



# The Ethics of Working Remotely



Presented by:  
Casey Murray, Partner | Kansas City  
Ruthie White, Partner | Houston  
June 17, 2020



1

## Disclaimer



- This presentation and its accompanying materials provide general coverage of its subject area and is presented for informational purposes only.
- The information in this presentation is not a substitute for legal advice as the laws governing legal ethics and professional responsibility are always changing and the information may not be suitable in a particular situation.
- Consult your attorney for legal advice. No attorney client relationship is intended or implied by making this presentation.

2

## The New Normal?



Spencer Fane LLP | [spencerfane.com](http://spencerfane.com)

3

3

## Meet Spencer Fane: Tech-Savvy Lawyer



- Has His Face in the “Book”
- Is LinkedIn with Everyone He Knows
- Blogs Like a Pro
- “Friends” with all the Judges
- Uses Smartphone to communicate with clients 24/7
- Can Try a Case from his Tablet
- Is a Real “Tweet”heart

Spencer Fane LLP | [spencerfane.com](http://spencerfane.com)

4

4

# Spencer's Ethical Obligations



- State Rules of Professional Conduct
- ABA Model Rules

5

## Confidentiality/Privilege

RULES	ABA	KANSAS	MISSOURI	NEBRASKA
Competence	1.1	226-1.1	4-1.1	3-501.1
Confidentiality of Information	1.6	226-1.6	4-1.6	3-501.6



6

## Work from Home or on the Road



- Do you travel for business?
- Do you work when you travel?
- Do you log onto your computer, tablet or smartphone to access the Internet using Wi-Fi at airports, airplanes, hotels, coffee bars, restaurants, opposing counsel's office, etc.?

Question: Do these activities pose an ethical risk?



7

## Videoconferencing



- Videoconferences can be prone to hacking or at least loss of confidentiality in a number of ways
- Screen-sharing can create an open door for other users—or hackers—to get into everything on the device you are using
- Make sure that:
  - (1) the recording functionality is disabled;
  - (2) you (and others) do not use any uploading or transfer of documents over the platform, or screen sharing;
  - (3) password protection or other limitations are in place that restrict access to the meeting to those who should be participating

8

## Videoconferencing



- Two of the most well-known videoconferencing tools: **WebEx** and **GoToMeeting**. Both offer end-to-end encryption. This type of encryption is built-in to GoToMeeting, and with WebEx, the site administrator must enable it.
- **Zoom** offers end-to-end encryption as a default option.
- The key is to carefully ensure that you fully understand the features, encryption method(s) and pricing scheme

<https://www.abajournal.com/web/article/top-video-conferencing-tools-for-lawyers>

ABA Journal, July 26, 2019; It's now a Trekkie world: Top videoconferencing tools for lawyers,  
By Nicole Black

## The Cloud



- Advantages: increased space, reduced need for storage and warehouse staffing, and increased organization of the client's information.
- Risks: The chief risk is that no one really knows where the data is located, whether European Privacy laws apply, or if someone else is looking at the data.
- Wise counsel will negotiate with the cloud provider to draft and revise important terms, decide on a choice of law provision, confirm data security requirements and protocols, and describe notice requirements in the event that someone wishes to access your data

## “Reasonable” Factors



- Sensitivity of the information;
- Likelihood of disclosure without additional safeguards;
- Cost of employing additional safeguards;
- Difficulty of implementing additional safeguards;
- Extent to which the safeguards will adversely affect the lawyer’s ability to represent clients (e.g. making software or device too difficult to use).

Proposed Comment [16] to Model Rule 1.6

11

## So, What Can Spencer Do to Protect Data?



- Protect laptop, flash drives, cellphones, smart phones, etc.
  - GPS your cellphone and laptop
  - Implement secure and strong passwords
  - Install network safeguards and backups
  - Purge before destroying or replacing equipment
- Make sure computer & phone are safe when accessing internet sites and data
- Do not send client information over 3d party Wi-Fi or “hot spots” (use only secure sites)



12

# Competence/Diligence/Supervision

	ABA	KANSAS	MISSOURI	NEBRASKA
Competence	1.1	226-1.1	4-1.1	3-501.1
Diligence	1.3	226-1.3	4-1.3	3-501.3
Responsibilities – Non-Lawyer Assistance	5.3	226-5.3	4-5.3	3-505.3



13

## Hypothetical



- HR calls IHC about a recent sexual harassment complaint from Employee involving Supervisor. According to Employee, Supervisor sent him explicit photos of herself on Snapchat.
- HR asked Employee to provide HR with a copy of the photos, but Employee said the photos disappeared after Supervisor sent them to him.
- HR tells IHC that she doesn't find Employee credible because "he claims the photos somehow disappeared before he could obtain them."
- IHC tells HR that he agrees that the employee's story sounds incredible. Recommends final written warning for false allegations.

14

## No Passes



- Technophobic lawyers can no longer ignore emerging technologies.
- The ABA amended the comments to Rule 1.1 (Competence) to state that a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*. ABA Model Rules of Prof 1 Conduct, R. 1.1, cmt. 8 (2012).

## Hypothetical



- Plaintiff accuses Supervisor of denying her multiple opportunities for promotion and creating a hostile work environment filled with rampant sexist remarks about women.
- Plaintiff serves a discovery request asking for Supervisor's Facebook and Twitter profile and data. IHC (In-house counsel) tells HR that they are going to object but the Court may compel production. IHC then asks HR to find out if there are any concerns with this request.
- HR meets with Supervisor, who admits he has a Facebook and Twitter account with some occasional "off-color jokes," but nothing about women. HR tells Supervisor to "clean up" his social media immediately. The Company does not want to give her any opportunity to amend her complaint to add discrimination on the basis of other protected characteristics, such as race or religion.



## Hypothetical



- HR calls IHC about a recent complaint she received from Supervisor.
- According to Supervisor, Employee's coworker (and another direct report) told her Employee posted several disparaging comments about Supervisor's leadership capabilities on his Facebook timeline. One example: "Supervisor's name should be Hitler instead of Helen, since it is always her way or no way."
- Supervisor has not seen the posts because Employee's Facebook page is private and she is not a Facebook friend, so she cannot obtain a copy of the posts. Nonetheless, Supervisor wants the employee fired.
- IHC advises HR to ask Employee to be a Facebook friend. If Employee does not accept her, ask Employee to produce his logon information for his Facebook account.

17

## Communication/Truthfulness

	ABA	KANSAS	MISSOURI	NEBRASKA
Truthfulness in Statement to Others	4.1	226-4.1	4-4.1	3-504.1
Communication – Represented Person	4.2	226-4.2	4-4.2	3-504.2



18

## Hypothetical



- IHC receives a demand letter from a local attorney. According to the attorney, Employee was discriminated against on the basis of her religion, GetHighanism.
- IHC speaks to Supervisor, who tells IHC that Employee's Facebook is completely public and filled with page-long posts about how he is going to make the Company "pay" for making fun of his religion.
- IHC tells his paralegal to go to the Employee's Facebook to see what else she can find.

19

## Don't friend the Defendant



- The jurors in a traffic accident case in Judge Wade Birdwell's Fort Worth courtroom were instructed not to discuss the case and specifically were prohibited from posting related commentary on social media.
- Despite the warnings, juror Jonathan Hudson, 22, sent a Facebook friend request to the defendant on the first day of trial. After the defendant told her lawyer about the message, Judge Birdwell immediately removed Hudson from the jury panel. Though he complained that he was unfairly targeted – not surprisingly, on his Facebook page – Hudson pleaded guilty to contempt of court and was sentenced to two days of community service.
- The defense lawyer immediately notified the judge of the juror's transgression, even though that juror – given his interest in the defendant – was probably one he would have liked to keep.

<https://www.legalethicstexas.com/On-The-Merits/September-2011/No,-You-Can-t-Befriend-the-Defendant,-Either>

20

## Facebook Pitfalls



- “Too Much Information, ABA Online Journal, Sept., 14, 2009
  - Young lawyer requested trial delay because of a death in the family
  - Judge Susan Criss, D.C., Galveston, TX granted the delay but checked the lawyer’s Facebook page
  - All week long, the lawyer posted about one night of drinking wine, another night of drinking mojitos, another day motor biking.
  - Upon return to court, the lawyer sought another continuance; this time the judge declined the request and disclosed her online research to a senior partner of the lawyer’s firm.
  - The lawyer has removed the judge from her friends list.

## Deceptive “Friending”



- May Spencer ask a paralegal to “friend” an employee in order to gain access to information?
- May Spencer ask another employee who is a “friend” of the target employee for a password (in order to view information)?
- May Spencer read the screen of a “friend” of the employee (with the friend’s permission but without the target employee’s permission)?
- What if the “friend” provides Spencer with print-outs of the information (versus viewing it online)?

## Answers: NO!



- Under the Rules, Spencer cannot ask another to do on his behalf what he is prohibited from doing
- New Jersey case: Two lawyers were disciplined when a paralegal “friended” a Plaintiff to learn information about alleged injuries (violated rules regarding honesty and communications with represented parties)



## Online Research



- OKAY to view or download information from passive website.
  - Company website
  - Personal website of an employee/witness
- NOT OKAY to send messages to a represented party on an interactive website or chat room.
  - May not be able to ascertain the identity of the person responding
  - May inadvertently communicate with a represented party (which is prohibited under the Rules)
- OKAY to access the public portions of a social networking site
  - Truthful “friending”


# Marketing/Advertising/Research

	ABA	KANSAS	MISSOURI	NEBRASKA
Communication – Lawyer’s Services	7.1	226-7.1	4-7.1	3-507.1
Communication – Lawyer’s Service, Special Rules	7.2	226-7.2	4-7.2	3-507.2
Solicitation of Clients	7.3	226-7.3	4-7.3	3-507.3



25

## LinkedIn

Add profile section More...

**Ruthie White**

Partner/Labor & Employment Co-Chair at Spencer Fane LLP  
Houston, Texas · 500+ connections · Contact info

Spencer Fane LLP  
South Texas College of Law

Skills & Endorsements Add a new skill

View 13 pending endorsements

**Employment Law** · 64

- Endorsed by Sonja McGill and 15 others who are highly skilled at this
- Endorsed by 5 of Ruthie's colleagues at Jackson Lewis P.C.

**Discrimination** · 30

- Endorsed by 5 of Ruthie's colleagues at Jones Day

**Litigation** · 30

- Endorsed by Kimberly James and 3 others who are highly skilled at this
- Endorsed by 3 of Ruthie's colleagues at Jones Day

26

## Recommendations/Testimonials



- Should Prescreen to Ensure Rule Compliance
  - Must not be false/misleading
  - LinkedIn setting allows view of testimonials before available to the public
- Avoid making reciprocal recommendations
  - Prohibited by Rule 7.03(b)
  - Giving anything of value to non-lawyer for soliciting prospective clients

27



THANK YOU



Casey Murray | Partner  
cmurray@spencerfane.com  
Kansas City | (816)292-8133



Ruthie White | Partner  
rwhite@spencerfane.com  
Houston | (713) 212-2626

28