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- **Letter from the Committee Chair**

  Dear Committee Members,

  I look forward to seeing many of you at the Section Spring Meeting in WashingtonDC (April 4-6). Please come to our program on "Legal Ethics and the Law of Lawyering - Where We Are After Ethics 20/20 and Where We Need To Be" on Friday morning, April 5, from 10:30 a.m. to 12:30 p.m. We are co-sponsoring several other ethics programs sponsored by other Committees during the Spring Meeting (see below).

  Please also attend our Committee meeting on Friday morning, April 5, from 9:00 to 10:30 a.m. We will discuss current initiatives and possible Annual and Fall Meeting programs. In addition, we will have reports from Subcommittee Chairs as to progress on their plans for this year.

  If you have colleagues who you think might be, or should be, interested in any aspect of the work of the Professional Responsibility Committee, please encourage them to join. Feel free to share this newsletter with them.

  Charles McCallum,  
  Chair, ABA/BLS Committee on Professional Responsibility

- **Spring Meeting Committee Events**
  - Full Committee Meeting - Friday, April 5, 2013, 9:00-10:30 a.m.  
    Charles McCallum, Chair
  - Subcommittee Meeting - Task Force on Professional Responsibility and Technology - Thursday, April 4, 2013, 4:00-5:00 p.m.  
    Juliet Moringiello and Lois Mermelstein, Co-Chairs
  - Program - Where Are We After Ethics 20/20 and Where We Need to Be - Friday, April 5, 2013, 10:30-12:30 p.m.  
    - Jointly with the Cyberspace Law Committee and the Business Law Education Committee  
    - Panel: Bob Creamer, former Loss Prevention Counsel at ALAS, Anthony Davis, partner, Hinshow & Culbertson, LLP, Prof. Carol Needham, St. Louis University School of Law and co-author, Lawyers and the Legal Profession, and Phil Schaeffer, Partner and General Counsel, White & Case, LLP

- **Spring Meeting Ethics Programs of Other Committees**
  (See details below.)

Featured Content:

- **Use of Social Media - Hostile Use of "Friend" Request Puts Lawyers in Ethics Trouble...**


  Improper use of social media may result in an ethics violation. Defendant's counsel caused a paralegal to "friend" plaintiff on Facebook, thereby gaining access to information they later used in deposing plaintiff. Plaintiff's counsel filed a disciplinary complaint against them, alleging *inter alia*, that the lawyers used a subterfuge to gain access to the plaintiff's confidential Facebook information in violation of NJ Rules 4.2 and 8.4(c). Defendants countered that they thought a friend request was an automatic process in which anyone who clicked on the button could view another person's information and did not understand that "friending" involved making a specific request to accept an invitation. They also argued that there was no subterfuge because the paralegal used her real name. (Editor's Note: results of the ethics complaint are not available.)

  A number of states have issued ethics opinions cautioning lawyers against "pretexing" on social media (*i.e.* misrepresenting themselves or their motives when contacting a third party in an effort to dig up evidence). See for example Philadelphia Bar Association's [Professional Guidance Committee Opinion 2009-03](http://www.philadelphiabar.org/) and [San Diego County Bar Legal Ethics Committee Opinion 2011-2](http://www.sdbaro.org/).

- **But Checking Social Media Is Permissible as Part of Timely Discovery**
At least in New York, a party may obtain discovery of an opposing party's current and historical Facebook and MySpace pages, see Romano v. Steelchase, 30 Misc.3d 426 (N.Y. Sup. Ct. 2010) but the request must be made timely, see Guzman v. Farrell Building Co., a case involving a workplace injury, in which the defendant employer was precluded from obtaining social media discovery because it failed to provide sufficient affirmation of a good faith effort to resolve the disclosure dispute and made the request after discovery had concluded without demonstrating unusual circumstances warranting granting the tardy discovery request.

- **What About Researching Jurors on the Internet?**

  The New York City Bar recently suggested that a trial attorney's failure to investigate prospective juror may be an abdication of professional responsibility but the New York State Bar takes the position that where a site notifies users when their profiles have been viewed, an attorney search may constitute improper communication and therefore, an attorney must, before undertaking such a search, confirm that the site does not notify other users when their profiles have been viewed. See Applying Rules of Discovery to Information Uncovered About Jurors by Thaddeus Hoffmeister, 59 UCLA L. Rev. Disc. 28 and Researching Jurors on the Internet Ethical Implications, by Robert B. Gibson and Jesse D. Capell, NYSBA Journal, November/December 2012

- **Watching Over, Watching Out: Lawyers' Responsibilities for Nonlawyer Assistants**

  By Douglas R. Richmond (from 61 Kan. L. Rev. 441)

  This article discusses lawyers' ethical and professional responsibilities to supervise nonlawyer assistants on the professional responsibility aspects of their assignments. It reviews specific state ethics opinions and other authorities involving lawyers found to have breached their professional responsibilities as the result of vicarious violations of ethical and professional conduct standards by non-lawyers they have supervised and suggests techniques for minimizing the likelihood of problems arising as a result of outsourcing assignments. (Full text available [here](#).)

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**Other Developments:**

- **Saved by the Bell?**

  In RTR Technologies, Inc. v. Helming, 815 F. Supp. 2d 411 (D.Mass. 2011), the court found that the three-year statute of limitations applicable to professional malpractice barred plaintiff's claims. Plaintiff alleged breach of contract (with an applicable six year statute of limitations) regarding an accountant's tax advice. The court decided that the "essential nature" of the claim was professional malpractice and thus barred by the statute of limitation. (See discussion in Hinshaw & Culbertson LLP's [Newsletter](#) of December 2012, vol. 12, Issue 1.)

- **Virginia considering amendment of its rules to eliminate an internal ethics rules/statute conflict and confirm that a non-lawyer may serve as an officer of law firm**

  The Virginia State Bar's Standing Committee on Legal Ethics is seeking public comment on proposed amendments to Rule 5.4 of the Rules of Professional Conduct, which currently prohibits a lawyer from practicing law in a firm in which a non-lawyer serves as a corporate officer, to bring that rule into alignment with Virginia Code §54.1-3902(B)(1), which permits a nonlawyer to serve as the secretary, treasurer, office manager, or business manager of a law firm, notwithstanding the rule's prohibition against a lawyer practicing in a law firm in which a nonlawyer serves as a corporate officer to permit a non-lawyer to serve. (See the Virginia State Bar web site.)

- **New Jersey imposes censure for paying referral fees**

  Where an attorney (not a certified specialist) received fees equal to 1/3 of the award in cases in which he did no work on the matters he was censured for violating NJ ethics Rule 1:39-6(d). That rule (which does not apply to matrimonial law matters referred to certified attorneys) permits certified specialists to pay referral fees to other attorneys but prohibits the practice by non-certified attorneys. ("Paying Referrals Without Authority in Multiple Cases Leads to Censure" by David Gialanella, New Jersey Law Journal 1/16/2013).

- **Wisconsin says law firm invoices to a county for representing it are public records subject to disclosure**

  Without discussing possible implications for attorney-client privilege, the Wisconsin Supreme Court has held that law firm invoices to a county are public records. (See Wisconsin Attorney General's January 14, 2013 Memorandum.) Practice tip: firms may want to review billing practices relating to invoices to government agencies and other government entities to determine whether they are vulnerable to demands for public disclosure, and if so, assure that such disclosure conforms to both confidentiality requirements and clients' requests for billing information, e.g. by disclosing only the minimum required - e.g. number of hours worked and amounts due on invoices and providing additional detail in a separate privileged and confidential letter.

Fifth Circuit rules an employer may access data stored on personal cell phones without the cell phone-owner-employee’s permission

In *Fannie Garcia v. City of Laredo*, a former police dispatcher challenged her dismissal for violation of police department policy on the grounds that the evidence against her was stored on her cell phone, taken from her unlocked locker and accessed without her permission. The court concluded that text messages and photos stored on the plaintiff's cell phone were not in “electronic storage” as defined by the Stored Communications Act and thus access to the text messages and photos on the dispatcher’s cell phone did not require her authorization.

Washington State authorizes "legal technicians" to practice law in limited areas


Committee News:

- Ethics 20/20 Commission Completes Work

On February 11, 2013 the ABA House of Delegates voted to approve the following during the ABA Midyear Meeting in Dallas, all of which the Committee supported in its December 1, 2012 Memorandum to the Officers, Counsel and Delegates of the ABA Business Law Section:

- Revised 107A (Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law)
- Revised 107B (Model Rule for Registration of In-House Counsel)
- 107C as Amended (ABA Model Rule on Pro Hac Vice Admission)
- 107D (Disciplinary Authority; Choice of Law)

See "ABA Ethics Updates May Ease Rules for Foreign In-House Lawyers", by Sue Reisinger at LAW.COM, web site of the ABA Center for Professional Responsibility [get permission to link to article] and the Commission on Ethics 20/20 homepage for additional resources.

- Committee Projects and Initiatives

(For more information contact Committee Chair at mccallce@wnj.com)

  - Law of Lawyering Initiative (this will be a long-term project for study and recommendations as to a number of aspects of legal ethics and the law governing lawyers)
  - Firm Counsel Connection (see below)
  - Behavioral Legal Ethics (this will look at the psycho-social context of ethical compliance and decision-making)
  - Ethics and Technology (this will look at various aspects of the interface between legal ethics and the fast-changing technology used by or affecting lawyers in their practices)
  - Legal Ethics and Lawyers Subject to Regulation by Federal Agencies (in addition to federal securities practice, addressed by an existing Subcommittee, this would look at the interface between the current law governing lawyers (including the MRPC) and other applicable regulatory regimes or traditions, as in, for example, patent law and bankruptcy law;
  - Legal Ethics in Transnational Practice in Multinational Firms (this will look at comparative rules of ethics and professional responsibility and will explore compliance issues inherent in practice that crosses national borders)
  - State and Local Ethics Watch (the Committee will build a network of state Reporters who will keep the Committee up to date on significant state and local ethics opinions, disciplinary rulings, new rules and statutory changes, and court decisions, on a state-by-state basis.

Future projects to be considered include a Committee ethics blog and a regular column by the Committee in a Section publication (e.g., Business Law Today).

News from the Subcommittees

*Subcommittee on Information Technology Issues in Ethics and Professional Responsibility, Juliet M. Moringiello, Chair*

We are working with the Professional Responsibility and Technology Task Force of the Cyberspace Law Committee to assist and guide business lawyers in complying with the technology-related standards that the ABA added to the Model Rules of Professional Conduct in the summer of 2012. The full report of the Subcommittee is available here. If you have any interest in these issues, please contact Juliet at jmoringiello@widener.edu.
Securities Regulation Subcommittee, Simon M. Lorne, Chair

The Securities Regulation Subcommittee thinks of itself primarily as a “force in readiness.” Over the years, periodic events within the securities regulation field-usually involving activity of the SEC-have been such as to require responses from the organized bar that are well informed about both securities law and regulation and the professional responsibility obligations of lawyers. The proceedings involving National Student Marketing (1972-77), Carter & Johnson (1979-81), George C Kern, Jr. (1987-91), and the adoption of the Part 205 Lawyer Conduct rules (2002-3) are perhaps the most obvious examples. The goal of the subcommittee is to be alert to such developments at an early stage and to respond promptly and authoritatively as appropriate to the circumstances.

Law of Lawyering Initiative, Keith R. Fisher, Chair

The Committee will launch, at the Spring Meeting, a new program to be called the Law of Lawyers Initiative. This will be an ambitious effort, spread over several years, to study in depth a number of areas in the law governing lawyers that we determine should be reviewed for possible revision.

Firm Counsel Connection, Philip H. Schaeffer, Chair

The Committee is re-launching its Firm Counsel Project under the name Firm Counsel Connection (FCCx). The FCCx is intended to provide opportunities by which, on a regional basis, law firm in-house counsel can connect with one another to discuss common issues and exchange experiences on matters of ethics and professional responsibility, including conflicts, risk avoidance, malpractice, disciplinary proceedings, and maintaining an ethical compliance culture.

Other News:

- Spring Meeting Ethics Programs of Other Committees
  "Beyond the Four Corners of the Ethics Rules: Professionalism and the Business Lawyer", Thursday 4 /4 /2013 2:30 p.m. - 4:30 p.m. sponsored by the Business Law Education Committee
  "Lawyers in the Regulatory Cross-Hairs: The Regulators Focus Enforcement Efforts", Thursday, April 4, 2013, 10:30 a.m. -12:30 p.m., sponsored by the Federal Regulation of Securities Committee
  "Lawyer's Ethical Obligations Serving on Boards of Merging Nonprofits", Saturday, April 6, 2013, 10:30 a.m.-12:30 p.m., sponsored by the Pro Bono Committee

- Additional Resources


  The ABACenter for Professional Responsibility has a new "Ethics Tip of the Month" at ABA ETHICSearch. The February tip is entitled "How Ethical is your Password?"

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