ETHICS WATCH

Technology and Ethics ("Technethics"): 2014 in Review

By Nathan M. Crystal

Because technology is playing an increasingly important role in the practice of law, this year's review column, like the one last year, focuses on important developments in technology and ethics around the country and the world. For ethics developments in South Carolina during 2014, see www.scbar.org/CLE/AnnotatedSCRulesofProfessionalConduct.aspx

ELECTRONIC DISCOVERY

Judicial Conference Committee approves amendments to Federal Rules of Civil Procedure. On September 18, 2014, the Judicial Conference Committee on Rules of Practice and Procedure approved proposed changes to the Federal Rules of Civil Procedure. The "Duke Rules Package" proposes amendments to rules 1, 4, 16, 26, 30, 31, 33 and 34, as well as an entirely rewritten Rule 37(e) addressing preservation and sanctions. Significant changes include the following:

(1) making clear in Rule 1 that the parties have a duty to cooperate to achieve the purposes of the Federal Rules;
(2) adding the concept of "proportionality" of discovery, along with a list of factors for courts to consider in determining proportionality to Rule 26(b)(1);
(3) allowing for earlier requests for production of documents under FRCP 34 and requiring greater specificity to objections to requests for production;
(4) specifying in Rule 37 when sanctions are appropriate if a party fails to take reasonable steps to preserve electronically stored information, ESI;
(5) revising several rules to encourage more active case management by judges.

The Judicial Conference Committee on Rules of Practice and Procedure Report is available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf. The proposal will go before the U.S. Supreme Court for review and, if approved, will take effect on December 1, 2015, absent any action by Congress to revise or reject the amendments.

Privilege review under claw back order not limited to TAR and "eyes on" review allowed, WVA district court holds. The parties reached agreement on the use of computer-assisted review of documents for attorney-client privilege and work product protection, but disagreed on whether the defendants could in addition conduct manual review. The court found that nothing in the rules prohibited defendants from also engaging in a manual review and refused to limit the defendants to a computer-assisted review. However, the court warned that it expected the defendants to comply with the discovery schedule and that it would entertain on a priority basis a motion by the plaintiffs to limit manual review if undue delay takes places. *Good v. Am. Water Works Co., Inc.*, 2014 U.S. Dist. LEXIS 154788 (S.D. W. Va. 2014).

SOCIAL MEDIA AND PROCEDURE

A social media page must be authenticated like any other piece of evidence, Second Circuit holds. In *United States v. Vayner*, 769 F.3d 125 (2d Cir. 2014), the court addressed the issue of electronic evidence authentication. Defendant Appellant Zhyltsou was criminally convicted on a single charge of transfer of a false identification document—a forged birth certificate. The government introduced as evidence to prove the forgery a copy of an e-mail, with the counterfeited birth certificate attached. The e-mail reflected the sender's and the recipient's addresses, but it did not prove any connection between Zhyltsou and the sender's e-mail address. The government tried to prove the connection between defendant and the e-mail account used to send the forged certificate by introducing a printout of a web page claimed to be Zhyltsou's profile on VK.com, the Russian equivalent of Facebook. The page showed that Zhyltsou's name on Skype was the same as the name of the sender of the forged birth certificate. The district court admitted the page under FRE 901, and the jury convicted the defendant. However, the Second Circuit reversed the conviction and ordered a new trial. While the court noted that the requirement for proof of authenticity is not particularly high, there must be sufficient evidence for a reasonable jury to conclude that an item is what it purports to be. In this case there was no evidence that the defendant created the page. The mere existence of a page on the Internet with the defendant's name, photograph, and other identifying information was not sufficient authentication.

District court applies the "express aiming" test to social media advertisement and holds that media presence alone is not

sufficient to establish personal jurisdiction. In *Telemedicine Solutions LLC v. WoundRight Techs., LLC*, 2014 U.S. Dist. LEXIS 33232 (N.D. Ill. 2014), an unfair competition case, the court applied the "express aiming" test for personal jurisdiction involving claimed intentional torts. The court concluded that decisions in this area show that "express aiming" is simply part of a traditional "minimum contacts" analysis. Minimum contacts require more than an injury in the forum state; instead "injury plus" is necessary. Moreover, Internet-based contacts do not require any special treatment or analysis: "Regardless of how the minimum contacts analysis is framed, or the medium through which the contacts are made, the bottom line inquiry is whether the nature of the relationship among the defendant, the forum, and the litigation makes it fair to exercise jurisdiction over the defendant." In this case defendant's Internet presence in Illinois was insufficient to establish the minimum contacts necessary to sustain personal jurisdiction.

SOCIAL MEDIA GENERALLY

Passive lawyer review of jurors' Internet presence is ethical. The ABA Standing Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 466 addressing lawyers' review of jurors' Internet presence distinguishing: (i) "passive lawyer review without juror awareness" (i.e., a juror's webpage is publicly available and the juror is unaware of lawyer's review); (ii) "active lawyer review" (i.e., the lawyer actually requests access to the juror's webpage to be able to see the information); and (iii) a "passive lawyer review with juror awareness" (i.e., the juror's webpage is publicly available but the juror is notified of lawyer's visit by an electronic social media ("ESM") function). The Committee concluded that situation number (i) is not an ex parte communication prohibited by Model Rule 3.5(b), while situation number (ii) is clearly prohibited under Rule 3.5(b). A lawyer may not, either personally or through another, actively send a request to a juror's electronic social media, because this would represent an illicit ex parte communication. Situation (iii) is also ethical but required more analysis. The Committee concluded that ESM-generated notice to a juror that a lawyer has reviewed the juror's information is not communication from the lawyer to the juror. If a lawyer becomes aware of juror misconduct during a review of the juror's social media, pursuant to Rule 3.3(b), she "must take reasonable remedial measures including, if necessary, disclosure to the tribunal."

Social media guidelines issued by the Social Media Committee of the Federal and Commercial Litigation Section of the New York Bar Association. The Committee issued interesting guidelines for those many lawyers who use social media in their practice. The guidelines cover five general areas: (1) attorney advertising, (2) furnishing of legal advice through social media, (3) review and use of evidence from social media, (4) ethically communicating with clients, and (5) researching social media profiles or posts of prospective and sitting jurors and reporting juror misconduct. Under each guideline, the section provides specific guidance and discussion. For example Guideline 1A provides that a social media site used by a lawyer primarily for personal or family purposes is not subject to the advertising rules. For the complete report, see www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html.

Lawyers' use of social media. In Formal Opinion 2014-300 the Pennsylvania Bar Association issued a comprehensive opinion on attorneys' use of social media that should be helpful to lawyers in other jurisdictions. The opinion deals with the following issues: (1) whether attorneys may advise clients about the content of the clients' social networking websites; (2) whether attorneys may connect with a client or former client on a social networking website; (3) whether attorneys may contact a represented person through a social networking website; (4) whether attorneys may contact an unrepresented person through a social networking website for viewing information that would otherwise be private/unavailable to the public; (5) whether attorneys may use information on a social networking website in client-related matters; (6) whether a client who asks to write a review of an attorney, or who writes a review of an attorney, has caused the attorney to violate any Rule of Professional Conduct; (7) whether attorneys may comment on or respond to reviews or endorsements; (8)

whether attorneys may endorse other attorneys on a social networking website; (9) whether attorneys may review a juror's Internet presence.

ADVERTISING

Lawyer sanctioned because he used a referral website that violated ethics advertising rules. *In Re Anonymous*, 6 N.E.3d 903 (Ind. 2014), the Indiana Supreme Court concluded that an attorney should be privately reprimanded because of his affiliation with a referral website ("Law Tigers") that posted testimonials and contained material about prior results of its members. Anonymous obtained an exclusive license for Indiana from the American Association of Motorcycle Injuries Lawyers (which ran Law Tigers). If AAMIL received a telephone call from a potential client for Indiana, it had a duty to route that telephone call directly to Anonymous. The court found that the average viewer would not differentiate between the lawyer and the AAMIL website. The court noted that while the firm's website contained disclaimers about the content of the AAMIL website, "a visitor to the Law Tigers website was not required to access the link to the firm website to be put in contact with Respondent and his firm."

The court also found that the lawyer was subject to discipline because the AAMIL website did not contain his office address. The sanction was limited to a private reprimand because the attorney had no history of discipline in 41 years of practice, he fully cooperated with disciplinary authorities, he engaged in due diligence before entering into a contractual relationship with AAMIL, and his own website contained disclaimers about the content of the AAMIL website.

INTERNATIONAL PRIVACY

ECJ's "right to be forgotten" decision: Europeans have the right to disappear from search engines' results. On May 13, 2014, the European Court of Justice (ECJ) in *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD) — Case C 131-12*, ruled that a search engine's retrieval and listing of information to the benefit of the searcher is "processing of personal data" if the information retrieved is personal data. The ECJ found that, except when the data subject is a public figure, the data subject has the right to ask that the information relating to him personally should no longer be linked to a search based on his name. According to the court, this right descends from the fundamental rights under Articles 7 and 8 of the Charter of the Fundamental Rights of the European Union which "override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name." ⚖