

Social Media and Family Law

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1

"...Our last best hope - in an age where the instruments of war have far outpaced the instruments of peace, we renew our pledge of support; to prevent it from becoming merely a forum for **invective**....." *John F. Kennedy*

Invective – noun – *insulting, abusive, or highly critical language....*

2

OUR COURT SYSTEM – OUR PROFESSION

PROFESSIONAL DUTY TO PREVENT INVECTIVE

SOCIETAL OPPORTUNITY TO ENCOURAGE HIGHER IDEALS

PERSONAL INTERPLAY OF EXISTING AS A HUMAN

v.

SAFETY, SECURITY, PROFESSIONAL DISTANCE AND DECORUM

3

EASIER TIMES

Wiegner Residence
Arlene Speaking
Who may I ask is calling?



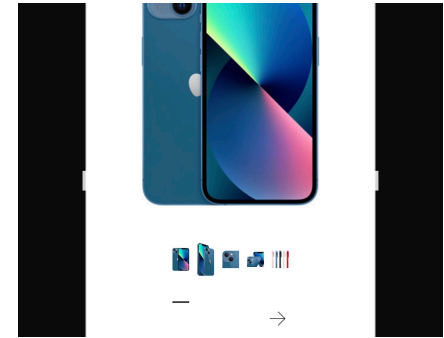
4

TECHNOLOGY!!!
 NOT SHARED
 ALL MINE
 MOBILE
 CONSTANT
 WHO GETS THIS
 NUMBER?
 DON'T TEXT ME \$\$\$



5

MICRO-COMPUTER
 FOR MY POCKET!
 SHOP - BANK
 TALK - TEXT
 PICTURES - SOCIALIZE
 GAMES
 END TO END ENCRYPTION
 DATING
 MEDICAL PORTALS



6

“DON'T KNOW MUCH ABOUT HISTORY”

- SAM COOKE, WONDERFUL WORLD

- MYSAPCE – AUGUST 1, 2003
 - FACEBOOK – FEBRUARY 2004
 - TWITTER – MARCH 2006
 - PINTREST - DECEMBER 2009
 - WHATSAPP – JANUARY 2009
 - INSTAGRAM - OCTOBER 6, 2010
 - KIK – OCTOBER 2010
 - SNAPCHAT – JULY 8, 2011
 - MESSENGER AUGUST 9, 2011
 - TIKTOK – SEPTEMBER, 2016
- WHAT'S NEXT?

7

“DON'T KNOW MUCH BIOLOGY”

- Id.

- DATING APP HISTORY
 - OKCupid - 2004
 - TINDER 2012
 - HINGE – DESIGNED TO BE DELETED – 2012
 - BUMBLE – 2014
 - (hotmess apps – ASHLEY MADISON. Proton Mail. OnlyFans)

THERE WILL ALWAYS BE MORE APPS THAN OLD LAWYERS AND JUDGES HAVE KNOWLEDGE OF..... THESE LISTS ARE BY NO MEANS EXHAUSTIVE.

AS SOON AS PEOPLE OF A CERTAIN AGE ACCESS AND USE TECHNOLOGY – NEW TECHNOLOGY COMES ALONG FOR YOUNGER POPULATIONS – TO AVOID OLD EYES.

8

APPS/PLATFORMS MEANT TO DECEIVE AND HIDE

“DON’T KNOW MUCH ABOUT A SCIENCE BOOK”

- SPOOFING NUMBERS
- GOOGLE NUMBERS
- END TO END ENCRYPTION
- INSPECTOR GADGET SELF DESTRUCTING/SELF DELETING TECHNOLOGY
- INFORM SENDERS OF SCREENSHOT/CAPTURE

“DON’T KNOW MUCH ABOUT THE FRENCH I TOOK....”

- PROTON MAIL
- SNAPCHAT
- HINGE
- WHATSAPP
- iSHREDDER

9

INTERPLAY BETWEEN FAMILY LAW AND SOCIAL MEDIA

GET TO KNOW SOMEONE PRIOR TO MEETING

- SEE WHO THEY ARE –
- DETERMINE HOW MUCH OF A MESS SOMEONE IS GOING TO BE?
- DO THEY UNDERSTAND BOUNDARIES PRIOR TO MY “TALK?”

TIGHTEN UP YOUR SETTINGS

- HIDE FRIENDS
- LIMIT AUDIENCES TO PICTURES/POSTS
- SELECT THE NSA SETTINGS...
- YOU CAN SAY NO
- IF YOU DON’T WANT TO SAY NO – THROW THEM IN THE RESTRICTED PILE.

10

RULES, RULES, THEY’RE EVERYWHERE

- FORMAL ETHICS OPINIONS (FEO)
- CASE LAW
- JUDICIAL STANDARDS
- RULES OF CIVIL PROCEDURE
- RULES OF EVIDENCE

11

Social Media – It’s everywhere!

ETHICS RULES

- 2021 FEO 4
 - Lawyers shall not possess child pornography
 - Lawyers may be mandatory reporters if laws require it
 - Lawyers shall not receive from clients child pornography

2018 FEO 5

- CAN A LAWYER ACCESS PUBLIC INFORMATION ON AN UNREPRESENTED PERSON’S PAGE?
- YES
- CAN A LAWYER DO THE SAME FOR A REPRESENTED PERSON?
- YES

12

2018 FEO 5 CONTINUED

- CAN A LAWYER ASK AN UNREPRESENTED PERSON TO FRIEND THEM SO THAT THEY CAN SEE THE PRIVATE INFORMATION ON THAT PERSON'S PAGE?
 - YES.
- CAN THEY DO THE SAME FOR A REPRESENTED PERSON?
 - NO.
- CAN THEY ACCEPT THE "PRIVATE" INFORMATION FROM A PERSON'S PAGE FROM A THIRD PARTY?
 - YES

13

18 FEO 5 CONTINUED

- CAN A LAWYER ENGAGE IN SUBTERFUGE TO ACCESS PRIVATE INFORMATION ON A PERSON'S PAGE?
 - NO. NOR CAN THEY ALLOW STAFF TO DO SO.

14

2014 FEO 8

- LAWYERS CAN FRIEND JUDGES ON SOCIAL MEDIA
 - JUDGES CAN FRIEND LAWYERS ON SOCIAL MEDIA
 - LAWYERS SHOULD NOT COMMUNICATE WITH THE JUDGE ON SOCIAL MEDIA WHILE A CASE IS PENDING
 - LAWYERS SHOULD NOT DISCUSS CASES WITH JUDGES ON SOCIAL MEDIA
 - LAWYERS CAN ENDORSE JUDGES ON SOCIAL MEDIA
 - JUDGES CANNOT ENDORSE LAWYERS ON SOCIAL MEDIA
- THEY SAY BEING A JUDGE IS LONELY. REVIEWING THESE RULES CONFIRMS THIS ADAGE.

15

2014 FEO 5

- LAWYERS SHALL ADVISE CLIENTS ABOUT IMPACT OF SOCIAL MEDIA FOOTPRINT
- LAWYERS SHALL ADVISE CLIENTS ABOUT DUTY TO PRESERVE ELECTRONIC EVIDENCE
- LAWYER CAN ADVISE TO TIGHTEN UP SECURITY
- LAWYERS MUST HAVE SOME KNOWLEDGE OF SOCIAL MEDIA – "I'M GETTING TO OLD FOR THIS IS NOT AN EXCUSE."
- LAWYER CANNOT ADVISE TO DELETE AND MUST DISCUSS DUTY TO PRESERVE

16

JUDICIAL STANDARDS

- HARMLESS COMMENTS ON LAWYERS TALKING ABOUT THEIR DAY IN COURT – NOT PERMISSIBLE.
- USING YOUR POSITION AS JUDGE ON SOCIAL MEDIA TO PRESSURE PEOPLE INTO DATING YOU – NOT PERMISSIBLE.
- READING THESE CENSURES FELT CREEPY. I HAD TO STOP AFTER 2.
- IF YOU COULDN'T DO IT AS A LAWYER – DON'T DO IT AS A JUDGE.

17

SOCIAL MEDIA AS DEFENSE AND WEAPONS

Sood v. Sood, 2012 N.C. App. LEXIS 1102

- The judge's religious beliefs, as expressed on Facebook and raised for the first time in the Record on Appeal, did not violate the father's First Amendment right where they were different than father's and where the judge did not recuse himself for said differences.
- Judge deemed capable of ruling in a custody case where judge's and litigants religions were different.

CLARK V. CLARK: 2021-NCCOA-652

- REVENGE PORN
- SEXTING
- FALSE IDENTITIES ON SOCIAL MEDIA
- FACEBOOK, CRAIGSLIST, AND KIK
- LAY V. EXPERT WITNESSES
- DIGITAL BACKUP OF PHONES
- INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS

18

CASELAW AND SOCIAL MEDIA

- 214 Opinions or law review articles that discuss Facebook
- 43 of them deal with custody cases
- 10 cases deal with snapchat
- One Law Review Article from North Carolina Law Journal addressing cybersecurity, TikTok, and proton mail.
- 20 cases or law review articles discussing twitter
- **Preservation of information and spoliation cases**

19

RULES OF CIVIL PROCEDURE

- INTERROGATORIES
- REQUEST FOR PRODUCTION OF DOCUMENTS
- ELECTRONIC DISCOVERY CONFERENCES
- IMAGING DEVICES – TABLETS, COMPUTERS, PHONES
- ACTIVITY LOGS AND AVAILABLE INFORMATION
- APPS THAT LACK ACCESSIBILITY
- INJUNCTIONS?
- Rule 26 and <https://canons.sog.unc.edu/2011/09/e-discovery-in-north-carolina-courts-an-overview-of-recent-amendments-to-the-north-carolina-rules-of-civil-procedure/>

20

Mandatory Pretrial Conferences

- Request whether e-discovery is going to be an issue?
- Request whether devices need to be produced, imaged
- Court can call its own witnesses – RULE 614
- Appointment of experts pursuant to - Rule 706
 - Show Cause Order to Appoint an Expert to image devices
 - Consider a provisional division of apportionment of fees with an ability to reconsider at the conclusion of the case.

21

Rules of Evidence

- Besides Rules 614 and 706
- Make the lawyers do their jobs
- They should call witnesses to identify social media accounts
- People admit the darndest things
- Foundation, authentication, lack of alteration
- Will require, on occasion, a stipulation of documentation produced in discovery
- Calling opposing party as a primary witness in the case in chief of moving party

22

A Word of Caution

- Shiny Objects lured Pinocchio to the kidnappers.
- Ransomware is getting trickier.
- New social media apps are always going to appear.
- You don't need to jump on every bandwagon.
- It would be so easy to infiltrate information you hold dear by creating an app that accesses the personal and confidential information you hold on your phones.
- That litigants hold on their phones....
- A precious few of us are trained in electronic safety and technological advances.

23

More Caution

- Don't cross contaminate your devices
- Do your online financials on a device separate from social media
- Don't click on links, regardless of "how much money you could save"
- Don't answer emails instantaneously. Double check that the email address is one that you recognize.
- Call folks if you get an attachment that requires you to click on a link.

24