

UNIVERSITY OF MIAMI SCHOOL OF LAW

CENTER FOR ETHICS & PUBLIC SERVICE

The Evolving Duties of Competence & Communication:
Social Media & Technology's Impact on the Practice of
Law

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Sarah Bujold, Intern

Danielle Gauer, Intern

Brian Vaca, Intern

Estate Planning Council of Greater Miami

ACT I: DIGGING FOR GOLD?

CLARA



MARK GOLDEN



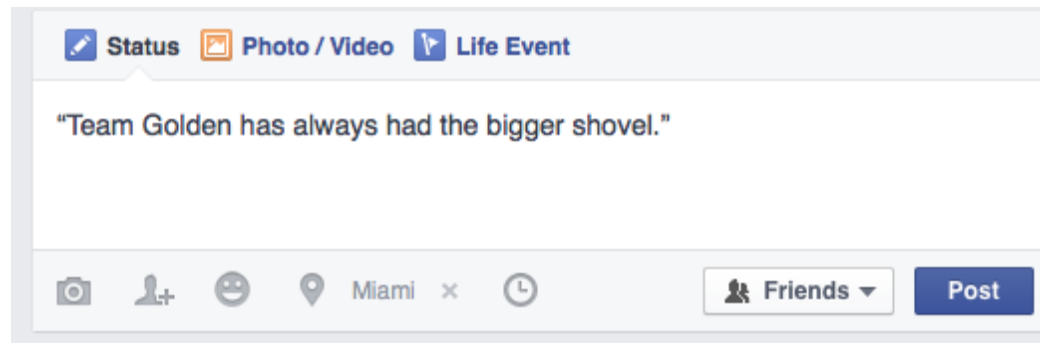
ACT I: QUESTION 1

The lawyer's failure to discuss Zoe and Rylan's social media presence

Zoe's Facebook Post



Rylan's Facebook Post



The Evolving Definition of Competence

Florida Rule 4-1.1 Competence: *Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.*

ABA Comment [8] (2012): *To maintain the requisite knowledge and skill a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.*



Current Florida Proposal to Amend 4-1.1 Comments




“Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question.”

Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications.”







3 hour Technology CLE Requirement



ACT I: QUESTION 2

Connor's advice to Clara to clean up her Facebook account



 Status  Photo / Video  Life Event

"So in love—Gold is a girl's best friend."

    Miami    Friends 

 Status  Photo / Video  Life Event

"Just left Connor's office...what a great attorney...I give it no more than two years until I'm the richest gal in Florida ."

    Miami    Friends 

ACT I: QUESTION 3

**Travis investigating Zoe and Rylan's
social media presence**

***RULE 4-5.1 RESPONSIBILITIES OF PARTNERS,
MANAGERS, AND SUPERVISORY LAWYERS***

(b) Supervisory Lawyer's Duties. Any lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Act II: Digital Age Advertising

**Travis Smith &
Associates, PA**

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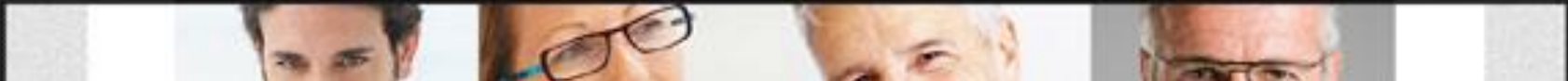


**We Specialize in
Probate Matters**



MORE

MEET THE ATTORNEYS



Blogging

What's Mine is Mine Travis Smith & Associates, PA.

Posted by Travis Smith, Partner
11:18 p.m. 2/1/2016

Another BIG WIN for Travis Smith's client!

- Another day, another big win for Travis Smith & Associates, PA., and its client! Our client, a middle-aged man was going through a nightmare of a divorce. He was desperate to protect his assets and in a huge hole. Fortunately, he came to the right people at Travis Smith, we successfully tackled every problem our client was facing obtaining him the BEST possible result.



LinkedIn Endorsements

Your Connection Suzanne has endorsed you for new skills and expertise!



Commercial
Litigation ×

Probate Law ×

Add to profile

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LinkedIn Recommendation



Suzanne Johnson

“Travis is the BEST Trusts Lawyer in town!
Highly recommend if you want to come out
on top!”

Potentially Misleading Advertisements

- Fla. Rule 4-7.14(a)(4)(A)-(C)
 - *Board Certified, Specialist, Expert*

- *Searcy Denney v. The Florida Bar*
 - Completely prohibiting law firms or lawyers from claiming expertize or specialization is UNCONSTITUTIONAL



Deceptive and Inherently Misleading Advertisements

- Fla. Rule 4-7.13(b)(2)
 - “Objectively Verifiable”
- Comments
 - “Obtained acquittals of all charges in 4 criminal defense cases.” = Objectively Verifiable
 - “Successful” or “Won” ≠ Objectively Verifiable
- *Searcy Denney v. The Florida Bar*
 - Issue lacked ripeness
 - “[L]ong and undeniable trend towards increasingly restrictive measures to control attorney advertising.” *Harrel v. FL Bar*



LinkedIn

- NYSBA Committee on Professional Ethics
 - ▣ If all 5 factors are met = Advertising
 - ▣ Exceptions included
- NYSBA Guidelines on Social Media
- Pennsylvania Bar Association Opinion

**LinkedIn
Ethics**



Act III - Information Security

□ ETHICAL RULES

- Fla. Rule 4-1.1 – Competence
- Fla. Rule 4-1.3 – Diligence
- Fla. Rule 4-1.6 – Confidentiality
- Fla. Rule 4-5.3 – Responsibility
Regarding Non-Lawyer Assistance



The Evolving Definition of Competence

- **ABA Comment [8] (2012):** *To maintain the requisite knowledge and skill a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology.***

As of December 2015, 20 states have adopted the new comment to Model Rule 1.1, some with variations from the ABA language.



Proposal to Amend 4-1.1 Comments

- **Florida Rule 4-1.1 Competence:** *Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.*
- *New Language adds that lawyers should also have:*
“an understanding of the benefits and risks associated with the use of technology.”



Proposal to Amend 4-1.1 Comments

- “Competent representation may also involve the **association or retention of a non-lawyer advisor of established technological competence in the field in question.**”

- Competent representation also involves **safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications.**”



Changes to CLE Requirements!

□ **New 3 hour Technology CLE Requirement**

Increases to 33 hours (per three-year), with 3 hours devoted to technology!

Originally 6 credits recommended by Vision 2016

Compromise: 3 approved by The Florida Bar Board of Governors

Awaiting Florida Supreme Court Final Approval!



Why Technology?

Practice Management Software

Accounting (QuickBooks)

E-Filing (State & Federal)

Templates (HotDocs)

Microsoft Office

Federal

State

SEC

FLOIR

IRS

Dept of Rev

USCIS

CFO

Video Conferencing

Now let's look at Travis and Rick...

Florida Rule 4-1.6 Confidentiality



uh oh.

(e) *Inadvertent Disclosure of Information.*
A lawyer must make *reasonable efforts* to prevent the *inadvertent or unauthorized disclosure* of, or *unauthorized access to*, information relating to the representation of a client.

Comments

Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to:

- *sensitivity* of the information,
- *likelihood* of disclosure if additional safeguards are not employed,
- *cost* of employing additional safeguards, and
- *difficulty* of implementing the safeguards.

Florida Rule 4-5.3 Responsibilities Regarding Nonlawyer Assistants

Comments

Nonlawyers Outside the Firm “The extent of this obligation [to ensure services are provided in a manner compatible with the lawyer’s professional obligations] will depend on the circumstances...”

- *Education;*
- *Experience;* and
- *Reputation* of nonlawyer must be considered
- *Incorporated? References?
Portfolio? Professional memberships?*



Text Messaging (SMS)

- **The Florida Bar's Best Practices for Effective Electronic Communication**
- *Functions on the same radio network as your phone (not iMessage, WhatsApp...)*



Email

- **The Florida Bar's Best Practices for Effective Electronic Communication**
- *My email is secure!! (...or is it?)*



Encryption services?

Even if I encrypt it, what is actually protected?

Time-delay applications?

Melissa and her Laptop



- MELISSA'S LAPTOP

- Anti-virus? Anti-malware?
- Compromised device can communicate any data

- WI-FI SETUP

- Modern router?
- Up-to-date and Encrypted
- **PASSWORD PROTECTED!!**



Florida Advisory Opinion 12-3



Lawyers may use cloud computing if they take **reasonable precautions to ensure that confidentiality** of client information is maintained, that the service provider maintains **adequate security**, and that the lawyer has **adequate access** to the information stored remotely. The lawyer should **research** the service provider to be used.

Russell and his Laptop



□ FREE WI-FI

- FL Best Practice
- So what can Russell do?

□ RUSSELL'S LAPTOP

- Human error is common!!
- Hard drive encryption