

# DUMMIES FOR ETHICS 3.0

JACK BURGIN  
KRAMER RAYSON LLP

# Agenda

- Ethics and the Internet
- Lawyers behaving Badly
- Rule Changes that Were and Weren't

# ETHICS AND THE INTERNET

# Friending Judges

- Tennessee judicial advisory opinion issued Oct. 2012, concluded:
  - judges may participate in social media, but
  - must do so with caution and expect
  - their use will be scrutinized by others.
  - No specifics on what was allowable or not.
  - “judges must be constantly aware of ethical implications as they participate in social media and whether disclosure must be made.”
- See also ABA Formal Opinion 462

# Florida Regulates Social Networks

- Attorney pages used solely for social purposes not subject to regulation.
- Pages used to promote practice must comply with advertising regulations.
  - No misleading information
  - References to past results
  - Predictions or guaranties
  - Testimonials
- Improper to send friend requests to obtain new business
- Must remove third party posts that fail to comply with Rules

# Va. Court Addresses Attorney Blog Posts

- *Hunter v. Virginia State Bar*, 285 Va. 485 (2013).
- Attorney's blog mostly discussed favorable criminal cases he handled. All were concluded.
- State bar brought charges saying attorney's discussion of specific results without disclaimer violated 7.1 and 7.2 because undisclaimed posts are inherently misleading.
- Court held
  - posts were commercial speech, not political speech.
  - posts could be misleading (without disclaimer) but that didn't satisfy the test.
  - State may not prohibit potentially misleading information if information also may be presented in way that is not deceptive.
  - disclaimer to explain to the public that no results are guaranteed advances legitimate government interest.

# Blog Posts Did Not Violate 1.6

- State bar also argued posts violated 1.6 because clients had not consented to releasing the information.
- Court held posts about clients was protected so long as information was already public and matter had been concluded.
  - To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom.

# Groupon Ethical Risks

- ABA issued Formal Opinion 465 on “Deal-of-the-Day” Marketing.
- Permissible but....
  - Coupon deal better than prepaid deal.
  - Must explain when deal may be refunded.
  - Must disclaim client relationship
  - ABA disagrees with jurisdictions (NC, Maryland) that have said attorney cannot retain fees from unredeemed coupons.
  - If conflict, lawyer must refund fees whether coupon or prepaid.

# Unpaid Legal Interns

- DOL Letter 9/12/2013
- Issue: employee status of law students (not graduates) who gain work experience through unpaid internships with private firms where work is limited to pro bono activities.
- FLSA generally prohibits “volunteer” services to for-profits.
  - Narrow educational benefit exception
  - Internship benefits intern and does not displace employees
- DOL conclusion: pro bono work permissible for unpaid interns, fee generating work is not.
- Intern cannot be used to “free up staff resources for billable work.”

# Appalachian Stereotypes

- NC law professor filed complaint with DC Bar alleging “client alert” posted on Crowell and Moring website violated ethical rules.
- Client alert outlined flaws in a epidemiological study of birth defects in Central Appalachian locales.
  - Namely study didn’t account for consanguinity.

# Appalachia . . .

- Professor argued client alert violated 7.1(a) (advertising) and 8.4(c) dishonesty
  - Degraded Appalachian people and mislead readers into believing that incest, not mountaintop removal mining, cause birth defects.
- D.C. Bar found no violation of rules.
  - 7.1(a) requires statement to relate to lawyer's services.
- Statement was not false because study had not, in fact, mentioned consanguinity so statement was not knowingly false.
- W.Va. Bar issued similar ruling in 2011.
- Both rulings also cautioned against firms continuing to make or promote stereotyped beliefs.

# LAWYERS BEHAVING BADLY

# Stupid Email Comments

- Prominent law firm retained in Chapter 11 filing.
- Client refused to pay \$675k bill; firm sued, client counterclaimed for firm's "sweeping practice of overbilling."

**To:**

**From:**

**Sent:** Thur 5/20/2010 10:42:27 PM

**Subject:** RE: Project Orange

What was our estimate? But Tim brought Vince in to work on the objection for whatever reason, and now Vince has random people working full time on random research projects in standard Vince "churn that bill, baby!" mode. That bill shall know no limits.

---

**From:**

**Sent:** Thursday, May 20, 2010 6:41 PM

**To:**

**Subject:** Re: Project Orange

I hear we are already 200k over our estimate-that's Team DLA Piper!

# It Only Got Worse

- New York Times, March 25, 2013: “Suit Offers a Peek at the Practice of Inflating a Legal Bill”
- New York Times, March 26, 2013, Law Firm: email was “offensive and inexcusable effort at humor.”
- New York Times, April 17, 2013: “Settling Fee Dispute, Law Firm Denounces ‘E-Mail Humor’”

# Bad Facebook Advice

- Day after receiving Defense RFP, Va. attorney told personal injury client to deactivate Facebook because it had unflattering photos.
  - One Photo showed client with a garter belt on his head, holding a bud wearing his “I Love Hot Moms” shirt.
- After page deactivated, Attorney asserted client did not have Facebook page “on the date this is signed.”
  - Then claimed defense counsel hacked client’s Facebook page and tried to make defense counsel a witness.
- Attorney agreed to five-year suspension for advice and making false statements.

# Not Letting the Facts . . .

- *Matter of Rios*, 2013 N.Y. App. Div. LEXIS 3359 (N.Y. A.D. 1<sup>st</sup> Div. 2013).
- Two attorneys were retained in sidewalk fall case in Bronx. Client said she slipped outside church.
- Attorneys found church in Yonkers (not Bronx) but sidewalk in front of that church had no defects, but sidewalk across street did.
- Attorneys then persuaded client she fell in front of home. Filed lawsuit against home owner.
- Attorneys then misled attorney they asked to help them try case. Lost the case.

# Spoil a Bad Lawsuit

- NY Disciplinary Committee alleged violations of
  - 8.4(c) (misleading conduct)
  - 8.4(h) (professional misconduct)
  - 1.1(b) (competency)
- Appellate Division upheld 9 month suspension because attorneys:
  - *intentionally influenced their client to misrepresent accident location*
  - *commenced an action against an innocent third party*
  - *failed to apprise trial counsel that their client's accident did not occur where she alleged and then sanitized file.*

# Being Your Brother's Keeper

- *Matter of Peter J. Galasso*, 19 N.Y.3d 688; 978 N.E.2d 1254 (2012), appeal after remand den. 20 N.Y.3d 1055; 985 N.E.2d 426 (2013).
- New York Court of Appeals upheld two-year suspension of lawyer whose brother stole from firm escrow accounts.
- Brother worked as a bookkeeper for the firm.
- Diverted more than \$4 million in escrow money.
- NY Grievance Committee charged Attorney with failing to safeguard clients' money.
- 2012 decision found attorney had “ceded an unacceptable level of control over the firm accounts to his brother.”

# SLAPP v. Extortion

- *Mendoza v. Hamzeh*, 215 Cal. App. 4th 799 (2013).
- Plaintiff sued attorney defendant for extortion after attorney wrote letter demanding settlement of claim.
- Demand letter threatened to report plaintiff for criminal prosecution.
- Attorney argued anti-SLAPP statute barred lawsuit.
- Court disagreed:
  - the anti-SLAPP statute does not apply to communications which constitute criminal extortion as a matter of law because such communications are “unprotected by constitutional guarantees of free speech and petition.” (quoting *Flatley v. Mauro*, 39 Cal. 4th 299, 305, 139 P.3d 2 (Cal. 2006))

# Illinois Disbars Attorney for Financial Aid Fraud

- Ill. disciplinary commission found attorney had fraudulently obtained \$22,830 in financial aid from his daughter's private school by submitting falsified income tax returns.
- Worse, attorney was antagonistic, sometimes rude" in representing himself to disciplinary commission.
- Disciplinary commission recommended suspension for three years. Ill. SC disbarred attorney instead.

# Jamaican Bigamy Nets Six

- New York attorney married in 1985.
- Went to Jamaica, falsely claimed to be a bachelor and married other woman.
- Referee recommend public censure, finding conduct unrelated to practice of law.
- Hearing panel imposed six month suspension.
- Appellate division affirmed, reasoning that the fact that the “misconduct involves his personal life only, does not necessarily warrant a sanction less severe than suspension”

# Cyberstalking Suspension

- In addition to counts alleging assault and theft (of M&M's), Illinois sought to discipline attorney for cyberstalking former girlfriend (whom he met through internet dating site).
- In one month, attorney sent 10 faxes to former girlfriend's employment saying (among others):
  - She was a “golddigging lying bimbo”
  - Not “even my ex wife has made me this angry”
  - "If I ever see you again-im gonna rip your bra off and stangle you with it lmao“ [sic]
- Illinois suspended attorney for one year.

# Ohio Suspends AG

- *Disciplinary Counsel v. Dann*, 134 Ohio St. 3d 68, 979 N.E.2d 1263 (2012).
- Ohio AG entered Alford plea to charge of soliciting improper compensation and pled guilty to filing false financial disclosures.
- AG had used campaign funds to pay for housing and other expenses for employees.
- Campaign contributor paid for AG and children to attend seminar in Arizona.
- Disciplinary board rejected 6 month suspended suspension.
- Ohio Supreme Court upheld imposition of six-month actual license suspension, relying in part on fact that AG held public office.

# Referring to Party as “illegal alien”

- Indiana Attorney represented father in divorce.
- Father complained Mom would not permit visitation.
- Attorney for Father sent Mom’s attorney letter saying
  - [Father] told me this week that he has only seen his baby . . . one day all year. Your client doesn't understand what laws and court orders mean I guess. Probably because she's *an illegal alien* to begin with.
  - I want you to repeat to her in whatever language she understands that we'll be demanding she be put in **JAIL** for contempt of court.
- Indiana Supreme Court *rejected* argument that “it was legitimate advocacy to connect Mother's alleged violation of immigration laws with her violation of Father's court-ordered visitation rights.”
- Suspended attorney for 30 days.

# Judge Tries to Ban Facebook

- Dearborn Michigan McDonald's settled class action alleging it sold non-halal meat as if it was halal.
- Attorney, Majed Moughni criticized the settlement on his Facebook page, calling it a backroom deal.
- Class counsel asked the judge to stop Moughni from making what they considered to be false and defamatory statements about the settlement.
- Judge agreed finding postings were "deliberative and abusive conduct."

# Facebook ban...

- A month after entering the injunction, the court lifted at the parties' request, who said:
  - “they changed their mind because they felt the case had become a ‘circus’ and wanted to be ‘settled and done with it.’”

# Ironic Facebook epilogue

- 2 years earlier, Majed Moughni sued Facebook, blaming it for his loss in a Congressional primary election.
- Moughni came in fourth in the August primary.
- Wanted to know why Facebook shut down his page. Wanted injunction

# Conviction for Moral Turpitude

- 70 year old attorney struck 85 year old man with his Bentley.
  - Left scene
  - Attorney lied about amount he had been drinking.
  - Falsely stated the victim had darted out in front of the car
- Pled guilty to vehicular homicide

# Moral Turpitude

- California State Bar Court found conviction and circumstances surrounding it amounted to a conviction for moral turpitude.
- RPC 8.4(b):
  - Professional misconduct to “commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects”
- RPC 8.4 comment [2]:
  - “Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.”

# W.Va. Café Fights Go Mental

- W.Va. Attorney gets in fight, twice, at local café. Told not to return.
- Day later, Attorney filed Application for Involuntary Custody for Mental Health Examination against Café owner.
  - Attorney Café owner was on drugs, suicidal, that he had assaulted attorney twice with no provocation.
  - Café owner committed, stripped, required to give urine sample and spend night at secure in-patient mental health facility.
- Attorney later pled no contest to two criminal charges.
- Attorney showed no remorse at disciplinary hearing. Maintained he was correct, argued he was staging an “intervention.”
- W.Va. Supreme Court of Appeals annulled (disbarment) license.

# Rogue Divorce Attorney

- New Mexico divorce lawyer spent 30 days in jail after security tape caught him helping a client break into her spouse's home
- Spouse moved another woman into the family residence while client was pregnant.
- Plead guilty to trespassing, criminal damage to property and larceny.

# Discipline Imposed Feb. 2013

- New Mexico Supreme Court suspended attorney from practicing law for two years.
- undergo a psychological evaluation before that and submit to a fitness assessment as required for new bar members.

**And in Local News . . .**

# TN BPR Censures Attorney for Unreasonable Fee

- John Michael Giglio told client that he would charge a fifteen percent contingency fee.
- Failed to obtain written contract documenting the terms of the fee agreement.
- Client contested the reasonableness of attorney fee because it was based on \$500,000 client received from insurance company without attorney's assistance.
- Probate Court Clerk and Master found that a reasonable fee for Mr. Giglio's services would be \$20,000. Ordered refund.
- BPR imposed public censure.

# Mishandling Funds Suspension

- Maddux, Chattanooga attorney, represented business trying collect money.
- Maddux sent letters to customers demanding they pay him directly.
  - said he would deposit funds with court pending resolution of dispute
  - paid funds to client instead
  - did not notify customers until after he paid client.
- TSC suspended Maddux for 9 months.

# **RULE CHANGES THAT WERE AND WEREN'T**

# TSC Revises Rule 9

- Rule 9 Governs Disciplinary Proceedings
- Did not adopt clear and convincing evidence standard
- BPR can Board require attorney to enter into a TLAP monitoring agreement as a condition of diversion.
- License suspension for student loan defaults.
- Effective Jan. 1, 2014

# Court Refuses Change to Advertising Rules

- Nov. 2012, TAJ petitions TSC to amend Rule 7.1 to make advertising rule more detailed.
  - Ad must include TN attorney who would perform services.
  - prohibits the use of an actor and/or model to portray a client
  - Prohibit “space aliens or talking dogs assisting clients in an advertisement”

# TSC Ruling

- After careful consideration of the petitions, briefs, and the significant number of public comments submitted on the proposed amendments, we have determined that the continued enforcement of the existing rules is preferable to any of the changes sought by the petitioners.

## RPC 8.4(d)

- BPR Petitioned TSC to broaden RPC 8.4 to move most of comment [3] to text of rule.

# BPR Petition

- BPR revision would have made it professional misconduct to “engage in conduct, in a professional capacity, manifesting bias or prejudice based on race, sex religion national origin, disability, age, sexual orientation or socio-economic status.
- Legitimate advocacy respecting the foregoing factors does not violate this provision.

# TBA Comment

- Objected to broadening of rule.
  - “in a professional capacity” is undefined and too broad
    - Would prohibit
  - No requirement that attorney *knowingly* manifested bias or prejudice.

# TSC Denied Petition

- BPR Rule would “substantially alter” current comment [3].
- Rule 8.4(d) similar to ABA model rule and is sufficiently clear.

**QUESTIONS?**