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# Ethics & Social Media With A Hint Of Privacy Law

Ethics Program

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Ethics—Obligations and Risks  
WEBINAR SERIES FOR IN-HOUSE COUNSEL

# Speakers

Ethics—Obligations and Risks  
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# Ethics—Obligations and Risks

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## OVERVIEW OF THE PROGRAM

# Ethics—Obligations and Risks

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## ETHICS AND SOCIAL MEDIA

# Ethics and Social Media

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- Proliferation of sources: Facebook, Twitter, MySpace, LinkedIn, YouTube, Plaxo, Digg, Pinterest, foursquare; not including those created within organizations
- Facebook has more than 600 million users and growing
- More than 70% of lawyers are members of at least one social media network
- For millennials, email is now passé; some universities are no longer giving email accounts

# Ethics and Social Media

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- Powerful tool
  - Creation and protection of brand
  - Credibility
  - Reach clients and potential clients
- Investigative tool
- But use with care
  - A legal “wild west” that can raise ethical issues
  - Ethical obligation to act competently, so lawyers must have an understanding of how to use social media



# Ethics and Social Media

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- Ok, but beware of issues like those discussed in SC Ethics Advisory Op. 09-10
  - The lawyer must monitor the “claimed” listing to make sure all comments are in conformity with the ethical rules (especially the rules for attorney advertising, testimonials, client endorsements that create unjustified expectations) and comparisons
- So be careful when linking to another site
- LinkedIn allows members to “recommend” the work of another member. Issues?



# Ethics and Social Media

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- Be mindful of rules that place limitations on the use and content of testimonials
- Model Rule 4.1 (duty of candor) also prohibits the making of a false statement of material fact to a third person
  - Beware of possible exaggerations regarding your biography, experience, etc.
- What about announcing on Facebook or LinkedIn that you just won a big jury trial or negotiated a big deal?

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- Depending on the rules in your jurisdiction, this could require you to add a disclaimer along the lines of “results will vary in each case” or similar language
- A related issue, depending on the content of your blogs or tweets
  - Could they be governed by your state’s restrictions on lawyer advertising?
  - If so, what are your obligations?

# Ethics and Social Media

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- Texas: must file video postings seeking clients with the Advertising Review Committee
- Connecticut: sending LinkedIn invitation that links to page describing law practice is an advertisement subject to all relevant rules
- LinkedIn allows users to provide professional information under “specialties.” Are there any issues with that?

# Ethics and Social Media

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- Depending on the content, it could run afoul of bar rules, such as NY Rule 7.4(a) and Illinois Rule 7.4(c) that prohibit attorneys from claiming they are certified “specialists” in a particular field
- What about “Friending” individuals to gain information for a litigation matter?

# Ethics and Social Media

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- A lawyer may access publicly available pages
  - NYS Op. 843
- A lawyer may not ask to friend under false pretenses – NY City Bar Op. 2010-2
- Is it false pretenses to
  - Remain silent?
  - Through a surrogate?

# Ethics and Social Media

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- Philadelphia Bar Op. No. 2009-02
  - Want to obtain information to impeach witness
  - Ask third party to try to friend third-party witness
  - Would not disclose relationship between third party and counsel
- Multiple violations: deceptive communication, making a false statement to another
  - Model Rule 8.4(c), involving dishonest conduct
- Issues with blogging about cases?

BEFORE THE HEARING BOARD OF THE - Windows Internet Explorer provided by American Bar Association

https://www.lardc.org/09CH0089CM.html

dupage lawyer blogs

File Edit View Favorites Tools Help

Switching to House Calls - Ma... BEFORE THE HEARING B...

4. On or about March 14, 2008, Respondent represented a college student in relation to allegations that he possessed a controlled substance. On March 14, 2008, Respondent published the following entry on her blog:

#127409 (the client's jail identification number) This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.

5. Respondent knew or should have known that information contained in her March 14, 2008 blog, as described in paragraph four, above, was confidential, or that it had been gained in the professional relationship and the revelation of it would be embarrassing or detrimental to her client.

6. On or about March 28, 2008, Respondent represented a diabetic client in relation to his drug charges. On March 28, 2008, Respondent published the following entry on her blog:

"Dennis," the diabetic whose case I mentioned in Wednesday's post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.

7. Respondent knew or should have known that the information contained in her March 28, 2008 blog was confidential, or that it had been gained in the professional relationship and its revelation would be embarrassing or detrimental to "Dennis."

8. On or about April 9, 2008, Respondent represented a woman in relation to allegations that she had violated the terms of a previous order of probation. On April 9, 2008, Respondent published the following entry on her blog:

"Laura" was a middle aged woman with 7 children, 2 of them still adolescents. She was a traditional housewife. Her husband, a recovering alcoholic, worked. She stayed at home, and home schooled her child

start W X E I P O 2 BEFORE TH... 2 Microsof... My Documents Microsoft Po... progann.do... 11:40 AM

# Ethics and Social Media

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- That state assistant PD has faced disciplinary action for publishing information about clients on a blog about her cases and disparaging judges before whom she practiced
- Duty to protect client confidences and take steps to avoid waiver of the attorney-client or other privileges



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## A HINT OF PRIVACY LAW

# Legal Obligations

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- Depending upon the nature of their business, companies may have legal obligations with respect to information about their customers or employees
- These legal obligations can arise under federal laws such as GLB Act, HIPAA, Fair Credit Reporting Act and state privacy laws related to data breach, data disposal or minimum security standards
- A company's obligations under these various laws may impose obligations on third parties used by the company to perform services, including lawyers, accountants and other professionals

# GLB Act

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- GLB Act applies to “financial institutions” and imposes certain obligations with respect to nonpublic personal information (NPI) of customers
  - Financial institutions must provide customers with a privacy notice describing their collection and use of customer information and may need to provide customers with opt-out rights if information is shared with third parties
  - Financial institutions also have an obligation to safeguard customer data and oversee third party service providers with access to such data

# GLB Act

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- GLB Act generally permits its financial institutions to share information with third party service providers subject to certain conditions
- Financial institutions generally require their third party service providers to provide written assurances and acknowledgements regarding the security of this customer information and prohibit reuse or redisclosure

# State Data Breach Laws

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- Almost every state and the District of Columbia require companies to provide notice to individuals (customers or employees) in the event of unauthorized access to sensitive personal information
  - No uniform definition of sensitive personal information but generally include name **and** social security, credit card number, bank or other account number or health information
- Laws are aimed at limiting identity theft and other fraud arising out of data breaches
- Not just financial services firms, laws apply to any company maintaining sensitive personal information

# State Data Breach Laws

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- Some of these state laws require that vendors or other third parties in possession of such information notify the owner of data in the event of unauthorized access while this information was in the possession of the vendor
- Absent notice from the vendor, the owner of the data cannot provide timely notice to the individuals under these state laws
- Many companies providing sensitive personal information related to their employees or customers will require their third party service providers to agree to provide notice in the event of a data security breach

# HIPAA Statute

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- HIPAA is an acronym for the Health Insurance Portability and Accountability Act of 1996.
- Among other things, HIPAA required the Department of Health and Human Services (DHHS) to adopt rules requiring “covered entities” (i.e., health plans, certain health care providers and health care clearinghouses) to develop and implement measures that protect the privacy of certain health information.

# Protected Health Information

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- PHI is basically individually identifiable health information, maintained in any form or transmitted electronically, which identifies a particular individual or from which there is a reasonable basis to believe that the information can be used to identify an individual.
- Ask yourself: “could I identify a person from the information I have in my possession”?



# Individually Identifiably Health Information

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- Names;
- All geographic subdivisions smaller than a state, (city, county, precinct, zip code, and their equivalent geocodes, except for the initial three digits of a zip code if:
  - The geographic unit contains more than 20,000 people; and
  - The initial three digits of a zip code for all such units is changed to 000;
- All elements of dates (except year) for dates, including birth date, admission date, discharge date, date of death; and all ages over 89 and all elements of dates (including year) indicative of such age;
- Telephone numbers;
- Fax numbers;
- Electronic mail addresses;
- Social security numbers;
- Medical record numbers;

# Individually Identifiably Health Information

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- Health plan beneficiary numbers;
- Account numbers;
- Certificate/license numbers;
- Vehicle identifiers and serial numbers, including license plate numbers;
- Device identifiers and serial numbers;
- Web Universal Resource Locators (URLs);
- Internet Protocol (IP) address numbers;
- Biometric identifiers (finger and voice prints);
- Full face photographic images and comparable images; and
- Any other unique identifying number, characteristic, or code

# Use and Disclosure of PHI

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- Request, use, and/or disclose only the minimum amount of PHI necessary to accomplish the task.
- Only disclose PHI when necessary.
- Business associate agreements may be necessary.

# Business Associates

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- Business associates are entities or persons who perform any function or activity involving the use or disclosure of Protected Health Information on behalf of a Covered Entity.
- Covered entities will require business associates to sign business associate agreements if the business associate will use or disclose protected health information.

# Business Associate Liability

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- Previously, Business Associates were not directly liable for HIPAA violations. Business Associate liability was purely derivative through contracts with Covered Entities known as Business Associate Agreements.
- New legislation and Privacy Rules now imposes direct civil and criminal penalties on Business Associates for certain security and privacy violations under HIPAA

# HIPAA Penalties For Business Associates

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- The Final Rule significantly increases the existing civil monetary penalties for each violation.
- The severity of the penalties is based upon the knowledge of the violator, e.g., no knowledge (and by exercising reasonable diligence would not have known) of violation to reasonable cause for the violation to willful neglect.
- The Final Rule sets a cap in that any penalty for violations of the same requirement or prohibition under any of the above categories may not exceed \$1,500,000 in a calendar year.

# Breach & HIPAA Notification Requirements

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- HIPAA presumes that any unauthorized access of PHI is a breach.
- Requires that the risk assessment focus on the likelihood that the PHI has been compromised.
- Covered entities need cooperation in these reporting requirements and, as a result, business associates need to be vigilant in reporting any breaches.
- Business associate must provide notice of breach of unsecured PHI to a covered entity “without unreasonable delay and in no case later than 60 days following the discovery of a breach.”

# Safeguards

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- Only use and disclose PHI to people who you know are authorized to receive the information.
- Print PHI only when absolutely necessary. Do not leave printouts out – lock them up.
- Lock up any PHI on CDs/DVDs/external media.
- Lock/log off of your computer when you are done accessing PHI.
- When disclosing PHI, use encryption. Do not send the password in the same transmission with the PHI – send it separately.



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# Questions?

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