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**Merrillville, Indiana**

**Indiana Child Support Conference**

# Social Media and Title IV-D Prosecutor's Offices

Ethan C. McKinney, DPA  
Child Support Director, St. Joseph County

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# Social Media



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# Issues to Cover

- Ethics
- Evidence
- Locate Tool
- Endorsements
- Appearance of Impropriety
- Workplace Issues
- Jury Tampering

# Indiana Rules

- There is no specific Rule of Professional conduct for Attorneys when it comes to social media specifically.
- However, there are several ways to break the Rules of Professional Conduct by using social media inappropriately. See:

## **Client Lawyer Relationship**

- Rule 1.4 Communication
- Rule 1.6 Confidentiality
- Rule 1.7 Conflict of Interests
- Rule 1.8 (I) for Part Time Prosecutors

# Ethical Issues

## Advocacy

- Rule 3.6 Trial Publicity
- Rule 3.8 (f) Special Responsibilities of a Prosecutor

## Transaction with Other Parties

- Rule 4.1 Truthfulness
- Rule 4.2 Communication with Represented Parties
- Rule 4.3 Communication with Unrepresented Parties
- Rule 4.4 Respect for the Rights of Third Parties

## Association

- Rule 5.1 Responsibility of Supervising Lawyer

# Ethical Issues

## Integrity of the Profession

- Rule 8.4 Misconduct

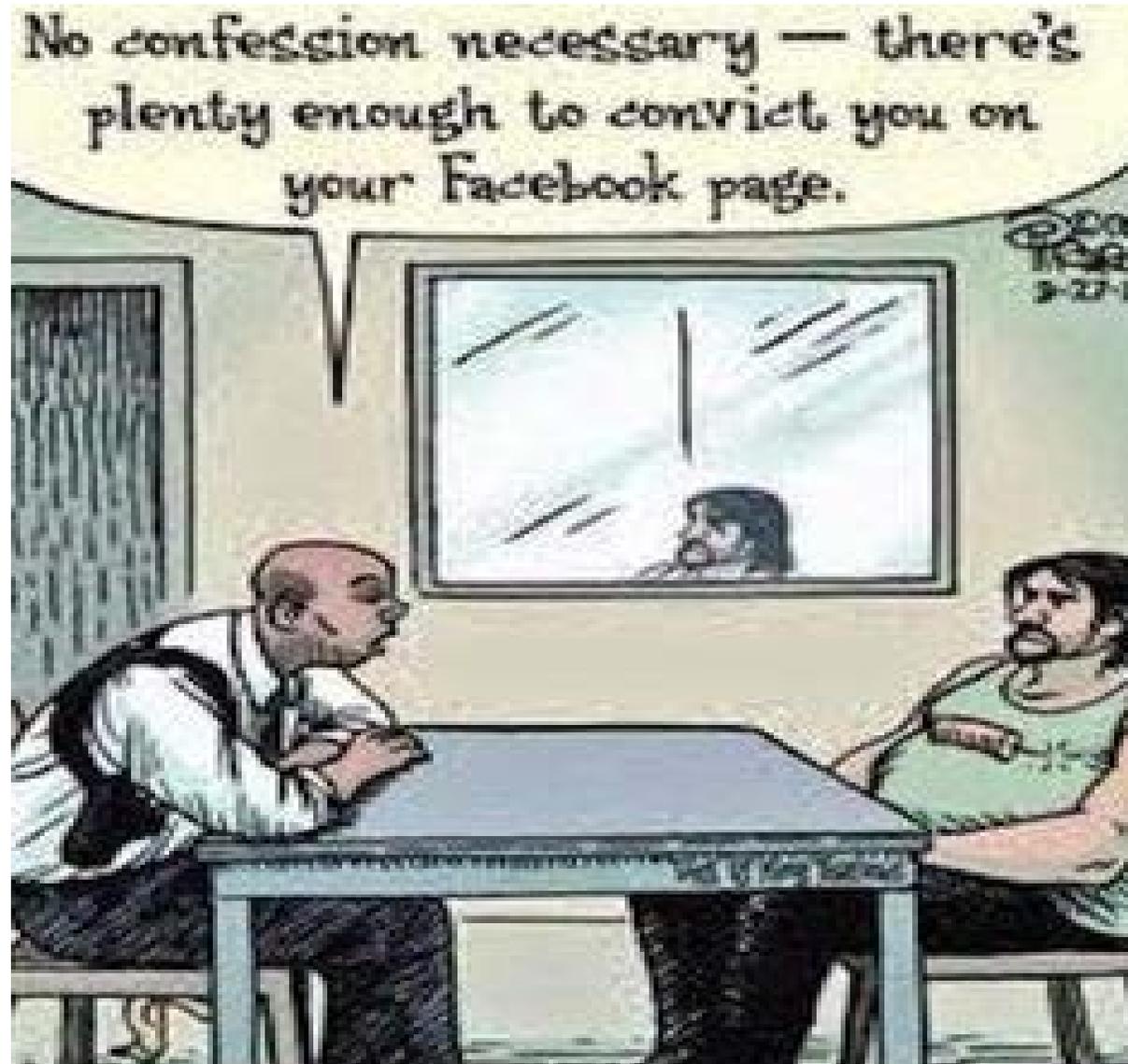
## Use of Non-Lawyer Assistants

- Rule 9.1 Supervision

# Code of Judicial Conduct

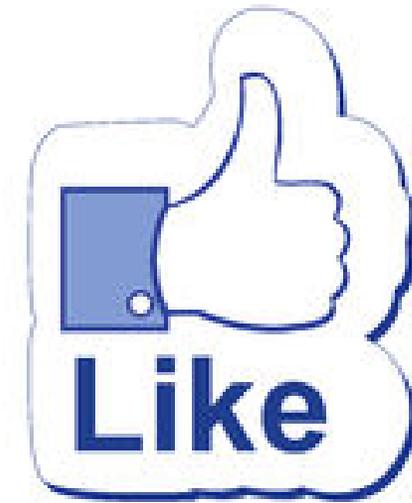
- Cannon 1: A judge shall uphold and promote the independence, integrity and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.
- Cannon 2: A judge shall perform the duties of the judicial office impartially, competently and diligently.
- Cannon 3: A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.
- Cannon 4: A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity or impartiality of the judiciary.

# Social Media as Evidence



# Discovery Issues

- May be discoverable.
- The reasonable expectation of privacy.
- **Relevancy** is usually a court's true threshold with many court's not allowing discovery unless the party already knows what it may find.



# Threshold Relevancy

- As far as the threshold relevancy inquiry is concerned, it is clear that material on social networking websites is discoverable in a civil case. Pennsylvania's discovery rules are broad, and there is no prohibition against electronic discovery of relevant information. Furthermore, courts in other jurisdiction with similar rules have allowed discovery of social networking data.

[Largent v. Reed, 2011 Pa. Dist. & Cnty. Dec. LEXIS 612, \\*10, 2011 WL 5632688 \(Pa. County Ct. 2011\)](#)

# Expectation of Privacy

- There is no confidential social networking privilege under existing Pennsylvania law. McMillen, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, 2010 WL 4403285. There is no reasonable expectation of privacy in material posted on Facebook. Almost all information on Facebook is shared with third parties, and there is no reasonable privacy expectation in such information. Cf. Commonwealth v. Proetto, 2001 PA Super 95, 771 A.2d 823, 828 (Pa. Super. 2001).

[Largent v. Reed](#), 2011 Pa. Dist. & Cnty. Dec. LEXIS 612, \*12, 2011 WL 5632688 (Pa. County Ct. 2011)

# Stored Communications Act

- See [Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965 \(CD. Cal. 2010\)](#). In [Crispin](#), the defendants [15] served subpoenas upon Facebook and other social networking sites seeking information about the plaintiff's online postings. [Id. at 969](#). The plaintiff filed a motion to quash the subpoenas arguing, among other things, that the SCA prohibited disclosure. [Id.](#) In a comprehensive opinion, the court held that Facebook is both an ECS and an RCS, depending on which function of the site is at issue. [Id. at 987-88, 990](#).
- The court granted the motion to quash. In doing so, it held that civil subpoenas are never permissible under the SCA. [Id. at 975-76](#) (quoting [Viacom Int'l, Inc. v. YouTube, Inc., 253 F.R.D. 256, 264 \(S.D.N.Y. 2008\)](#); [In re Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606, 611 \(E.D. Va. 2008\)](#); [O'Grady v. Super. Ct., 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 \(2006\)](#)).

# Password and ID!

- We agree with Rosko that information contained on Jennifer Largent's Facebook profile is discoverable. It is relevant and not covered by any privilege, and the request is not unreasonable. We will thus allow Rosko access to Largent's Facebook account to look for the necessary information. Plaintiff Jessica Largent must turn over her Facebook login information to Defense counsel within 14 days of the date of the attached Order. Defense counsel is allotted a 21-day window in which to inspect [19] Largent's profile. After the window closes, Plaintiff may change her password to prevent any further access to her account by Defense counsel.

[Largent v. Reed, 2011 Pa. Dist. & Cnty. Dec. LEXIS 612, \\*17-19, 2011 WL 5632688 \(Pa. County Ct. 2011\)](#)

# Obtain directly from the Person

- The SCA does not apply because Largent is not an entity regulated by the SCA. She is neither an RCS nor an ECS, and accessing Facebook or the Internet via a home computer, smartphone, laptop, or other means does not render her an RCS or ECS. See Kerr, 72 Geo. Wash. L. Rev. at 1214. She cannot claim the protection of the SCA, because that Act does not apply to her. **HN10** "The SCA is not a catch-all statute designed to protect the privacy of stored Internet communications." Id. Rather, it only applies **[16]** to the enumerated entities. Largent being neither an ECS nor an RCS, the SCA does not protect her Facebook profile from discovery.

[Largent v. Reed, 2011 Pa. Dist. & Cnty. Dec. LEXIS 612, \\*15-16, 2011 WL 5632688 \(Pa. County Ct. 2011\)](#)

# Don't get Greedy!

- Moreover, in Largent, the plaintiff's claims of severe and permanent mental and physical injuries would seemingly affect almost every aspect of her life and likely be reflected in much, if not all, of her Facebook data. No such claims are at issue here and thus Largent (nor Zimmerman or McMillen) support a finding that disclosure of Plaintiff's entire Facebook file or her username and password is appropriate. Under these circumstances, the Court finds not only that unfettered access to Plaintiff's Facebook data, particularly her access information, is not warranted but that Defendants have received all the discovery relative to Plaintiff's Facebook account to which they are entitled, with perhaps one exception.

[In re Milo's Kitchen Dog Treats Consol. Cases, 307 F.R.D. 177, 182, 2015 U.S. Dist. LEXIS 48808, \\*12-13, 91 Fed. R. Serv. 3d \(Callaghan\) 704 \(W.D. Pa. 2015\)](#)

# In Camera Review

- Informed by this review of the pleadings and other information in the record, and assisted by the parties' respective submissions, the Court conducted a thorough in camera review of Plaintiff's Facebook account on June 20, 2011.

[Offenback v. L.M. Bowman, Inc., 2011 U.S. Dist. LEXIS 66432, \\*4, 2011 WL 2491371 \(M.D. Pa. June 22, 2011\)](#)

- The court then specifically detailed the items that were relevant for production and otherwise allowed no access to the Facebook page.



Find us on  
**Facebook**

- Cop helps take down Brooklyn crew accused of burglary spree by friending them on Facebook, Oren Yaniv, New York Daily News, May 30, 2012.
- *"There was at least one member among the gang friends who didn't have much stock in Facebook's confidentiality because he posted ... 'If they was coming after the Brower Gang you would all just gave yourselves away,'" said Kelly.*
- *Another man retorted, "Don't say that," according to Kelly. That gangster then changed his online handle from BrowerBoysBodyBags to LowKeyBodyBags.*



Facebook Terms and Policies prohibit fake Facebook Pages.

## Fake Profile Page for Locate and Investigations

Police and Federal Law enforcement officials may create a fake Facebook profile as part of an investigation and even though it violates the terms and policies of Facebook the evidence gathered may still be used in court. However the Federal DOJ is reviewing this policy in light of the case of Sondra Arquiett being impersonated by the DEA.

# Concern for your Police Agencies

- Sondra Arquiett settled her law suit against the DEA for \$134,000!
- Why if fake pages are okay?
- DEA confiscated her phone – published her pictures to a counterfeit Facebook page without her knowledge or consent. These photos included revealing photos. The DEA then messaged her friends and invited them to be friends with her, including the fugitive he was trying to arrest.
- Takeaways – Don't use anyone's photos without consent. While the case may hold up in court – they could subject the State, City or County to liability if they impersonate a real person.

# No Fake Page for Prosecutors

- The ethical constraints of attorneys and in particular the higher standards placed on a prosecutor and her staff make the creation of a fake Facebook page, not only a bad idea but a potentially career ending proposition.
- Prosecutor Suspended for Fake Facebook Page, Rose Bouboushian, Courthouse News Service, Feb. 26, 2016.
- OH Prosecutor impersonated murder suspect's mistress to attempt to turn his girlfriend against him.
- He was fired and suspended for 1 year from the practice of law.
- **The dissent wanted an indefinite suspension.**

# Must use Your Own Profile

- As a Prosecutor's Employee you must either use your own Facebook page to search or friend parties you are interested in to see limited publication postings.
- You don't have to "friend" someone if their page is publicly viewable – no reasonable expectation of privacy.
- You do have to friend them if you want to see private information.
- CP can you bring you information he obtained using his own page. He would have to testify to authenticate it potentially.
- You must not tell the CP to do anything that would otherwise violate your ethical duties and you should strongly consider whether you should use anything they obtained through deception.



“Just showing off the view from my apartment and outside of my new job.”



# Other Ways to Search

- Location Services
- Check In's at Restaurants
- City A person Lives in
- Sports Team they Follow
- Location of Day Care or School for the children.
- Events they are planning on attending.
- News Channels They Follow
- Friends in common
- Relatives

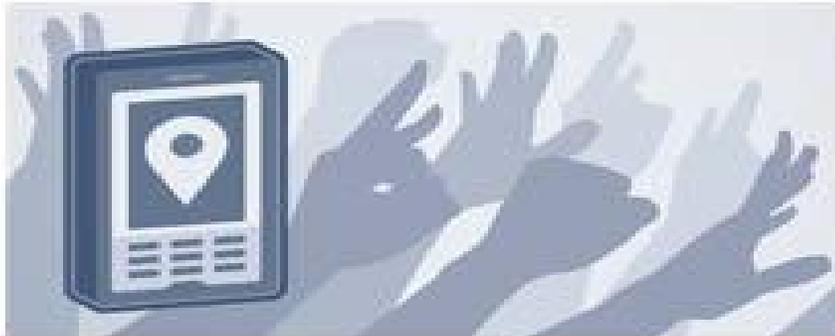
# Locate Tips and Warnings



## Places

Who. What. When. And now **Where.**

### Share Where You Are

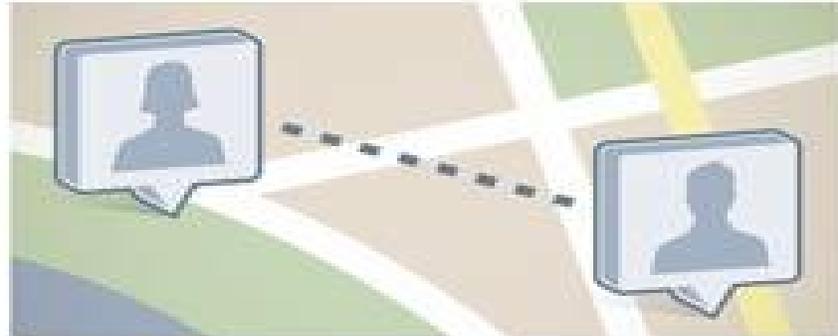


"Best. Concert. Ever."

Easily share where you are, what you're doing and the friends you're with right from your mobile.

- 📍 Check in and your update will appear on the Place page, your friends' News Feed and your Wall.
- 📍 Tag the friends you're with so they can be part of your update.

### Connect With Friends Nearby



"I'm just down the street!"

Never miss another chance to connect when you happen to be at the same place at the same time.

- 📍 Browse status updates of friends checked in nearby.
- 📍 After checking in, tap "Here Now" to see who else is checked in where you are.

## Patrick Lamb, Chicago Valorem Law Group



Nancy, would you like to recommend Patrick?

[Recommend Patrick](#) ▾

### Founding Member Valorem Law Group



**Susan Hackett**

CEO | CLO at Legal Executive Leadership, LLC

“ I've worked with Pat (and also with his partner, Nichole Auerbach) on several occasions as ACC stepped up to the bully pulpit to drive increased value for clients from the traditional corporate practice/law firm/law department service model. I've not only enjoyed collaborating with him - on programs, publications, and strategies to move the profession forward - but also... more

April 27, 2011, Susan was Patrick's client



**Jordan Furlong**

Partner at Edge International and Senior Consultant at Stem Legal Web Enterprises

“ Patrick is among the most articulate and outspoken advocates of a new and better way of practising law, one engineered in every respect to provide value to clients. Exemplified by his rejection of the billable hour, Patrick's approach to lawyering puts client service at the forefront of everything his law firm does and poses to the profession the question: why isn't every... more

November 1, 2009, Jordan was with another company when working with Patrick at Valorem Law Group

# The problem with Endorsements

As the Prosecutor's Office or employee have you told the public that choosing this lawyer you endorsed means they will get favorable treatment.



## States with Ethics Advisory Opinions:

Arizona California Florida

Kentucky Maryland  
Massachusetts

New York Ohio Oklahoma

South Carolina Washington



# Employment Dangers

- Every few days someone posts something new that ends with their termination.
- Google the phrase “fired over social media.”
- Remember we serve the public. Your social media profile may reflect upon that as we’ve learned nothing is truly private so be smart.

# Jury Tampering

- Juror in the UK dismissed from a case after she disclosed sensitive case information on her Facebook page then stated “I don’t know which way to go, so I’m holding a poll.” - The Telegraph.
- Airline employees fired for insulting passengers and making jokes about faulty engines on Facebook. - The Guardian
- Defendant had his friend contact Jurors through Facebook. The NLRG

# Motion for a New Trial

- Tyler Webster shot and killed Buddy Frisbie. On appeal, Webster claimed his conviction should be vacated because of juror misconduct and juror bias. Specifically, Webster claimed a juror failed to disclose that her daughter was a good friend of Frisbie's stepsister. Webster further claimed the same juror engaged in discussions about the case with third parties, posted comments on Facebook, and "liked" a comment posted by Frisbie's stepmother on Facebook related to the trial. Webster also appealed the judgment based upon assorted errors in the district court's evidentiary rulings.

[State v. Webster, 865 N.W.2d 223, 226, 2015 Iowa Sup. LEXIS 69, \\*2 \(Iowa 2015\)](#)

# Small Towns

- The juror told the court that her twenty-seven-year-old daughter was friends with Frisbie's half-sister or stepsister as they had attended high school together. The juror stated she did not know Frisbie, and other than telling her daughter she had jury duty, she did not discuss the case with her. She also stated she was friendly with Frisbie's parents, as they worked in the courthouse and she also worked in the courthouse. She also noted she thought she knew a family member of Webster's wife. Webster's attorney noted the juror's [228] familiarity with these individuals commenting, "I understand this is a small town." When asked if the relationships would cause her to be biased, the juror stated she would not be biased and would rely upon her notes in making her decision.

[State v. Webster, 865 N.W.2d 223, 227-228, 2015 Iowa Sup. LEXIS 69, \\*5 \(Iowa 2015\)](#)

# Facebook Friendship

- The juror further stated she was a Facebook user and knew about the shooting the night of the incident through Facebook. She stated that while she had been on Facebook during the trial playing games, she had "not read anybody else's postings, because [she] kn[ew] if they posted something [she] didn't want to know about it." At the conclusion of the in camera examination of the juror, the defense declined to challenge the juror for cause.

[State v. Webster, 865 N.W.2d 223, 228, 2015 Iowa Sup. LEXIS 69, \\*5-6 \(Iowa 2015\)](#)

# Jury Instruction

- You may not communicate about this case before reaching your verdict. This includes cell phones, and electronic media such as text messages, Facebook, MySpace, LinkedIn, YouTube, Twitter, email, etc. Do not do any research or make any investigation about this case on your own. Also, do not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge. This includes using the Internet to research events or people referenced at trial.

[State v. Webster, 865 N.W.2d 223, 228, 2015 Iowa Sup. LEXIS 69, \\*6 \(Iowa 2015\)](#)

# Facebook Misconduct

- The juror also testified about her Facebook activity. She testified she was "friends" with Frisbie's stepmother on Facebook. At the same time, the juror testified she was not "close friends" with the Frisbies. She admitted she "probably" clicked "Like" on Frisbie's stepmother's comment, "Give me strength," but denied that she communicated with Frisbie's stepmother, stating she simply "clicked a button that said, 'like.'" Additionally, although she claimed not to be close to the Frisbie family, she knew it was a good family because her daughter had said so and her daughter would never allow the Frisbie family to babysit for her child if she did not feel that way.

[State v. Webster, 865 N.W.2d 223, 230, 2015 Iowa Sup. LEXIS 69, \\*13 \(Iowa 2015\)](#)

# Decision

- However, the record here does not disclose the court's initial admonition or when the juror clicked "like." In any event, while the short form admonition to the jury in the record indicated that the juror should not communicate with parties and witnesses about the case, the juror apparently thought (erroneously) that merely clicking "like" on Facebook was not a "communication." Moreover, the communication did not relate to the guilt or innocence of the accused, but only showed a degree of empathy for a grieving stepmother who lost her son. A juror who does not have empathy for a grieving mother whose son was a homicide victim would be awfully cold hearted. If we disqualified jurors because they empathized with the family of crime victims, we would have no jurors.

[State v. Webster, 865 N.W.2d 223, 239, 2015 Iowa Sup. LEXIS 69, \\*37 \(Iowa 2015\)](#)

# Final Thought for the Day

- Notwithstanding our resolution of the issues in this appeal, we do not approve of the juror's conduct in this case. While the click of the mouse does not require reversal of Webster's criminal conviction, it is troublesome nevertheless. While it did not occur in this case, a single click of the mouse on Facebook can trigger cascading responses. Further, messages posted on Facebook may be viewed by many persons, generating a perception of a miscarriage of justice.

[State v. Webster, 865 N.W.2d 223, 239, 2015 Iowa Sup. LEXIS 69, \\*38 \(Iowa 2015\)](#)



# Contact Information

- Ethan C. McKinney, DPA, Director  
St. Joseph County Prosecutor's Office – Child  
Support Division  
227 W. Jefferson Boulevard, Ste. 600  
South Bend, IN 46601  
[emckinney@stjoepros.org](mailto:emckinney@stjoepros.org)  
574-235-5023