to Rule 3.6(a) contains a list of "certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury.."

What may I post online about an investigation or litigation in which I am participating?
ABA Model Rule 3.6(b) carves six exceptions to the rule established in Rule 3.6(a), stating: "Notwithstanding paragraph (a), a lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a 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.."

Comment 4 to Rule 3.6(b) states: "Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a)."

What may I post online to protect my client from recent publicity that I did not initiate?

ABA Model Rule 3.6(c) states; "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."

Comment 7 to Rule 3.6 states: "Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others."

What may I post online about an investigation or litigation being handled by another attorney in my firm?

ABA Model Rule 3.6(d) states: "No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a)."

Online Investigation Of Potential Jurors

May I perform an online investigation of potential jurors during voir dire?

"It is proper and ethical under RPC 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to "friend" jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them." New York County Lawyers' Association Committee on Professional Ethics Opinion 743 (2011)

"Some authorities have examined a lawyer's use of internet resources to investigate potential jurors in the voir dire stage. For example, one recent Missouri decision considered and set aside a jury verdict in which a juror had specifically denied (falsely) any prior jury service. See Johnson v. McCullough, 306 S.W. 3d 551 (Mo. 2010). In holding that the juror had acted improperly, the Court observed that a more thorough investigation of the juror's background would have obviated the need to set aside the jury verdict and conduct a retrial. The trial court chided the attorney for failing to perform internet research on the juror, and granted a new trial, observing that a party should use reasonable efforts to examine the litigation history of potential jurors. 306 S.W. 3d at 559. A New Jersey appellate court similarly held that the plaintiff counsel's use of a laptop computer to google potential jurors was permissible and did not require judicial intervention for fairness concerns. See Carino v. Muenzen, No. A-5491-08T1, N.J. Super. Unpub. LEXIS 2154, at *26-27 (App. Div. Aug. 30, 2010); see also Jamila A. Johnson, 'Voir Dire: to Google or Not to Google' (ABA Law Trends and News, GP/Solo & Small Firm Practice Area Newsletter, Fall 2008, Volume 5, No. 1)." New York County Lawyers' Association Committee on Professional Ethics Opinion 743 (2011).

May I send a Facebook "friend" request to jurors during the trial?

ABA Model Rule 3.5(b) states: "A lawyer shall not communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order."

"Significant ethical concerns would be raised by sending a "friend request," attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog or "following" a juror's Twitter account. We believe that such contact would be impermissible communication with a juror. Moreover, under some circumstances a juror may become aware of a lawyer's visit to the juror's website.2 If a juror becomes aware of an

attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial." New York County Lawyers' Association Committee on Professional Ethics Opinion 743 (2011).

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Online Monitoring Of Sworn Jurors:

Do I have an obligation to my client to recognize the danger of online jurors?

The reality is that potential jurors and sworn jurors are going online to investigate the cases. In the case of In re Methyl Tertiary Butyl Ether (MTBE) Products Liability, 739 F.Supp.2d 576 (S.D.N.Y. 9/7/10), Juror No. 5 learned that ExxonMobil was the only remaining defendant in this case and that many of the other defendants had settled for approximately one million dollars each." In that case, the district court provided the following string cite: Christina Hall, Facebook Juror Gets Homework Assignment, The Detroit Free Press, Sept. 2, 2010 (reporting that a Michigan juror who posted on Facebook that a defendant was guilty before the completion of trial was dismissed from the jury, held in contempt of court, ordered to pay a $250 fine and required to write a five page essay on the defendant's Sixth Amendment right to a jury trial); Noeleen G. Walter, Access to Internet, Social Media by Jurors Pose Challenges for Bench, N.Y. L.J., Mar. 3, 2010 (reporting that a state trial court in the Bronx determined that a woman breached her obligations as a juror by sending a Facebook "friend" request to a government witness but rejected the defense's argument that this act had tainted the jury's guilty verdict); Andrea F. Siegel, Judges Confounded by Jury's Access to Cyberspace: Panelists Can Do Own Research on Web, Confer Outside of Courthouse, The Balt. Sun, Dec. 13, 2009 (discussing the increasing trend in Maryland courts of defendants seeking a mistrial on the ground that one or more of the jurors conducted Internet research about the defendant's case while the trial was ongoing); Debra C. Weiss, Juror Whose Revelation Forced a Mistrial Will Pay $1,200, A.B.A. J., Oct. 13, 2009 (reporting that a New Hampshire juror charged with contempt of court for revealing during deliberations that the defendant was a convicted child molester pleaded guilty to a reduced charge and agreed to pay $1,200 to reimburse the county for expenses related to two days of deliberations); Daniel A. Ross, Juror Abuse of the Internet, N.Y. L. J., Sept. 8, 2009 (examining the problem of "Internet-tainted" juries across the United States and abroad); John Schwartz, As Jurors Turn to Web, Mistrials Are Popping Up, N.Y. Times, Mar. 18, 2009 ("It might be called a Google mistrial. The use of BlackBerry's and iPhones by jurors gathering and sending out information about cases is wreaking havoc on trials around the country, upending deliberations and infuriating judges."). In response to this problem, the Judicial Conference Committee on Court Administration and Case Management has recently recommended the following charge..").

Is there an instruction that I can ask the trial court to give to reduce the likelihood of online jurors?

In December of 2009, the Judicial Conference Committee On Court Administration And Case Management prepared "Proposed Model Jury Instructions The Use of Electronic Technology to Conduct Research on or Communicate about a Case". In September of 2010, the American College Of Trial Lawyers prepared "Jury Instructions Cautioning Against Use Of The Internet And Social Networking." Today, many states have adopted jury instructions to specifically address the danger of online jurors. A list appears at http://goingpaperlessblog.com/social-media-in-the-legal-profession/ (last visited 5/26/12).

May I monitor jurors' publicly available blog or Facebook pages?

"During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not "friend" the juror, email, send tweets to the juror or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentations or engage in deceit, directly or indirectly, in reviewing juror social networking sites." New York County Lawyers' Association Committee on Professional Ethics Opinion 743 (2011).

"In another context, the New York State Bar Association Committee on Professional Ethics, in Ethics Opinion 843, recently considered whether a lawyer could ethically access the publicly available social networking page of an unrepresented party or witness for use in litigation, including possible impeachment. The NYSBA

concluded that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so." Drawing an analogy to jurors, we conclude that passive monitoring of jurors, such as viewing a publicly available blog or Facebook page, may be permissible." New York County Lawyers' Association Committee on Professional Ethics Opinion 743 (2011)(underline added).

What if I learn that a juror is communicating online or tweeting about the trial, and I know that juror's opinion is favorable to my client?

Comment 12 to ABA Model Rule 3.3 states: "Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding."

"In the event the lawyer learns of juror misconduct, including deliberations that violate the court's instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must promptly." New York County Lawyers' Association Committee on Professional Ethics Opinion 743 (2011).\

"Any lawyer who learns of juror misconduct, such as substantial violations of the court's instructions, is ethically bound to report such misconduct to the court under RPC 3.5, and the lawyer would violate RPC 3.5 if he or she learned of such misconduct yet failed to notify the court. This is so even should the client notify the lawyer that she does not wish the lawyer to comply with the requirements of RPC 3.5. Of course, the lawyer has no ethical duty to routinely monitor the web posting or Twitter musings of jurors, but merely to promptly notify the court of any impropriety of which the lawyer becomes aware." New York County Lawyers' Association Committee on Professional Ethics Opinion 743 (2011)(citing RPC 3.5(d)).

"Lawyers who learn of impeachment or other useful material about an adverse party, assuming that they otherwise conform with the rules of the court, have no obligation to come forward affirmatively to inform the court of their findings. Such lawyers, absent other obligations under court rules or the RPC, may sit back confidently, waiting to spring their trap at trial. On the other hand, a lawyer who learns of juror impropriety is bound by RPC 3.5 to promptly report such impropriety to the court. That rule provides that: "A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge." New York County Lawyers' Association Committee on Professional Ethics Opinion 743 (2011)(citing RPC 3.5(d)).

1 Facebook Statistics (http://newsroom.fb.com/Key-Facts/Statistics-8b.aspx)(last visited 5/26/12); ComScore Releases April 2012 U.S. Search Engine Rankings, Press Release on 5/11/12 (http://www.comscore.com/Press_Events/Press_Releases/2012/5/comScore_Releases_April_2012_U.S._Search_Engine_Rankings)(last visited on 5/16/12).

2 Wikipedia:About (http://en.wikipedia.org/wiki/Wikipedia:About)(last visited 5/26/12); YouTube Statistics (http://www.youtube.com/t/press_statistics)(last visited 5/26/12); Jeff Bullas, 50 Awesome YouTube Facts and Figures (http://www.jeffbullas.com/2011/05/09/50-awesome-youtube-facts-and-figures); Jeff Bullas, 20 Stunning Social Media Statistics Plus Infographic (http://www.jeffbullas.com/2011/09/02/20-stunning-social-media-statistics)).

3 It should be noted that the answers to these questions will also depend on the Rules of Professional Conduct adopted by each state, and on the cases interpreting those Rules.

About Jerry Glas

Partner | Deutsch Kerrigan & Stiles | New Orleans, LA
504.593.0627 | jglas@dkslaw.com

John Jerry Glas is a partner and a member of the Civil Litigation Department. He is an Adjunct Professor at Loyola University Law School, where he has taught a Trial Practice core curriculum class every spring semester since 2009. Mr. Glas has tried more than seventy jury trials to verdict, and he has lectured locally and nationally on cross-examination and jury selection.

Mr. Worden is a trial lawyer. He has tried dozens of cases of all kinds across the United States, for plaintiffs and defendants, in state court, federal court, in front of judges and juries and binding arbitration panels, including all of the following: insurance, reinsurance, construction, securities, environmental, venture capital, finance, labor and employment, commercial, contract, real estate, personal injury (plaintiff and defense), wrongful death, and uninsured motorist matters. To date he has won the last 19 cases he has tried.

Representative Work

Mr. Glas represents a multinational oil and gas corporation, and has handled cases involving catastrophic plant failures, chemical releases, product liability, station accidents, disputed royalty and gas interests, personal injury actions, possessory actions and petitory actions.

Mr. Glas represents the leading manufacturer of Electronic Control Devices (ECDs), and has defended law enforcement officers throughout Louisiana against claims filed by suspects and prisoners. In 2010, Jerry provided pro bono representation to a 22 year-old Winnfield Police Officer who was indicted for manslaughter after using an ECD on a criminal suspect. After a three-week jury trial, and about three hours after Jerry's closing argument, the Officer was found "not guilty."

Mr. Glas represents a Louisiana freight shipping and trucking company, and has handled numerous automobile accidents involving tractor trailer rigs, tie-down accidents, and unloading accidents.

Mr. Glas represents a Louisiana restaurant chain, and has defended restaurants and clubs against premises defect claims, negligent security claims, slip and fall claims, and other personal injury actions.

Mr. Glas has defended the manufacturers and owners of equipment against claims their machinery was unreasonably dangerous under the Louisiana Products Liability Act, including mobile container ramps, cranes, bucket trucks, and historic New Orleans streetcars

Education

- J.D., Louisiana State University, 1996
- M.A., Philosophy, University of Toronto, 1992
- B.A., Philosophy, College of the Holy Cross, 1991