NORTH CAROLINA CENTRAL UNIVERSITY SCHOOL OF LAW

CONTINUING LEGAL EDUCATION SERIES

JUNE JOY OF LEARNING

Friday, June 7, 2013

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AGENDA

8:30 am	**Registration**
9:00 am	**Divorce: It's Not as Simple as You Think!** ***Nakia C. Davis and Tameka Lester***
10:30 am	**BREAK**
10:45 am	**Free Legal Research for North Carolina Attorneys: Search Engines, Research Websites, Government Resources, and Fastcase** ***Lauren Collins and Adrienne DeWitt***
12:00 pm	**LUNCH**
1:00 pm	**Driving While Impaired for Beginners (Or a Refresher for Those Who Aren't)** ***Jeffrey Edwards***
2:30 pm	**Ethics: The Effect of Social Media and Technology on the Rules of Professional Responsibility** ***Patricia Dickerson, Moderator with Shonnese Stanback and Gerald Walden***

Divorce-It's Not as Simple as You Think!

I. "I WANT A DIVORCE!": What does your client really mean? Initial Client and Identification Issues

When I first started practicing in 2002, I was "wide eyed and bushy tailed" and was under the impression that when potential clients came into my office, they would know what they wanted, even though I was the attorney. I soon learned that more often than not, when the consultation begins with potential clients, they are at a loss as to what they really want and need, especially as it relates to a divorce. Normally, the first sentence out of a client's mouth is "I want a divorce." My "seasoned" response, "let's talk about what the word divorce really means legally and for your situation."

This CLE manuscript will address the remedies available under North Carolina law for separation and the dissolution of a marriage as well as issues (aka road blocks) that may present themselves when you are discussing with your clients how they may wish to proceed, or issues that may arise after the legal process of separation or divorce has begun. Although the emphasis of this manuscript is on separation and the dissolution of marriage, other domestic issues that normally arise as a result of the desire to sever the bonds of matrimony, such as post-separation support, alimony, equitable distribution, child custody, and child support, are also discussed as matters that are incident to separation or divorce. If any of these other domestic issues are applicable to your client, they should be discussed along with the ultimate issue of separation and divorce.

To obtain a strong understanding of what your clients consider to be the facts of their situation, it is vital that you provide them with a detailed family law consultation form/checklist (hereinafter "intake form") to complete before you meet with them. If you are a general practitioner, it is very important that you have consultation forms that are tailored to each area of law that you practice**.** ***See*** **Appendix 1**.-Gold-Bikin, et al., Divorce Practice Handbook 63-66 (1994). The more detailed the intake form, the more overwhelming it may be for potential clients. Thus, a practitioner must consider the client when drafting certain sections of the intake form that are vital to the initial consultation. One of the most important sections of the intake form is the *Vital Statics Section*, which provides a practitioner with general information regarding the potential client, the opposing party, their children and basic information about their marriage and the life of their children. This information will prove to be crucial for the practitioner and the client, as it will probably be needed for the initial draft of pleadings and the gathering of further information for potential litigation. Information and documentation about pensions, retirement plans, and other assets and debts may also be obtained by the practitioner during the consultation.

Consequently, I would strongly suggest that if you have been practicing for less than five years, you make it a priority to obtain basic information about pensions, retirements, real property, and other assets and debts as these things tend involve some of the more complex issues in family law. If, after obtaining this information, you determine that the potential client has significant assets and/or debts, you should seriously consider referring the potential legal matter to a more experienced attorney or inquire as to whether a more experienced attorney would be willing to assist you with these particular legal matters.

In addition to obtaining certain background information from the intake form, it is very important that a practitioner allows the potential client to "exhale" as potential divorce clients are usually emotional and very nervous during the initial consultation. Give them some time to just talk

to you about where they are and how they got there. As attorneys, we sometimes forget that this is our job, while this is their life. It is very important during the initial consultation that you "lend them your ear," so that they feel that you are either empathetic or sympathetic to their situation. In displaying your concern about the situation, you may want to address the emotional stages of divorce in which stage your potential client may be. "A [potential] client's emotions can have significant impact on the progress of the case." Gold-Bikin et al., *supra*, at 42. According to the *Divorce Practice Handbook*, there are five emotional stages of divorce that you should share with potential clients:

(1) Denial (this is not happening).

(2) Depression (this is happening).

(3) Anger (my spouse has some nerve).

(4) Acceptance (I'm going through a divorce and I'll survive).

(5) Going on with my life.

Id. at 42. Finally, after a review of the information obtained from the intake form and potential clients' accounts of matters, advise them of where they stand legally and what their options are as it relates to moving forward with separation and divorce-- all of which we will discuss momentarily.

You should never encourage separation or divorce. Encourage potential clients to take some time to evaluate all of their options before making the decision to proceed with filing an action. In the domestic world, at times, being a counselor is just as important as being an attorney.

It is also very important that you give potential clients other alternatives to the legal remedies discussed herein. For example, you may want to discuss the benefit of therapy, individually or for the entire family. If therapy is not an option, inquire as to whether the clients have a spiritual advisor. In addition, provide them with information that they may review before making a final decision about proceeding with litigation. There are pamphlets available on separation and divorce,

child custody, and child support produced by the Public Service Committee of the North Carolina Bar Association, or the *Divorce Manual: A Client Handbook* or *Protecting Your Children During Divorce: A Model Parenting Plan and Guidelines*, which are just two of the many publications produced by the American Academy of Matrimonial Lawyers.

II. GROUNDS FOR DIVORCE IN THE STATE OF NORTH CAROLINA

In North Carolina, one will commonly hear the term "absolute divorce." The North Carolina Family Law Marital Claims book states that "[a]n absolute divorce ends a marriage so that (except for matters involving children [and the support thereof] all of the rights and obligations between spouses that are not preserved by an agreement, a court order, or a pending claim are ended. Tenancies by the entirety are transformed, estate claims are voided, and rights to alimony and equitable distribution cease to exist unless claims are pending or have been resolved." Carlyn G. Poole, *North Carolina Family Law Marital Claims* 1 (3rd ed. 2006). And of course, the obvious result, one can marry again.

When interviewing potential clients, it is not uncommon to hear how their spouse's actions or lack thereof are the cause of the marriage failing, how their neighbor who was divorced twelve years ago in another jurisdiction told them that the spouse's actions are grounds for divorce, and how their divorce should take no time based on the "evidence" they have. Thus, before we discuss the grounds of divorce that are recognized in North Carolina, it is important to note that North Carolina is a "no fault" state. This simply means that one is not granted or entitled to a divorce based on a finding that there is an "innocent" spouse who desires a divorce due to actions of marital fault committed by a "guilty" spouse. Suzanne Reynolds & Jacqueline Kane Connors, *North Carolina Family Law* 12 (5th ed. 1999)

There are two grounds for an absolute divorce in the State of North Carolina: (1) incurable insanity of a spouse, and (2) one year's separation.

A. DIVORCE BASED ON INCURABLE INSANITY

N.C.G.S. § 50-5.1 addresses the grounds for absolute divorce in cases of incurable insanity. N.C. Gen. Stat. § 50-5.1 (2012). The elements of absolute divorce in cases of incurable insanity are:

1. That either the husband or wife has been a resident of the state of North Carolina for at least six months preceding the action.

1. A valid marriage as recognized by the State of North Carolina.

2. That the parties have lived separate and apart for three consecutive years due to the incurable insanity of the defendant.

3. Proof of the incurable insanity of the defendant by one of the three methods set out in North Carolina General Statute section 50-5.1.

4. The three methods are "a) by confinement or examination in an institution, b) by adjudication; and by c) examination."

Id. at 74 (citing N.C.G.S. § 50-5.1); *see* **Appendix 2** for the entire statue and **Appendix 3** for the Pattern Jury Instructions as it relates to divorce by incurable insanity.

It is very important to note that what is deemed insanity may vary depending on the applicable statute. Criminal and civil cases have different standards that are applied when making a determination as to what constitutes insanity. If there is a question as to whether a defendant is insane in a criminal case, the M'Naghten test is normally applied to make that determination. *The Queen v. M'Naghten*, 8 Eng. Rep. (1843). According Black's Law Dictionary, this test is used to determine if a person is "criminally responsible for an act when a mental disability prevented the person from knowing either (1) the nature and quality of the act or (2) whether the act was right or wrong." Black's Law Dictionary 433 (5th ed. 2000).

Scott v. Scott provides further instruction as to the distinction that should be made in civil cases depending on whether insanity is an issue in a divorce case or criminal case. 336 N.C. 284, 442 S.E.2d 492 (1994). In *Scott*, the plaintiff filed an action for absolute divorce based on a one-year separation and the defendant filed a motion to dismiss, asserting N.C.G.S. § 50-5.1 as an affirmative defense based on her suffering from a combination of manic depression and paranoid schizophrenia, which was argued to be incurable mental illnesses. *Id.* at 289, 442 S.E.2d at 496. As such, the defendant argued that the plaintiff should have filed an action pursuant to § 50-5.1. *Id.* at 286, 442 S.E.2d at 494. The North Carolina Supreme Court held that the lower court had properly denied the defendant's motion to dismiss as she did not " . . . prove by the greater weight of the evidence that she [was] incurably insane . . ." as addressed in the statute as testimony was given by a medical expert that "[h]er mental illness was treatable and was controlled by medication". *Id.* at 293, 442 S.E.2d at 498.

Specifically in *Scott*, the court stated,

> [the] mental impairment must be to such an extent that defendant does not understand what he or she is engaged in doing, and the nature and consequences of the act. The term "incurable insanity" in N.C.G.S. § 50-5.1 will not be redefined to equate it with severe and persistent mental illness as defined in N.C.G.S. § 122C-3(33a) of the Mental Health, Developmental Disorders, and Substance Abuse Act[.]

24 Am. Jur. 2d Divorce and Separation § 88 (2013). N.C.G.S. § 122C-3(33a) provides,

> "severe and persistent mental illness" means a mental disorder suffered by persons of 18 years of age or older that leads these persons to exhibit emotional or behavioral functioning that is so impaired as to interfere substantially with their capacity to remain in the community without supportive treatment or services of a long term or indefinite duration. This disorder is a severe and persistent mental disability, resulting in a long-term limitation of functional capacities for the primary activities of daily living, such as interpersonal relations, homemaking, self-care, employment, and recreation.

N.C. Gen. Stat. § 122C-3(33a) (2013), *quoted in Scott,* 336 N.C. at 292, 442 S.E.2d at 497.

POTENTIAL ROAD BLOCKS/PRACTICE TIPS!:

There are several important issues that a practitioner should know and bring to potential clients' attention about a divorce being granted by incurable insanity. First, once incurable insanity has been established before the court and the court finds that the insane defendant has insufficient means, which includes income and property to care from him or herself, "the court shall require the plaintiff to provide for the care and maintenance of the insane defendant for the defendant's lifetime. N.C.G.S. § 50-5.1. Second, if a finding is made that the actions of the plaintiff have contributed to the defendant's condition, the plaintiff's request for relief will be denied. Third, since only a sane spouse can bring an action for divorce based on incurable insanity, the defendant may raise the incompetence of the plaintiff as a defense. Reynolds & Connors, *supra,* at 82-83. Notably, even if a plaintiff brings an action for divorce based on one year separation under N.C.G.S. § 50-6, the defendant may use § 50-5.1 as an affirmative defense to a pleading stating an action for divorce based on one year separation. *Id.*

If § 50-5.1 is used as an affirmative defense, the success of the defendant would turn on the intent of the plaintiff. *Id.* It would have to be proved that the plaintiff's intent to separate and divorce the defendant was "motivated by the mental condition of the impaired spouse" and not the intent to end the martial relationship, which is required under § 50-6. *Id.*

B. DIVORCE BASED ON ONE-YEAR SEPARATION

An absolute divorce based on one year's separation is the most common method of securing a divorce in North Carolina. However, before discussing the intricacies of N.C.G.S. § 50-6, I must bring to your attention that there has been some active discussion within the North Carolina Legislature on amending this law. Senate Bill 518 entitled the "Health Marriage Act" will require a two-year waiting period before being able to file an action for divorce. S.B. 518, 2013 Gen. Assemb.,

Reg. Sess (N.C. 2013). During the two- year waiting period, the parties would be required to take part in various courses in an effort to prevent the dissolution of the marriage. *Id.*; *see* **Appendix 4 .**

The four elements that must be met to secure a divorce based on one-year separation are the following:

1. The parties to the action must have entered into a lawful marriage.
2. At least one of the parties must have be a resident of the state of North Carolina for at least six months before filing the complaint.
3. That upon separation, it was the intent of at least one the parties to live separate and apart.
4. That the parties have lived separate and apart for one year, preceding the institution of the divorce action.
    a. The one year requirement is actually a year and one day. You are eligible under the statue to file the action the day *after* the year waiting period has expired.
    b. Isolated incidences of sexual intercourse between the parties during the separation does not toll the statutory period.

***See* Appendix 5**.

POTENTIAL ROADBLOCKS/PRACTICE TIPS!

The elements are straightforward as written, but further investigation of the alleged facts in preparation to file the action may present unanticipated road blocks to a successful separation or divorce action, especially as it relates to the elements of residency and separation.

1. Residency/Service Members

In the context of divorce, a practitioner must understand that residency is actually based on one's domicile. Domicile is defined as a person's fixed, permanent, and principal home or dwelling place for legal purposes. Merriam-Webster Dictionary 289 (5th ed. 1999). To meet the residency requirement in a divorce action, the plaintiff must prove by a greater weight of the evidence that either party was physically present within the state for at least six months before filing the complaint **and** that it was the intent of that party to make the state his or her permanent home. N.C.P.I. Civil

815.40 (2004). So long as the requirement is met at the time the action is filed, the plaintiff, nor defendant have to reside in the state after the filing date. Reynolds & Connors, *supra,* at 35-36. As it relates to proving physical presence within the state, tangible evidence such as a person's voter registration card, driver's license and/or registration, property taxes, and proof of employment in the state may all serve as evidence to be presented and considered by the court in addressing the residency question. The conduct of the alleged resident, such as the nature and extent of social activities on a regular basis, the extent of investment in the repairs and alternations made to the home within the state, where children born of the marriage attend school may also assist the court in making a final determination as to residency. Family Law & Practice § 3.01(2)(a)(Arnold H. Rutkin, ed. 2012).

It is important to note that the above examples do not necessarily establish physical presence in a literal sense, but in a legal sense. It is not required that a person be physically present within the state for six months to meet this requirement. Also, if a resident is physically present within the state, the statute does not require that the action be filed in the county where he or she resides; however, a practicing attorney may be presented with a motion to change venue from opposing counsel if a counterclaim is filed for other domestic issues such as equitable distribution or child custody.

Although a party may physically reside within the state for legal purposes as discussed above, the party must also have had the intent for the state to be his or her permanent residence for at least six months prior to the filing of the action. "[I]f the resident never formed the intent to abandon the original residence, it remains the legal residence." Reynolds & Connors, *supra,* at 37.

Residency "road blocks" are most common in divorce actions that involve service members. A service member's military duty station is not considered his or her domicile. For example, James is a member of the army and lived in New York until his military assignment caused him to be

stationed in North Carolina. James has been stationed in North Carolina for five years and his wife, Sara, who still resides in New York, files a divorce action in the state of North Carolina. Pursuant to the residency requirement under N.C.G.S. § 50-6, if there is no evidence presented that James had, or has, the intent to change his permanent residence from New York to North Carolina, a strong argument can be made by James that the North Carolina residency requirement has not been met.

Sara may, however, attempt to counter James' argument by alleging that the residency requirement is met pursuant to N.C.G.S. § 50-18, which states that if a member of the armed forces has "resided or been stationed" within the state of North Carolina due to military duty for six months preceding the institution of the action, the residence requirement will have been met provided that "personal service is had upon the defendant or service is accepted by the defendant[.]" N.C. Gen. Stat. § 50-18 (2012). When reading the statute, on its face, it seems as if Sara would prevail; however, case law, such as *Martin v. Martin,* 253 N.C. 704, 118 S.E.2d 29 (1961), shows that North Carolina incorporates the intent requirement when applying this particular statute.

"In *Martin v. Martin*, . . . the North Carolina Supreme Court interpreted the statute to mean that a [service member] living on base (which is federal territory) does not qualify the [service member] from claiming that he or she is living *in the state of North Carolina*. The statute merely allows an otherwise eligible service member-domiciliary to file for divorce in the state when his or her recent physical residence has been 'on base' instead of in the surrounding civilian community. [T]his statute is not to be construed to mean that true domicile in North Carolina is not required for the court to assert jurisdiction over the marriage of the parties." Mark E. Sullivan, *The Military Divorce Handbook* 342-43 (2006) (emphasis in original) (citing *Martin*, 253 N.C. at 710-711, 118 S.E.2d at 31, 34; *see also Hutson v. Hustson*, No. No. COA10–1177, 2011 WL 705136 , *___ (N.C. Ct. App. Mar. 1, 2011) (unpublished). To assist the practitioner with making a determination as to whether there is a

residency issue, I have included a checklist that was created by Mark E. Sullivan for service members and spouses. I find it helpful in general. ***See* Appendix 6**.

2. INTENT AND ACTUAL PHYSICAL SEPARATION

As it relates to intent to live separate and apart, it is not required that the "departing" spouse verbally state that he or she no longer intends to cohabitate. *See Smith v. Smith*, 151 N.C. App. 130, 132, 564 S.E. 2d 591, 592 (2002). "[Case law in North Carolina] . . . has consistently required that the spouses live in separate residences in order for them to live 'separate and apart' within the meaning of the statute." Reynolds & Connors, *supra,* at 44. The physical separation is a strong indicator of the intent to severe the marital relationship, but is not conclusive of such. *Id.* at 45. Since the statute does not give a clear meaning of what constitutes separation as it relates to this statute, this may present a road block. In making a determination as to whether the parties are still "holding themselves out as husband and wife," you must consider all of the fact and circumstances of the parties relationship during the marriage and how, if any way, those facts and circumstances have change during the required separation period. N.C.P.I. Civil 815.40 (1999).

In *Lange v. Lange*, the plaintiff appealed the lower court's decision to dismiss his claim for divorce from bed and board, equitable distribution, child custody, and child support due to a validly executed separation agreement that had not been terminated due to reconciliation since its execution. No. COA03–1070, 2004 WL 1325790 (N.C. Ct. App. June 15, 2004)(unpublished). The plaintiff contended that the living arrangement, agreed upon by the parties and documented in the separation agreement, violated the requirement that the parties must live separate and apart. *Id.* at *1-3. The North Carolina Court of Appeals affirmed the lower court's decision, stating that "although the parties both resided in the marital residence, albeit in separate living quarters, when

reviewing the totality of the circumstances, they did not reconcile following the execution of the their separation agreement. *Id.* at *8.

In *Lin v. Lin*, the husband claimed on appeal that the parties living in adjacent apartments from 1979 until 1990 met the "separate and apart" requirement.108 N.C. App. 772, 774, 425 S.E.2d 9, 10 (1993). The record and the court's order reflected that although the parties lived in adjacent apartments, the parties still engaged in activities that supported the marital relationship on a consistent basis, such as continuing to share in family chores, family meals, jointly entertaining overnight house guest and occupying one hotel room when on business trips. *Id.* at 774, 425 S.E.2d at 10. The North Carolina Court of Appeals affirmed the decision of the lower court, stating "It is well settled that there is no separation where 'the parties have held themselves out as husband and wife living together, nor when the association between them has been of such character as to induce others who observe them to regard them as living together in the ordinary acceptation of that descriptive phrase" *Id.* (citing *In re Estate of Adamee*, 291 N.C. 386, 392, 230 S.E.2d 541, 546 (1976)).

In *Leford v. Leford*, the Court of Appeals vacated and remanded the lower court's decision to grant the husband's summary judgment motion in objection to his wife's action for the divorce based on one-year separation. 49 N.C. App. 226, 234, 271 S.E.2d 393, 399 (1980). The husband provided the lower court with an affidavit, which included a list of activities that he contended established an ongoing marital relationship during the alleged year of separation. *Id.* at 230-31, 271 S.E.2d at 397. The list of activities provided in the husband's affidavit, included occasional cooking and cleaning by the wife, eating a restaurants together on three different occasions, and attending church together. *Id.* "The court held that [upon review of the record, specifically the affidavit of social activities that occurred between the parties] we see nothing that would warrant finding as a matter of law that the parties held themselves out as man and wife. The acts listed appear to be

isolated or occasional and not of a character to be inconsistent with the parties' status as separated spouses." *Id.*

III. COLLALTERAL ISSUES TO ADDRESS *BEFORE* FILING AN ABSOLUTE DIVORCE

Even if it appears that based on the fact and circumstances provided, obtaining an absolute divorce will not present any of the statutory issues discussed above, practitioners should still make their clients aware of various collateral issues that may need to be addressed before the filing of the action or before the entry of the trial court's judgment.

A. EFFECTS ON ALIMONY AND EQUITABLE DISTRIBUTION

I have heard, on many occasions, the phrase, "I don't want anything but out!" However, it is important that clients understand "the anything" they are giving up, especially as it relates to possible alimony and equitable distribution. N.C.G.S. §§ 50-11 (c)-(f) addresses the effects of an absolute divorce judgment on a spouse's right to alimony and equitable distribution.

The right to alimony or post-separation support of either spouse is forever waived unless there is a ***pending*** claim at the time the divorce judgment is granted. N.C. Gen. Stat. § 50-11 (c) (2012). Even if the parties consent to modifying the divorce judgment to include alimony and there was not a pending claim at the time the divorce was granted, the court lacks subject matter jurisdiction to modify the judgment. *S*ee *Magaro v. Magaro*, No. COA 10-96, 2010 WL 3466419 (2010). The exception to this rule is found in G.S. § 50-11 (d), which states, "[a] divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained shall not impair or destroy the right of the dependent spouse to alimony as provided by the law of this State." G.S. § 50-11(d). In addition, a judgment or decree for alimony or post-separation

that was rendered before, or at the time of, the divorce judgment is granted shall not be affected by that judgment. N.C.G.S. § 50- 11 (c).

Similarly, the right to equitable distribution is forever waived unless there is claim that has been asserted prior to entry of the divorce judgment. N.C.G.S. § 50-11 (e). An exception is permitted if the defendant was properly severed via publication, pursuant to N.C.R. Civ. P. 4, and the defendant did not appear before the court or the court lacked jurisdiction over the defendant or the property *Id.* In these instances, the defendant has six months from the date of judgment to assert his or her right to equitable distribution. *Id.*

An interesting topic as it relates to equitable distribution claims and divorce judgments is the effect of a voluntarily dismissal without prejudice under Rule 41 (a)(1) of the North Carolina Rules of Civil Procedure. The timing of the dismissal is very important and determines whether the action can be refilled within the one-year period allotted under the statute. If the claim was asserted and dismissed under Rule 41 (a)(1) before final judgment was rendered, the petitioner may not refile; however, if the claim is dismissed after final judgment, the petition shall have one year from the date of final judgment to refile the claim. *North Carolina Trial Judges' Bench Book*, District Court, Volume 1 Family Law 5-23 (2012) (citing, *Rhue v. Pace*, 165 N.C. App. 423, 598 S.E.2d 662 (2004) and *Stegall v. Stegall*, 336 N.C. 473, 444 S.E.2d 177 (1994)). The statute does not provide for a verbal motion asserting an equitable distribution claim . *See Webb v. Webb*, 188 N.C. App. 621, 656 S.E.2d 334 (2008).

It is important that one understands that a divorce does not become final until it is reduced to writing, signed by the judge, and filed by the clerk. In *Santana*, the court stated, "'[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.'" *Santana v. Santana*, 171, N.C. App. 432, 434, 614 S.E.2d 438, 439 (2005)(quoting N.C.R. Civ. P. 58). The key is to assert the right to alimony/post-separation support or equitable distribution before this process

is completed. If you assert the right in a timely fashion, the court has the authority to reserve the right to be resolved at a later date. Thus, placing the sentence, "The Plaintiff/Defendant wishes to reserve his or her right to post separation support, alimony and/or equitable distribution," is of no, legal value if a claim(s) has not been asserted before the final judgment. If, after explaining the effects of the absolute divorce judgment on any of these claims, clients still desires to proceed without asserting the aforementioned rights, have them sign an Affidavit of Understanding for your file. ***See* Appendix 7**.

B. RESUMPTION OF NAME AND DEATH *BEFORE* FINAL ORDER

N.C.G.S. § 50-12 provides for the resumption of a maiden or pre-marriage name. The name may be resumed in one of two ways. You may make the request simultaneously with the filing of the divorce action or, after the final action is rendered, you may file an Application/Notice of Resumption of Former Name. ***S*ee Appendix 8**. As it relates to the death of a party, if a party dies before the final judgment is rendered, the claim for absolute divorce will be dismissed. *Dunevant v. Dunevant*, 142 N.C. App 169, 542 S.E.2d 242 (2001). However, if that final judgment effects property rights of the parties, then the final judgment as it relates to those rights may be amended, altered or modified. *Id.*

IV. DIVORCE NOT AN OPTION… Separation Agreements and Divorce from Bed and Board

Proceeding with an absolute divorce may not be an option, either because the client does not meet the elements as discussed above or the client is not ready to take that step. If this is the case, entering into a separation agreement with the spouse or filing a claim for Divorce from Bed and Board may be plausible options.

1. SEPARATION AGREEMENTS

A separation agreement is a written contract between a husband and wife that addresses domestic issues such as child custody, child support, equitable distribution, post separation and alimony. A separation agreement is not required to corroborate the intent of the parties to dissolve the marriage. N.C.G.S. § 52-10.1 authorizes a husband and wife to enter into a separation agreement so long as it is "not inconsistent with public policy which shall be legal, valid, and binding in all respects[.]" N.C. Gen. Stat. § 52-10.1 (2012).

"Separation Agreements are void against public policy unless the parties are living apart at the time of execution or they plan to separate shortly thereafter." *North Carolina Trial Judges' Bench Book*, *supra,* at 5-23(citing *Stegall v. Stegall*, 336 N.C. 473, 444 S.E.2d 177 (1994). "[In addition], reconciliation voids the executory provisions of the separation agreement of the parties." *Id.* at 1-21 (citing *Newland v. Newland*, 129 N.C. App. 418, 498 S.E.2d 855 (1998). It is important to advise your clients that a separation agreement is an alternative to filing certain domestic actions with the court and that it may be drafted and presented to their spouse for their review and signature indicating the agreement to the terms thereof. However, that spouse is under no obligation to sign that agreement. Thus, before payment is submitted to the attorney, clients may want to carefully consider whether this option is a viable one.

A duly executed separation agreement is governed by contract law, unless the parties to the separation agreement *consent* to have it incorporated by reference into an absolute divorce decree. *See* N.C.G.S. § 52-10.1 If the separation agreement is incorporated into a divorce decree, it becomes an order of the court and is enforceable by the contempt powers of the court. *See* N.C. Gen . Stat. §§ 5A-21-23 (2012). An absolute divorce does not affect the validity of an otherwise duly executed separation agreement.

<u>POTENTIAL ROADBLOCK/PRACTICE TIPS!</u>

The Question of Incorporation

The decision as to whether a separation agreement should be incorporated should not be made lightly and the potential road blocks that is may pose for your client should be discussed in detail. It is key to note that the different provisions of an incorporated separation agreement do not have the same legal effect as it relates to enforcement of the various rights and interests that may be addressed before the court. For a more in depth discussion on the implications, please see **Appendix 9**.

2. DIVORCE FROM BED AND BOARD

A divorce from bed and board is nothing more than a judicial separation of the parties involved. Normally, if you have parties who both are determined to stay in the home but do not want to reside with each other, an action for a divorce from bed and board is the proper assert to force one of the parties to leave. Unlike an absolute divorce, a divorce from bed and board is fault based. N.C.G.S. § 50-7 provides the grounds for divorce from bed and board, any one of which the plaintiff must prove the defendant is guilty by the great weight of the evidence. N.C. Gen. Stat. § 50-7 (2012).

IV. V. TAX CONSEQUENCES OF SEPARATION AND DIVORCE

A. TAX CONSEQUENCES OVERVIEW

When discussing a separation or divorce with your client, it is important to be mindful of the associated tax consequences. Those consequences can include changes in the following:

a. Amount of individual exemptions
b. Definition and allocation of dependency for exemption purposes
c. Federal tax credits
d. Taxation of income due to alimony and/or child support payments
e. Tax treatment of children's medical expenses

In addition, the parties must consider the tax consequences of property transfers related to the divorce and equitable distribution. Failure to consider tax consequences of the divorce can lead to liability for attorneys, as well as professional discipline.

Parties who are involved in a divorce have the freedom to structure their divorce in ways that will significantly impact the tax consequences to both parties. Decisions made for non-tax related reasons can have tremendous and very costly tax consequences.

1. STRUCTURING THE DIVORCE

When working through a divorce, a couple's primary considerations will likely involve children, financial stability, and the division of property. This CLE will address the tax consequences associated with decisions made in each of those categories.

a. Filing Statuses

Filing a tax return is a yearly requirement for most taxpayers. One of the most important considerations when filing a tax return is which filing status to use. A taxpayer's choice of filing status is primarily dictated by his or her marital status and can affect the amount of standard deduction to which he/she is entitled, credits that may be claimed, and ultimately the amount of tax owed. The Internal Revenue Service (IRS) provides the following five filing status options: Single, Head of Household, Married Filing Jointly, Married Filing Separately, and Qualified Widow(er) with Dependent Child. For those individuals who are unmarried, Single or Head of Household are the filing options available to choose from. For individuals who are married, they must elect to file Married Filing Jointly, Married Filing Separately, or Head of Household (narrow exception). In the case of a widow(er), a fifth filing status is available (Qualifying Widow with Dependent Child) in certain situations.

Marital status is determined on the last day of the year. A person's marital status on that day (ex. December 31, 2012) will be applied to the entire year. An unmarried individual is either not married or legally separated from his or her spouse under a divorce or separate maintenance decree. Married individuals, who are not legally separated or divorced and who do not have a divorce or separate maintenance decree, must choose one of the filing statuses available to married individuals. It is important to note that when using the Married Filing Separately filing status, the taxpayer will be ineligible for most of the refundable and non-refundable tax credits. The individual filing status requirements are provided in I.R.C. § 2 , as well as Internal Revenue Service Publication 501 (2012).

b. Custody/Child Support

Custody is a major consideration for couples who have children. Pursuant to I.R.C. § 152, the custodial parent is allocated the dependence exemption for the child(ren) unless the custodial parent signs a declaration allowing the noncustodial parent to take the exemption. In situations where both parents qualify for the exemption (ex. joint physical custody), the IRS provides that the parent with the highest adjusted gross income (AGI) shall claim the exemption. The custodial parent is the only parent who may claim the Child and Dependent Care Credit, the Child Tax Credit, the Earned Income Credit and the deduction for the child's medical expenses. I.R.C. §§ 21, 24, 32, 213.

Child support is a fixed sum designated in a court order to assist the custodial parent with supporting the child(ren). Child support is not a taxable transaction, thus, it is not treated as gross income to the recipient or deductible to the payor. If child support is not designated in the order, but the payment is closely associated with a contingency relating to child support, the payment will be treated as child support. In addition, if the payor has been ordered to pay child support and alimony and pays less than the amount designated for both, the payment will be treated as child support first. Pursuant to the Omnibus Budget Reconciliation Act of 1981 (Tax Refund Intercept

Program), the Secretary of Treasury may intercept the tax refund of the payor if he/she has delinquent child support. In 1984, this program was expanded to allow states to submit request for tax intercepts for families receiving Aid to Families with Dependent Children (AFDC) services.

c. Alimony

Alimony payments are made to a spouse or former spouse under a divorce or separate maintenance decree for his or her own support. Pursuant to I.R.C. § 215, alimony payments are deductible to the payor and taxable to the payee. I.R.C. § 71 sets forth the following requirements for a payment to be considered alimony:

1. Payments are in cash or equivalent, to and for the benefit of the spouse
2. Payments are pursuant to a divorce decree, support decree, or written separation agreement that does not designate the payment as not being alimony
3. Parties are legally separated under a divorce or separate maintenance agreement
    i. Cohabitation not allowed if under a final divorce decree
    ii. Cohabitation permitted if legally separated or temporary divorce decree
4. Payments must stop at death of payee
5. Payments are not designated as child support payments

Id. An excellent illustration of the treatment of alimony for tax purposes is *Hoover v. Commissioner*, 102 F.3d 842 (6th Cir. 1996)). In *Hoover*, the court went through an alimony analysis. *Id.* at 845. The controversy began when the IRS disallowed the taxpayer's alimony deductions. *Id.* at 844. The United States Tax Court agreed with the IRS and the taxpayer appealed. *Id.* at 843. On appeal, the Sixth Circuit Court of Appeals affirmed the lower court's decision. *Id.* at 848. The Court of Appeals held that taxpayer's obligation to make payments under the divorce decree would not

terminate upon former spouse's death, and thus, such payments did not qualify for alimony deduction. *Id.*

The payee spouse will list alimony as gross income on line 11 of the Form 1040, and the payor will take an above-the-line deduction on line 31a of the Form 1040. The payor spouse will also need to include the payee's social security number on the form.

d. Property Transfers

Pursuant to I.R.C. § 1041, "no gain or loss shall be recognized on a transfer of property from an individual to a (1) spouse, or (2) former spouse." Such a transfer will be treated as a gift.

e. Qualified Domestic Relations Order (QDRO)

A Qualified Domestic Relations Order (QDRO) is critical in determining tax benefits and consequences from the division of pensions, retirement, and benefit plans. N.C.G.S. 50-20.1(d) provides instructions for determining the actual award amount. In *Hawkins v. Commissioner*, a divorce settlement provided that a million dollar award be paid to the wife from the husband's pension. 86 F. 3d 982 (1996). After the divorce was finalized, both parties challenged the assessment of income tax deficiencies. *Id.* at 985. The wife claimed, and the U.S. Tax Court agreed, that the distribution should be taxed to the husband. *Id.* at 984. The husband appealed to the Tenth Circuit Court of Appeals, and the decision of the U.S. Tax Court was reversed. *Id.* at 994. The court held that the marital settlement agreement that was incorporated into the divorce decree was a QDRO that shifted the income liability to the wife. *Id.* at 993.

VI. THE PROCESS….PROCEDURAL OVERVIEW

A. CONTENTS OF THE ENTIRE FILING

1. THE COMPLAINT AND OTHER FILINGS

It is important that the contents of your divorce complaint are in compliance with N.C.G.S. § 50-8. The contents of an absolute divorce complaint based on one year separation, other related documentation, and an actual absolute divorce judgment are found in **Appendix 10** . Along with the complaint, one should also file: a) a domestic action coversheet- AOC-CV-750; b) a civil summons-AOC-CV-100; c) and any other documents needed, according to the local rules of the court in which you will be filing the action.

2. SERVICE OF PROCESS—DUE DILIGENCE AND A "BREATHING SUMMONS"

Once the pleading(s) and other required documentation has been filed, proper service upon the defendant must take place before obtaining a divorce. Under G.S. § 50-8, if the plaintiff is not a resident of North Carolina, he or she must file the action for divorce in the county in which the defendant residences. *Id.* If for some reason, this rule "slips you mind," it is not a ground for dismissal. If the defendant does not contest venue before the time to answer expires, the right to do so is waived, and the court where the action was filed may exercise jurisdiction. Reynolds & Connors, *supra,* at 114.

Pursuant to N.C.R. Civ. P. 4 , there are several ways that one my serve an opposing party:

a. personal service via certified mail, return receipt requested;
b. personal service by the sheriff of the county in which the action was filed or by some other person duly authorized by law to serve summons[]

N.C.R. Civ. P. 4. There are two other methods of service that are allowed under Rule 4, but they need more than mere mention, as they may lead to road blocks. They are acceptance of service by the defendant and service via publication.

Although acceptance of service by the defendant is permitted, an attorney may not provide a defendant with an Acceptance of Service and Waiver form. Pursuant to North Carolina State Bar Ethics Opinion CPR 296, an attorney may not prepare and/or provide a pro se defendant with any

other type of waiver other than for service of process. ***See*** **Appendix 11.** As it relates to service via publication, Rule 4 (j1) states, in pertinent part, "[a] party that cannot with *due diligence* be served by personal delivery, registered mail, or by a designated delivery service authorized pursuant to 26 U.S.C. sec. 7502 (f)(2) may be served by publication." Thus, this cannot serve as your first method of service. This method of service is commonly used when your client comes in and states, "I don't know where his lives." This statement, even in the form of an affidavit from your client, will not serve as your "due diligence" required under law. "If the plaintiff knew where the defendant was or could have found out with the use of due diligence, service of process by publication is void even if the plaintiff was not guilty of fraud or concealment." Reynolds & Connors, *supra,* at 115. Due diligence simply means that all reasonable means must be exhausted in an attempt to locate the defendant. To show due diligence, I suggest the following:

a. Attempt to obtain the defendant's address by one of the following methods:
    i. ask your client to provide you with the last address at which he or she knew the defendant to reside;
    ii. check to see if the defendant has a criminal record and if so, what address was given by the defendant at the time of arrest;
    iii. if applicable, complete a Department of Motor Vehicles Request form for the state in which the defendant holds a driver's license. Please note that you must research the method of request as each state is different. I have attached the appropriate form needed for North Carolina as **Appendix 12**.
b. Upon receiving the most recent address from the suggested methods of inquiry above, attempt to serve the defendant by personal delivery, registered mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502 (f)(2).

c. If the summons and complaint are returned unserved, I suggest that you prepare an Affidavit of Attempted Service explaining your efforts of due diligence and attach a copy of the attempt. (If requested, present the original to the court as you want to ensure there is not tampering.)

d. Serve via publication in the county of the last known address.

Pursuant to Rule 4 (a) of the North Carolina Rules of Civil Procedure, a summons must be issued within five days of the filing of the action. Once the summons has been issued, one must attempt to complete service of the summons within thirty days of its issuance to prevent it from becoming "functus officio." *See Dozier v. Crandall*, 105 N.C. App. 74, 75-76, 411 S.E2d 635, 636 (1992). In the event that you are unable to serve the defendant within the thirty day time period, you may "revive" the summons and extend the time to serve the summons by securing an endorsement or swearing out an alias and pluries summons, pursuant to Rule 4 (d) of the North Carolina Rules of Civil Procedure.

These methods of extension do not have to be used in any particular order, nor is any one method preferred by the courts over another. The extension, however, must be secured within ninety (90) days after the issuance of the original summons, or issuance of the last endorsement or alias and pluries summons.

3. DIVORCE VIA SUMMARY JUDGMENT

Once service has been properly effected, one may secure a judgment of absolute divorce in three ways. First, N.C.G.S.§ 50-10(e) allows for a judgment to be entered by the clerk of court under specific circumstances when the action was for an absolute divorce, or an absolute divorce and resumption of former name. N.C. Gen. Stat. § 50-10(e) (2012). Second, an absolute divorce may be secured by hearing by judge or by jury. Due to the voluminous dockets in many counties, the courts look to operate in an expeditious fashion; thus, this method is normally chosen when there is

a dispute about a material fact that has been alleged in the complaint. Lastly, when there is no genuine issue of material fact in dispute and the plaintiff is entitled to a judgment as a matter of law, N.C.G.S. § 50-10 (d) allows an absolute divorce to be secured by summary judgment pursuant to N.C.R. Civ. P. 56. N.C. Gen. Stat. § 50-10(e) (2012); ***see* Appendix 10** for a sample Motion for Summary Judgment. The motion may be filed thirty (30) days after the filing of the complaint and the defendant is entitled to ten (10) days notice of the summary judgment hearing. Reynolds & Connors, *supra,* at 123 (citing N.C.R. Civ. P. 12).

If you represent a defendant who claims that there is a genuine issue of material fact that is in dispute, make sure that the answer that you prepare is detailed as it relates to the disputed fact(s). In *Daniel v. Daniel*, the plaintiff filed an action for an absolute divorce and properly served the defendant. 132 N.C. App. 217, 510 S.E.2d 689 (1999). The defendant filed an answer that generally denied the allegation asserted in the plaintiff's complaint. *Id.* at 218, 510 S.E.2d at 689. The plaintiff then moved for an absolute divorce by summary judgment and the motion was granted. *Id.* The defendant appealed the ruling, stating that the general denials asserted in her answer were sufficient to assert a genuine issue of material fact. *Id.* The court of appeals rejected this argument on appeal, stating that "the affidavit/complaint raised no issues of material fact and established plaintiff's entitlement to the divorce. [T]he defendant's general denials, without more, were not sufficient to rebut the allegations of plaintiff's complaint." Reynolds & Connors, *supra,* at 145 (citing *Daniel*, 132 N.C. App. at 218, 510 S.E.2d at 690).

Free Legal Research for North Carolina Attorneys:

Search Engines, Research Websites, Government Resources, and Fastcase

Lauren Collins

and

Adrienne DeWitt

(Material Available at CLE)

Driving While Impaired for Beginners

(Or a Refresher for Those Who Aren't)

Jeffrey Edwards

(Material Available at CLE)

Ethics: The Effect of Social Media and Technology on the Rules of Professional Responsibility

Patricia Dickerson,

Shonnese Stanback

and

Gerald Walden

The Effect of Social Media and Technology on the Rules of Professional Responsibility
Select Rules for Professional Conduct (RPC) and Formal Ethical Opinions (FEO)

RPC 215
July 21, 1995
Modern Communications Technology and the Duty of Confidentiality (1 of 2)

Opinion rules that when using a cellular or cordless telephone or any other unsecure method of communication, a lawyer must take steps to minimize the risk that confidential information may be disclosed.

Inquiry #1:

Communications by means of cellular and cordless telephones are broadcast over the public airwaves rather than telephone lines. For this reason, a conversation over a cordless or cellular phone may be easily intercepted.

A cordless telephone uses AM or FM radio signals to transmit a communication from the handset to the base unit. This signal can be easily intercepted by a standard AM radio Cordless telephones are, therefore, particularly susceptible to both intentional and unintentional interception. Although less susceptible to unintentional interception, a communication by a cellular telephone can be intentionally intercepted by means of a sophisticated scanner specifically designed for the purpose or by a regular radio scanner, which is available at most electronics stores, that has been modified.

What is a lawyer's ethical responsibility when using a cellular or cordless telephone to communicate client information that is intended to be confidential?

Opinion #1:

A lawyer has a professional obligation, pursuant to Rule 4 of the Rules of Professional Conduct, to protect and preserve the confidences of a client. This professional obligation extends to the use of communications technology. However, this obligation does not require that a lawyer use only infallibly secure methods of communication. Lawyers are not required to use paper shredders to dispose of waste paper so long as the responsible lawyer ascertains that procedures are in place which "effectively minimize the risks that confidential information might be disclosed." RPC 133. Similarly, a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication via a cellular or cordless telephone. First, the lawyer must use reasonable care to select a mode of communication that, in light of the exigencies of the existing circumstances, will best maintain any confidential information that might be conveyed in the communication. Second, if the lawyer knows or has reason to believe that the communication is over a telecommunication device that is susceptible to interception, the lawyer must advise the other parties to the communication of the risks of interception and the potential for confidentiality to be lost.

RPC 215
July 21, 1995
Modern Communications Technology and the Duty of Confidentiality (2 of 2)

lnquiry #2:

What is a lawyer's ethical obligation when using electronic mail to communicate confidential client information?

Opinion #2:

Although electronic mail or "e-mail," is not conveyed over the public airwaves like communications by cordless or cellular telephones, many of the same concerns for client confidences apply to communications by e-mail. E-mail is susceptible to interception by anyone who has access to the computer network to which a lawyer "logs-on" and such communications are rarely protected from interception by anything more than a simple password. In using e-mail, or any other technological means of communication that is not secure, the same precautions must be taken to protect client confidentiality as are set forth in opinion #1 above.

Endnotes

1. Colorado State Bar Ethics Opinion 92-90.

2. Id.

RPC 241
January 24, 1997
Participating in a Directory of Lawyers on the Internet (1 of 1)

Opinion rules that a lawyer may participate in a directory of lawyers on the Internet if the information about the lawyer in the directory is truthful.

Inquiry:

A private company is developing an Internet site to be known as the National Attorney Locator. The site will contain an electronic directory of lawyers. The directory will include listings for lawyers from across the United States. These listings can be searched by lawyers' geographic location and areas of legal practice. Each listing will include the name of the lawyer or law firm, the name of a contact person at the firm, firm address, phone number, fax number, e-mail address, and areas of practice. Lawyers must apply and pay a fee to be listed on the directory. The Internet site will have a hypertext section on "Choosing an Attorney" which includes a statement that the National Attorney Locator is not a referral service but an electronic directory.

May a lawyer participate in a directory of lawyers on the Internet?

Opinion:

Yes, provided the information contained in the lawyer's listing is truthful and not misleading. Rule 2.1. To avoid misleading a user of the directory from another jurisdiction, the listing should indicate the jurisdictions in which the lawyer is licensed to practice law and the geographic location of the lawyer's or law firm's principal office. See RPC 239. Rule 2.5 prohibits communications implying that a lawyer is a specialist in an area of practice unless the lawyer is certified as a specialist by the North Carolina State Bar or a certifying organization approved by the State Bar. However, a lawyer who is not a certified specialist may indicate areas of concentration or interest in a listing on the directory.

2000 Formal Ethics Opinion 3
July 21, 2000
Responding to Inquiries Posted on a Message Board on the Web (1 of 2)

Opinion rules a lawyer may respond to an inquiry posted on a web page message board provided there are certain disclosures.

Inquiry:

P Law Firm represents Company, a telecommunications switch manufacturing company. Company's website includes a web page that is designed to appeal to emerging service providers including local exchange carriers and Internet service providers. The website is accessible to anyone with Internet access.

The web page includes a link to a message board. Visitors to the message board are invited to post questions. The message board is not interactive. Responses to inquiries are not posted immediately. Company has asked professionals from several disciplines to monitor the message board regularly and to provide responses to the posted inquiries that are within their respective areas of expertise. Company asked P Law Firm to monitor the message board for inquiries concerning the telecommunications regulatory law. Company will pay P Law Firm a fee for monitoring the message board and providing responses to inquiries posted there.

Company's web page will identify P Law Firm as the law firm responding to inquiries relative to regulatory matters. P Law Firm will limit the scope of its responses to federal law. The following disclaimer will appear on the message board:

Members of the telecommunications practice of P Law Firm provide responses to regulatory questions posted to the Message Board. Responses are limited to matters of federal law and decisions of the Federal Communications Commission. Responses posted should not be considered as legal opinions or as providing conclusive answers to specific legal problems.

May lawyers with P Law Firm respond to inquiries on Company's message board?

Opinion:

Yes, it is not a violation of the Revised Rules of Professional Conduct for a lawyer to respond to inquiries posted on an Internet message board provided the lawyer clarifies the nature of the lawyer's relationship with the person or company making the inquiry and the limits of the information that the lawyer is providing.

Participation in a message board is not improper solicitation, prohibited by Rule 7.3(a), because there is no direct communication, by telephone or in-person, with the individuals or companies making the inquiries. Moreover, the lawyers with P Law Firm are not making the initial contact and they do not know that the inquirer is in need of legal services in a particular matter until the lawyers retrieve an inquiry from the message board. Therefore, the message board does not have to include an advertising disclaimer such as the one required by Rule 7.3(c) for targeted direct mail.

2000 Formal Ethics Opinion 3
July 21, 2000
Responding to Inquiries Posted on a Message Board on the Web (2 of 2)

Limiting responses to inquiries involving federal law should avoid the unauthorized practice of law in jurisdictions where the P Law Firm lawyers are not licensed to practice law. It is assumed a lawyer with an active law license from any state may practice federal telecommunications law. However, to avoid the possibility of misleading a user of the message board, a lawyer responding to an inquiry should state the jurisdictions where he or she is licensed to practice law. See Rule 7.1(a) and RPC 241.

If, as the result of responding to an inquiry, a client-lawyer relationship is created between an inquirer to the message board and a lawyer with P Law Firm, the lawyers with the firm will be required to comply with the duties to a client set forth in the Revised Rules of Professional Conduct including maintaining client confidences and avoiding conflicts of interest. If the lawyers from P Law Firm do not want to create a client-lawyer relationship with a party using the message board, the message board and any subsequent communications with an inquirer must clearly and specifically state that no client-lawyer relationship is created by virtue of the communication. Even so, substantive law will determine whether a client-lawyer relationship is created. See Cmt. [3], 0.2 Scope, Revised Rules. As an example, a disclaimer might state the following:

Although a response is provided to the specific question, there may be other facts and law relevant to the issue. The questioner should not base any decision on the answer and specifically understands and agrees that no client-lawyer relationship has been established between a lawyer with P Law Firm and the inquirer.

As a precautionary step, visitors to the web page should be warned not to include any confidential or proprietary information in an inquiry posted on the web page.

Finally, if the lawyers responding to the inquiries posted on the message board are influenced or affected by the fact that P Law Firm represents Company and Company is paying P Law Firm to respond to the inquiries on the message board, the relationship between P Law Firm and Company must be disclosed to those using the message board to avoid misrepresentation. See generally Rule 7.1.

2005 Formal Ethics Opinion 14
January 20, 2006
Identifying Information in URL for Law Firm Website (1 of 1)

Opinion rules that the URL for a law firm website does not have to include words that identify the site as belonging to a law firm provided the URL is not otherwise misleading.

Inquiry:

2005 FEO 8 ruled that the URL for a law firm website is a trade name that must be registered with the State Bar, in compliance with Rule 7.5(a), and may not be misleading.

Lawyers have applied to the State Bar to register the following URLs for their law firm websites: "Asbestos-Mesothelioma.com" "DrugInjury.com" and "NCworkinjury. com". None of the URLs contain language sufficient to indicate to a user that the URL is for the website of a law firm. May a law firm use a URL that does not include words or language sufficient to identify it as the address of a website of a law firm?

Opinion:

Yes, provided the URL is not otherwise false or misleading and the homepage of the website clearly and unambiguously identifies the site as belonging to a lawyer or a law firm.

Rule 7.1 and Rule 7.5(a) prohibit lawyers and law firms from using trade names that are misleading. Nevertheless, the Rules of Professional Conduct are rules of reason and should be interpreted with reference to the purposes of legal representation. Rule 0.2, Scope, cmt. [1]. None of the URLs listed in the inquiry make false promises or misrepresentations about a lawyer or a lawyer's services. Although a person who is using the internet to research a medical condition, such as mesothelioma, or injuries caused by prescription medications or on the job, may be given one of these website addresses in a response to an internet browser search, if the user is not interested in legal advice relative to the medical condition or the injury, the user does not have to click on the URL or, having done so, may exit the website as soon as he or she determines that it does not contain the information being sought. At worst, the URLs may cause the user of the internet an extra click of the mouse and, at best, they may provide a user with helpful information about legal rights. Therefore, as long as a URL of a law firm is not otherwise misleading or false and the homepage of the website identifies the sponsoring law firm or lawyer, the URL does not have to contain language specifically identifying the website as one belonging to a law firm.

2011 Formal Ethics Opinion 8
July 15, 2011
Utilizing Live Chat Support Service on Law Firm Website (1 of 3)

Opinion provides guidelines for the use of live chat support services on law firm websites.

Inquiry:

A law firm would like to utilize a live chat support service on its website. Typically, such a service requires the law firm to download a software program to the firm website. After the software is downloaded, a "button" is displayed on the website which reads something like "Click Here to Chat Live." The button is often accompanied by a picture of a person with a headset. Once a visitor clicks on the button to request a live chat, the visitor will be able to have a typed out conversation in real-time with an agent identified as perhaps a "law firm staff member" or an "operator." The agent will guide the visitor through a series of screening questions through the use of a script. Typically, the agent will learn about the facts of the potential case. The agent will also obtain contact information for the visitor. The agent then emails a transcript of the "chat" to the law firm. In some instances, the law firm pays only for the transcripts of "chats" in which the visitor provides a way for the law firm to contact him or her.

Depending on the software program purchased, in addition to the live chat "button" being displayed on the website, a pop-up window may also appear on the screen specifically asking visitors if they would like "live help." The window may contain a picture of a person with a headset and reads something like, "Hi, you may just be browsing but we are here to answer your questions. Please click 'yes' for live help." The pop-up window is software-generated. It is only after the visitor clicks on the button that the live agent is engaged.

In another form of the live chat support service, the "button" and pop-up window showing a picture of a person with a headset is displayed on the website and a voice says something like, "Hi, we are here to answer your questions. Please click 'yes' for live help." These statements are presumably software-generated. It is only after the visitor clicks on the "yes" button that the live agent is engaged.

Is the utilization of these types of live chat support services a violation of the Rules of Professional Conduct?

Opinion:

No. Rule 7.3(a) provides that a lawyer shall not by "in-person, live telephone, or real-time electronic contact" solicit professional employment from a potential client unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication. The interactive typed conversation with a live agent provided by the live chat support service described above constitutes a real-time electronic contact.

It is important to note that the prohibition in Rule 7.3(a) applies only to lawyer-initiated contact. Rule 7.3 does not prohibit real-time electronic contact that is initiated by a potential client. In each of the instances described above, the website visitor has made the initial contact with the firm. The visitor has

chosen to visit the law firm's website, indicating that they have some interest in the website's content. It is appropriate at this juncture for the law firm to offer the website visitor live assistance.

In addition to the fact that the potential client has initiated the contact with the law firm, the circumstances surrounding this type of real-time electronic contact do not trigger the concerns necessitating the prohibition set out in Rule 7.3. Comment [1] to Rule 7.3 explains the policy considerations behind the prohibition:

There is a potential for abuse inherent in direct in-person, live telephone, or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

The use of a live chat support service does not subject the website visitor to undue influence or intimidation. The visitor has the ability to ignore the live chat button or to indicate with a click that he or she does not wish to participate in a live chat session.

The Philadelphia Bar Association recently issued an opinion that allows certain real-time electronic communications, including communications through blogs, chat rooms, and other social media. Philadelphia Bar Ass'n Prof'l. Guidance Comm., Op. 2010-6 (2010). The opinion states that Rule 7.3 does not bar the use of social media for solicitation where a prospective client to whom the lawyer's communication is directed has the ability "to 'turn off' the soliciting lawyer and respond or not as he or she sees fit." The Philadelphia Bar Association opined that "with the increasing sophistication and ubiquity of social media, it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures, and that everyone realizes that—like targeted mail—emails, blogs, and chat room comments can be readily ignored, or not, as the recipient wishes."

Although the use of this type of technology is permissible, the practice is not without its risks, and a law firm utilizing this service must exercise certain precautions. The law firm must ensure that visitors who elect to participate in a live chat session are not misled to believe that they are conversing with a lawyer if such is not the case. While the use of the term "operator" seems appropriate for a nonlawyer, a designation such as "staff member," or something similar, would require an affirmative disclaimer that a nonlawyer staff member is not an attorney. The law firm must ensure that the nonlawyer agent does not give any legal advice.

The law firm should be wary of creating an "inadvertent" lawyer-client relationship. In addition, the law firm should exercise care in obtaining information from potential clients and be mindful of the potential consequences/duties resulting from the electronic communications. Rule 1.18 provides that a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client and that, even when no client-lawyer relationship ensues, a lawyer who

has had discussions with a prospective client may generally not use or reveal information learned in the consultation. Furthermore, Rule 1.18(c) prohibits a lawyer from representing a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. Therefore, acquiring information from a prospective client via the live chat service could create a conflict of interest with a current client that would require withdrawal.

Formal Opinion 2010-2:
OBTAINING EVIDENCE FROM SOCIAL NETWORKING WEBSITES
TOPIC: Lawyers obtaining information from social networking websites.

DIGEST: A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.

RULES: 4.1, 5.3(b)(1), 8.4(a) & (c)

QUESTION: May a lawyer, either directly or through an agent, contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation?

OPINION

Lawyers increasingly have turned to social networking sites, such as Facebook, Twitter and YouTube, as potential sources of evidence for use in litigation.[1] 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.[2] 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.[3] 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.

In this opinion, we address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively "deceptive" behavior to "friend" potential witnesses. We do so in light of, among other things, the Court of Appeals' oft-cited policy in favor of informal discovery. See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493, 497 (1990) ("[T]he Appellate Division's blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."); Muriel, Siebert & Co. v. Intuit Inc., 8 N.Y.3d 506, 511, 836 N.Y.S.2d 527, 530 (2007) ("the importance of informal discovery underlies our holding here"). It would be inconsistent with this policy to flatly prohibit lawyers from engaging in any and all contact with users of social networking sites. 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.[4] 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 potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web. In that connection, in seeking access to an individual's personal information, it may be easier to deceive an individual in the virtual world than in the real world. For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth, and review the witness's personal diary, the witness almost certainly would slam the door shut and perhaps even call the police.

In contrast, in the "virtual" world, the same stranger is more likely to be able to gain admission to an individual's personal webpage and have unfettered access to most, if not all, of the foregoing information. Using publicly-available information, an attorney or her investigator could easily create a false Facebook profile listing schools, hobbies, interests, or other background information likely to be of interest to a targeted witness. After creating the profile, the attorney or investigator could use it to make a "friend request" falsely portraying the attorney or investigator as the witness's long lost classmate, prospective employer, or friend of a friend. Many casual social network users might accept such a "friend request" or even one less tailored to the background and interests of the witness. Similarly, an investigator could e-mail a YouTube account holder, falsely touting a recent digital posting of potential interest as a hook to ask to subscribe to the account holder's "channel" and view all of her digital postings. By making the "friend request" or a request for access to a YouTube "channel," the investigator could obtain instant access to everything the user has posted and will post in the future. In each of these instances, the "virtual" inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions. The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to "open the door" to strangers, social networking users often do just that with a click of the mouse.

Under the New York Rules of Professional Conduct (the "Rules"), an attorney and those in her employ are prohibited from engaging in this type of conduct. The applicable restrictions are found in Rules 4.1 and 8.4(c). The latter provides that "[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." N.Y. Prof'l Conduct R. 8.4(c) (2010). And Rule 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Id. 4.1. We believe these Rules are violated whenever an attorney "friends" an individual under false pretenses to obtain evidence from a social networking website.

For purposes of this analysis, it does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse. As provided by Rule 8.4(a), "[a] lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Id. 8.4(a). Consequently, absent some exception to the Rules, a lawyer's investigator or other agent also may not use deception to obtain information from the user of a social networking website. See id. Rule 5.3(b)(1) ("A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if . . . the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it . . . .").

We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. See N.Y. County 737 (2007) (requiring, for use of dissemblance, that "the evidence sought is not reasonably and readily obtainable through other lawful means"); see also ABCNY Formal Op. 2003-02 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions -- a question we do not address here -- they are, at least in most situations, inapplicable to social networking websites. Because non-deceptive means of communication ordinarily are available to obtain information on a social networking page -- through ordinary discovery of the targeted individual or of the social networking sites themselves -- trickery cannot be justified as a necessary last resort.[5] For this reason we conclude that lawyers may not use or cause others to use deception in this context.

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.[6]

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.

[1] Social networks are internet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to "friends" – those who have specifically sent a computerized request to view their profile page which the user has accepted. Examples of currently popular social networks include Facebook, Twitter, MySpace and LinkedIn.

[2] See, e.g., Stephanie Chen, Divorce attorneys catching cheaters on Facebook, June 1, 2010, http://www.cnn.com/2010/TECH/social.media/06/01/facebook.divorce.lawyers/index.html?hpt=C2.

[3] See, e.g., Bass ex rel. Bass v. Miss Porter's School, No. 3:08cv01807, 2009 WL 3724968, at *1-2 (D. Conn. Oct. 27, 2009).

[4] The communications of a lawyer and her agents with parties known to be represented by counsel are governed by Rule 4.2, which prohibits such communications unless the prior consent of the party's lawyer is obtained or the conduct is authorized by law. N.Y. Prof'l Conduct R. 4.2. The term "party" is generally interpreted broadly to include "represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties." N.Y. State 735 (2001). Cf. N.Y. State 843 (2010)(lawyers may access

public pages of social networking websites maintained by any person, including represented parties).

[5] Although a question of law beyond the scope of our reach, the Stored Communications Act, 18 U.S.C. § 2701(a)(1) et seq. and the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq., among others, raise questions as to whether certain information is discoverable directly from third-party service providers such as Facebook. Counsel, of course, must ensure that her contemplated discovery comports with applicable law.

[6] While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an ethical line when she falsely identifies herself in a "friend request". See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 376, 559 N.Y.S.2d 493, 499 (1990) (permitting ex parte communications with certain employees); Muriel Siebert, 8 N.Y.3d at 511, 836 N.Y.S.2d at 530 ("[T]he importance of informal discovery underlie[s] our holding here that, so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party's former employee.").

Ethics Opinion Articles - NC State Bar Journal

You Can Have Too Many Friends

By Suzanne Lever

Many lawyers and other legal professionals use social networking websites to advertise their legal practice, connect with like-minded people, post "adorable" family photos, or locate long lost boyfriends—I mean friends. Some of the better-known sites include MySpace, Facebook, LinkedIn, and Twitter. (I am including Twitter in the list because it is well-known. In the interest of full disclosure I need to report that, to the best of my knowledge and recollection, I have never "tweeted," "twooted," or "twitted" anything.) Essentially, social networking sites allow users to create personal profiles and then interact with "friends" through "chatting"1 or "blogging."2 While social networking sites can be useful, entertaining, and addictive, legal professionals need to be cognizant of potential ethical pitfalls attendant to revealing, and discovering, information on a social website.

Several opinions have recently been issued addressing the propriety of judges participating in social networking websites. For example, the North Carolina Judicial Standards Commission reprimanded a judge for "friending" a lawyer involved in a hearing before him and using Facebook to discuss the case with the lawyer. The judge also "googled" one of the parties and accessed the party's website. See N.C. Judicial Standards Comm., Inquiry No. 08-234 (April 1, 2009). The commission found that the ex parte communications and the independent gathering of information indicated a disregard of the principles of judicial conduct and constituted conduct prejudicial to the administration of justice.

To prevent such occurrences, the Judicial Ethics Advisory Committee of the Florida Supreme Court issued an opinion prohibiting judges from adding lawyers who may appear before the judge as "friends" and vice versa. Fla. Judicial Ethics Advisory Comm., Op. 2009-20. The reason for the ban is to prevent the appearance to the public that "friended" lawyers might have a special influence over the judge. Kentucky, New York, and South Carolina have issued opinions allowing judges to participate in social networking websites, but advising judges to be extremely cautious that such participation does not otherwise result in violations of the rules governing judicial conduct. Ethics Committee of the Kentucky Judiciary, Formal Judicial Ethics Op. JE-119 (2010); NY State Advisory Committee on Judicial Ethics, Op. 08-176 (2009); SC Judicial Department Advisory Committee, Op. 17-2009 (2009).

It is not just judges who have to be wary of their online activity. The Philadelphia Bar Association's Professional Guidance Committee issued an opinion concerning a lawyer's proposed investigation of a witness's Facebook and MySpace pages. Phila. Bar Assoc. Prof'l. Guidance Comm., Opinion 2009-2 (March 2009). The lawyer wanted to ask a third party to use the Facebook and MySpace websites to send a "friend request" to the witness. The lawyer believed that the third party would be able to uncover information on the websites that could be used to impeach the witness. The committee concluded that the proposed method of obtaining information was deceptive and in violation of the Pennsylvania Rules of Professional Conduct.

Lawyers have also been cautioned as to their participation in online lawyer rating sites. The South Carolina Bar Association responded to an inquiry about a lawyer's professional

responsibilities when a company launched a website that listed lawyers without the lawyers' permission or involvement. SC Ethics Advisory Comm., Opinion 09-10 (2009). The company used information obtained from state courts and bar associations to create website entries for lawyers. For each lawyer listed, the website included a company "rating." The website also included a feature for peer endorsements and client ratings. The South Carolina Bar Association held that if the lawyer participated in the listing by "claiming" or "updating" his listing, all comments made about him on the website were subject to the advertising requirements of the South Carolina Rules of Professional Conduct and the lawyer would have an ongoing duty to monitor the listing to keep all comments in conformity with the rules.

And in the category of "what were they thinking?" we have the following two scenarios involving lawyers online. In Texas, a lawyer asked for a continuance from a judge due to the death of her father, but was later sanctioned by the judge when it was discovered that the lawyer's Facebook profile page detailed a week of drinking and partying. Also, the Florida State Bar fined a trial lawyer $1,250 for criticizing a judge on a blog. The lawyer questioned the judge's mental stability and stated that she was unfit for her position. The lawyer also stated that the judge had an "ugly, condescending attitude" and was an "evil, unfair witch." Ouch! The Florida Supreme Court upheld the sanction. 996 So. 2d 213 (2008).

Law students are not immune from scrutiny either. The Florida Board of Bar Examiners adopted a policy of reviewing applicants' social networking sites as a part of its character and fitness investigations. Facebook review is limited to certain applicants such as those who need rehabilitation or who have admitted to past indiscretions.

Remember that if you are using a social networking or online rating website to market your law firm, you have to follow all of the advertising rules. See RPC 239. For example, in response to social networking profiles that ask users to list their "specialties," you cannot state that you are a "specialist" in a particular field of law, except as allowed by Rule 7.4(b). In addition, you need to be careful not to violate Rule 7.3, the anti-solicitation rule, which regulates real-time communications with prospective clients. Interestingly, the Philadelphia Bar Association just issued an opinion that allows certain real-time electronic communications, including communications through blogs, chat rooms, and other social media. Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2010-6 (2010). The opinion states that Rule 7.3 does not bar the use of social media for solicitation where a prospective client to whom the lawyer's communication is directed has the ability to ignore the soliciting lawyer and respond or not as he or she sees fit.

In conclusion, don't turn off your brain when you sign onto your favorite social networking website. Keep the ethics rules in mind and remember that what happens in Vegas doesn't stay in Vegas if you post it on your website.

Suzanne Lever is assistant ethics counsel for the North Carolina State Bar.

Endnotes

1. Some social websites have a "chat" feature which allows users to instantly communicate with friends who are also online.
2. "Blogging" is the process of communicating with other people through the use of an online diary or "web log."

The Ethical Boundaries of Social Media
FRIDAY, MARCH 9, 2012 AT 6:01AM
By James Hart

Is It Okay for a Party or a Non-Lawyer Assistant to "Friend" an Unrepresented Witness?

The Philadelphia Bar Association's Professional Guidance Committee addressed this exact question in Opinion 2009-02 (March 2009). To date, this appears to be the only ethics opinion on point. However, the ethical issues presented are not unique to the Pennsylvania Rules of Professional Conduct, and corollaries can be made to North Carolina's Rules.

In this inquiry, an attorney asked whether it would be ok for a non-lawyer assistant to "friend" the witness, without revealing that he or she is affiliated with the lawyer or the true purpose of the friend request. Ultimately, this opinion concluded that conduct of this sort would violate several rules of professional conduct. Because the North Carolina Rules closely mirror the Pennsylvania Rules, the analysis given in the Pennsylvania Opinion is helpful in determining our obligations as North Carolina Attorneys.

Although violations of any ethical rule can land an attorney in hot water, the Pennsylvania Opinion discussed most thoroughly the violation of Rule 8.4 (Misconduct) and Rule 4.1 (Truthfulness in Statements to Others).

Rule 8.4 states that it is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; ...

The Opinion states, "the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness." (emphasis added)

It is interesting to note that the Opinion states that if the attorney asked the witness "forthrightly for access", by letting them know who they were and why they wanted to "friend" the witness, than this would appear to be ethical. It is the intentional concealment of the purpose of the access to the witness's profile that causes the ethical problem.

Rule 4.1 states that in the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person;…

By making a false statement of material fact to the witness, the attorney is also violating Rule 4.1. In addition, because the proposed conduct is being done via a third party, the legal assistant, than a violation of Rule 8.4(a) would occur as well.

So What's the lesson here?

Whether you are an attorney, a paralegal under the direction of an attorney, or a party to a lawsuit, don't friend an adverse party or witness onFacebook in an attempt to gather information on that person unless you have disclosed to them who you are and why you are "friending" them.

Mining Social Media for Information about Case Parties, Jurors or Witnesses

Given the analysis above, it would appear to be permissible to mine social media sites for information about other parties, Jurors, or witnesses – and even Judges and other lawyers. The Internet is a public domain, and so long as you are not attempting to obtain permission to access someone's profile by misrepresenting who you are or why you want access to his or her profile, you are on safe ground from an ethical standpoint.

As an analogy, the Pennsylvania Opinion compares the practice of an investigator videotaping the public conduct of a plaintiff in a personal injury case to show that they are capable of performing physical acts that they would otherwise claim their injury prevents them from performing. The opinion states:

In the video situation, the videographer simply follows the subject and films him as he presents himself to the public. The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker.

James Hart is a workers compensation and divorce lawyer in Cary.

Website & Article Links:

NCSC: Social Media and the Courts Resource Guide**:**
http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/Resource-Guide.aspx

Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous:
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