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ETHICS & THE NEW MEDIA : STRATEGIES FOR THE DIGITAL AGE

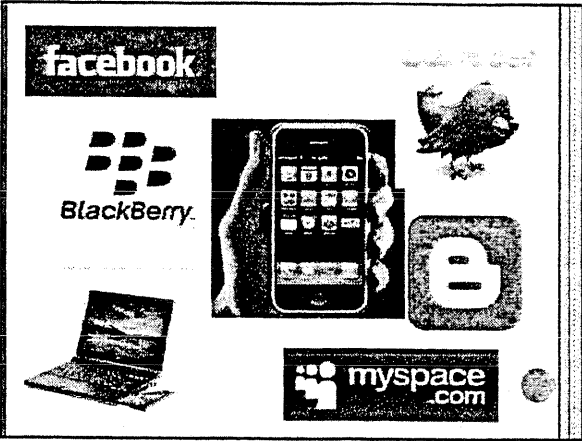
GOALS OF THE PROGRAM:

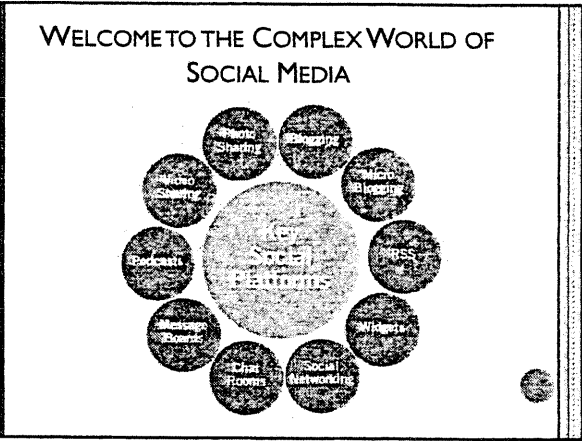
- o Identify Role of Judge and Court Personnel in Promoting Public Confidence in Judicial System
- o Summarize Ethical Rules and Opinions that should govern Online Behavior
- o Discuss Traps for the Unwary with Examples
- o Provide Strategies for Ethical Use of Modern Technology including internet, Blogs, Tweets, and Social Media

POSITIVE ADVANCEMENTS IN COURT TECHNOLOGY

- E-Filing/Electronic Ticket Writers
- High Tech Courtrooms
- Court Websites
- Video Magistrations and Hearings
- Courthouse Security
- Case Management Software

WHAT ABOUT PERSONAL TECHNOLOGY?





SOCIAL NETWORKING

- o Social networking sites are used everywhere, by everyone.
- o "A survey of British employees found that 57% of staff use Twitter, Facebook or other social-networking websites for personal use during office hours, sometimes divulging sensitive business information. The average worker spends almost one working week a year on such sites."
-The Economist, October 31, 2009, "Business this Week."
- o 86% of lawyers age 25-35 use social networking, 66% of lawyers over 46.
 - NY Times, Sept. 13, 2009, "A Legal Battle" Online Attitude vs. Rules of the Bar

MAINTAINING PUBLIC CONFIDENCE

- Role of Judge
- Role of Attorneys
- Role of Court Staff

ETHICAL RULES STILL APPLY IN A HIGH TECH WORLD

- Code of Judicial Conduct
- Disciplinary Rules of Professional Conduct
- Ethics Advisory Opinions
- Statutes
- Court Rules and Opinions

CODE OF JUDICIAL CONDUCT

- o Canon 2B Canon 4A(1)
- o Canon 2C Canon 4A(2)
- o Canon 3B(1) Canon 4B(1)
- o Canon 3B(8) Canon 5(1)
- o Canon 3B(10) Canon 5(2)
- o Canon 3B(11)

ONLINE TROUBLE FOR JUDGES

- o North Carolina child custody case
- o Judge "friended" lawyer on **Facebook**
- o Judge and the lawyer commented about the proceedings through **Facebook**
- o Lawyer: "I have a wise Judge."
- o Opposing lawyer discovered the "friendship"
- o asked for a new trial and for the judge's disqualification
- o The judge recused himself and the wife got a new trial.
- o The judge was also publicly reprimanded by the State for the improper *ex parte* communications.

MORE ONLINE TROUBLE FOR JUDGES

- o Criminal Court Judge in Brooklyn provided details of his location and schedule on **Facebook**
- o updated his profile and "status" while on the bench
- o posted photos of his crowded courtroom on his account
- o The judge also invited several lawyers to be his "friend."
- o was transferred to another court after supervisors learned of his online social networking activities

NY JUDGE'S TROUBLES CONTINUE

- o Judge also had a **MySpace** account
- o when accessed in August 2009 listed his mood as "**amorous**."
- o MySpace page also listed at least one lawyer among his "friends."
- o lawyer was a candidate for the State Assembly
- o Judge's MySpace account provided a link to the attorney's campaign website
- o had several postings promoting his candidacy

JUDGE "BUCKY" WOOD

- o Georgia judge resigned in December 2009
- o allegations surfaced about his alleged inappropriate contact with a defendant through **Facebook** postings
- o judge reportedly offered "behind the scenes" help in a criminal case
- o used a photo taken from the woman's Facebook page as a basis for issuing a revocation against another defendant

WHEN MAGISTRATES TWEET

- o **Magistrate in England was turned in by a fellow magistrate for tweeting about his cases.**
- o the judge tweeted on a Saturday before magistrating those arrested the night before:
- o "Called into Court today to deal with those arrested last night and held in custody. I guess they will be mostly drunks but you never know."

**THE TWEETING MAGISTRATE
(CONTINUED)**

- o Regarding the cases of 3 men accused of robbery, the judge tweeted:
- o "1st defendant. Conspiracy to rob TSB of £500,000. Good start - wrong previous convictions presented."
- o "Finished hearing bail. 3 refused for planning robbery of £480,000 from TSB in Dawley, Telford."
- o Resigned his position
- o the magistrate defended himself with the following Twitter post: "I didn't tweet whilst sitting in court but in the retiring room during the break and at the end of the hearing."

**DISCIPLINARY RULES OF PROFESSIONAL
CONDUCT**

- o Rule 1.05 (Confidentiality of Information)
- o Rule 3.03 (Candor toward the Tribunal)
- o Rule 3.04 (Fairness in Adjudicatory Proceedings)
- o Rule 3.05 (Maintaining Impartiality of Tribunal)
- o Rule 3.06 (Maintaining Integrity of Jury System)
- o Rule 3.07 (Trial Publicity)
- o Rule 4.01 (Truthfulness in Statements to Others)
- o Rule 4.02 (Communications with One represented by Counsel)
- o Rule 4.04 (Respect for Rights of Third Persons)

**ONLINE PRIVACY LAW
EMAIL AND CLIENT CONFIDENTIALITY**

- o How can using email potentially endanger client confidentiality?
- o Unauthorized interception of an email bearing confidential information
- o Inadvertent misdirection of an email bearing confidential information

CANDOR TOWARD TRIBUNAL

- o Galveston County District Judge Susan Criss denied a lawyer's request for a continuance due to death in the family
- o after reading **Facebook** entries posted by the lawyer who bragged about her week of drinking and partying at the same time she was representing to the judge that she was supposedly grieving over her father's death.

THE KRISTINE ANN PESHEK CASE

- o Assistant Public defender in Illinois was fired and brought up on attorney discipline charges
- o allegedly revealed client confidences in blog posts.
- o blog posts identified clients by either their first name (or a nickname) or by their jail identification numbers.
- o Peshek also made derogatory comments about judges in her posts.

OTHER LEGAL CONCERNS

- o In 2009, a blogging lawyer was sued in Tyler, Texas, for defamation.
- o The plaintiff (another attorney) **Eric Albritton**, claimed that lawyer **Richard Frenkel** defamed him in anonymous postings on his Patent Troll Tracker blog
- o Frenkel accused Albritton of conspiring with a federal judicial clerk to alter documents to obtain subject matter jurisdiction
- o The case settled after the federal judge ruled that Albritton could not prevail in his claim for punitive damages unless he proved actual malice.

DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

- o Rules Relating to Supervision of Attorneys and Staff
- o Advertising Rules
- o Rules Relating to Maintaining Integrity of the Profession
 - Rule 8.02 (Judicial and Legal officials)

THE SEAN CONWAY CASE

- o Florida lawyer, mad at a Fort Lauderdale judge oblogged, calling her an "Evil, Unfair Witch"
- o ACLU makes compelling First Amendment arguments
- o lawyer was publicly reprimanded and fined by the Florida State Bar in April 2009 for criticizing the court.

ATTORNEY (JUROR) MISCONDUCT

- o California lawyer received a suspension, lost his job, and paid \$14,000 in legal fees
- o Posted his experiences as a juror in a felony trial despite the judge's warnings to jurors not to discuss the case.
- o posts identified the judge by name and described her
- o gave the first name of the defendant and described his alleged crimes
- o When the lawyer's blogging was discovered, the defendant was granted a new trial.

ETHICS ADVISORY OPINIONS

- o New York Opinion No. 08-176 (01/29/09)
- o Washington State Opinion No. 09-05 (11/17/09)
- o South Carolina Opinion No. 17-2009 (October 2009)
- o Florida Opinion No. 2009-20 (11/17/09)
- o Ohio Opinion No. 2010-7 (12/3/10)

**OTHER TECHNOLOGY CHALLENGES
AND TRAPS FOR THE UNWARY**

- o Jurors using internet to research and investigate cases
- o Jurors and witnesses using technology and social media to communicate during trial or deliberations

THE TWITTERING JUROR

- o In Arkansas, a juror tweeted:
- o "I just gave away TWELVE MILLION DOLLARS of somebody else's money."
- o In another tweet: the company would "probably cease to exist, now that their wallet is 12m lighter."
- o defendant learned of the tweets and moved for a new trial, arguing that the juror's tweets demonstrated that he "was predisposed toward giving a verdict that would impress his audience."
- o Judge denied request. Ruling that the juror's posts did not amount to improper conduct sufficient to warrant a new trial.

INTERNET RESEARCH

- o Florida juror in a federal drug trial used the internet to research the case in violation of the judge's instructions
- o 8 other jurors had been doing the same thing.
- o After 8 weeks of work, Judge William J. Zloch had no choice but to declare a mistrial.
- o "We were stunned," said a defense lawyer, Peter Raben, who was told by the jury that he had been on the verge of winning the case. "It's the first time modern technology struck us in that fashion, and it hit us right over the head."



JURORS ON FACEBOOK

- o In Maryland, the conviction of the Mayor of Baltimore for embezzlement was jeopardized after it was discovered that 5 of the jurors who convicted her were communicating among themselves on Facebook during deliberations.
- o According to the brief filed by the defense team, as "Facebook Friends," the jurors had formed a "clique" that "altered jury dynamics."



STRATEGIES FOR THE ETHICAL USE OF TECHNOLOGY



**APPRECIATE AND UTILIZE THE
BENEFITS OF TECHNOLOGY**

**BE AWARE OF INADVERTENT
MISDIRECTION OF EMAILS**

- o Email programs "help" by guessing the email address you would like to send it to
- o You have no control over subsequent forwarding of your message

USE A DISCLAIMER

o **CONFIDENTIALITY NOTICE:** *This email communication may contain private, confidential, or legally privileged information intended for the sole use of the designated and/or duly authorized recipient(s). If you are not the intended recipient or have received this email in error, please notify the sender immediately by email and permanently delete all copies of this email including all attachments without reading them. If you are the intended recipient, secure the contents in a manner that conforms to all applicable state and/or federal requirements related to privacy and confidentiality of such information.*

BLOG TO GIVE THE PUBLIC A BETTER UNDERSTANDING OF THE JUDICIAL SYSTEM

- o Ron Sylvester's daily blog, called "What the Judge Ate for Breakfast,"
 - posts two-minute videos on different aspects of courtroom procedure as well as interviews with prosecutors, deputies and others in the court about their everyday work lives as a way of educating the public.



PROVIDE LINKS TO OTHER SITES/RESOURCES

- o Sylvester also tweets closing arguments and jury verdicts in real time. He links to other source material, making more information available to his readers and making the process more transparent at the same time.



MORE BLOGGING STRATEGIES FOR JUDGES

- o Treat blogs like any other form of communication & comply with the Code of Judicial Conduct.
- o Blog on judicial issues:
 - provides information other judges may need (i.e., helpful tips on caseload management).
 - gives the public a better understanding of the judicial system



BLOGGING STRATEGIES FOR JUDGES

- o DON'T write blog posts about pending or impending cases (even if pending in another court or on appeal).
- o DON'T mix your personal and your professional life into one blog.

BLOGGING STRATEGIES FOR JUDGES


- o DON'T write anything that could compromise your safety or the safety of those in the courthouse.
- o DON'T blog on issues that might cause your impartiality to be questioned, resulting in frequent recusal.

SOME FOOD FOR THOUGHT

THINK before you post. Even with privacy settings, pictures and writings may become public and could come back years later to haunt you. If your post is something you would not want certain people to see, DON'T POST IT.

MORE FOOD FOR THOUGHT

Does your online profile reflect the professional image you wish to project to the public? To the legal community? To the judiciary?



A FINAL THOUGHT

Don't let social networking take over your life.

