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Social Media - Security, Confidentiality and Privacy

22nd Annual New York State Cyber Security
Conference | June 2019

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2019 New York State Cyber Security Conference: Security, Confidentiality, and Privacy

Tuesday, June 4, 2019 – Wednesday, June 5, 2019
1:00 p.m. – 3:00 p.m.

4.0 MCLE Credits
4 Ethics

Sponsored by the [Committee on Continuing Legal Education](#) of the [New York State Bar Association](#).

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Program Description

This program will delve into the use of social media, discovery of social media in legal matters, and the ethics of using social media - both as an attorney and as a private citizen. Can you communicate with parties and witnesses over social media? Can you research parties, witnesses and jurors? We will answer these questions and consider others, and the answers are more complicated than you may think. Further, have you ever considered the security risks and dangers for your and your clients' electronic information when you travel internationally? If not, you should, and this program will address those security concerns for electronic devices and electronically stored information. Finally, the program will examine storage of client confidential information utilizing the cloud and will analyze the specific and real ethical concerns before and while engaging in electronic storage.

Albany Cyber Conference

Tuesday, June 4, 2019 – Wednesday, June 5, 2019 | 1:00 p.m. – 3:00 p.m.
Empire State Plaza | Albany, NY

4.0 MCLE Credits; 4.0 Ethics

Program Agenda

Tuesday, June 4, 2019

- 12:20 p.m. **Registration**
- 12:50 p.m. – 1:00 p.m. **Welcome and Introductions**
- 1:00 p.m. – 1:50 p.m. **Biometrics, Facial Recognition, and Autonomous Vehicles**
Peter Moomjian, Esq., Lester Schwab Katz & Dwyer, LLP
- 2:10 p.m. – 3:00 p.m. **Who Owns Your “Personal” Emails and Social Media Data?**
Mark A. Berman, Esq., Gander Shore Leeds & Zauderer, LLP
Shawndra G. Jones, Esq., Epstein Becker & Green, P.C.

(1 Ethics)

Wednesday, June 5, 2019

- 12:20 p.m. **Registration**
- 12:50 p.m. – 1:00 p.m. **Welcome and Introductions**
- 1:00 p.m. – 1:50 p.m. **Practical Tips to Avoid Data Breaches**
John Bandler, Esq., Bandler Group LLC
- 2:10 p.m. – 3:00 p.m. **Security, Confidentiality, Privacy and Social Media**
Prof. Michael L. Fox, Esq., Mount Saint Mary College, Columbia
University School of Law
Tarique Collins, Esq., Robinson Brog Leinwand Greene Genovese
& Gluck, P.C.

(1 Ethics)

Accessing the Online Course Materials

The link to access the online course materials is listed below.

Supplemental materials are posted to the online materials link.



www.nysba.org/CyberConference2019Materials

All program materials are being distributed online, allowing you more flexibility in storing this information and allowing you to copy and paste relevant portions of the materials for specific use in your practice. WiFi is available at the program location however, we cannot guarantee connection speeds.

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**Topic I. “Social Media-Security,
Confidentiality and Privacy!”**

1 ☐ New York State Cybersecurity Conference

"Social Media – Security, Confidentiality and Privacy!"

June 5, 2019 – Albany, New York

Prof. Michael L. Fox

Assistant Professor – Mount Saint Mary College

Assistant Adjunct Professor of Law – Columbia University School of Law

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2 ☐ Privacy?? – To begin, it is acknowledged...

► "The protections of the Fourth Amendment extend only to information over which the party has a reasonable expectation of privacy.... [T]he Fourth Amendment does not protect against the disclosure of information 'knowingly expose[d] to the public.'... Generally speaking, "[c]ourts... do not consider social media content as 'private.'"... Courts routinely have found that there is no right to privacy in internet postings that are publicly accessible...."

► Burke v. New Mexico, 2018 WL 2134030 (D. N.M. May 9, 2018) (citing, *inter alia*, Katz v. United States, 389 U.S. 347, 351 (1967); United States v. Meregildo, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012); Rosario v. Clark Cty. Sch. Dist., 2013 WL 3679375, at *6 (D. Nev. July 3, 2013) (unpublished); Tompkins v. Detroit Metro. Airport, 278 F.R.D. 387, 388 (E.D. Mich. 2012) ("[M]aterial posted on a 'private' Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy.")).

► For instance: "'Twitter is a social networking and micro-blogging service' that allows users to 'send and read electronic messages known as "tweets.".... 'Any Twitter user can sign up to "follow" any other Twitter user, which means that Twitter will cause the follower to receive all tweets the author publishes.'" Beter v. Murdoch, 2018 WL 3323162 at *2 n.4 (S.D.N.Y. June 22, 2018) (citing United States v. Liu, 69 F.Supp. 3d 374, 377 n.1 (S.D.N.Y. 2014); Nunes v. Twitter, Inc., 194 F.Supp. 3d 959, 960 (N.D. Cal. 2016)).

► See J. Wolff, "Losing Our Fourth Amendment Data Protection", THE N.Y. TIMES (Apr. 28, 2019) for further discussion. Obviously, there is no expectation of privacy in social media, and no protection from discovery for the reason of privacy. *Cell phones, Alexa/Echo, Google Home, and other devices require application of different standard* (Riley v. California, 134 S.Ct. 2473 (2014); *Fourth Amendment jurisprudence; etc.*).

3 ☐ Can you get access to Social Media accounts for Discovery in New York? Yes – Forman v. Henkin, 30 N.Y.3d 656 (2018) (DiFiore, C.J.)

► Personal Injury action following fall from a horse.

► Trial Court had granted Defendant's motion to compel, directed Plaintiff to produce all

photographs of Plaintiff privately posted on Facebook prior to the accident that Plaintiff intended to use at trial, and post-accident photos and messages, with built-in restrictions for those showing nudity or romantic encounters. Citations to CPLR 3101(a).

- ▶ Appellate Division majority reversed trial court. Cited to Tapp, McCann and other decisions. Held Plaintiff must disclose all photos intended to use at trial, *but* eliminated authorization for post-accident messages and data. Surveillance of a PI plaintiff in public is “far cry” from trying to uncover private social media postings absent a factual predicate.
- ▶ N.Y. Court of Appeals reversed Appellate Division. Also analyzed utilizing CPLR 3101, and cited Romano v. Steelcase. Chief Judge DiFiore, writing for a unanimous court, held that it is inherent in discovery that parties may not know if requested material actually exists. The purpose of discovery is to find that out. Therefore, disclosure “should [turn] on whether it is ‘material and necessary to the prosecution or defense of an action.’”

4 ☐ **The Forman Court further held:**

- ▶ “[W]e agree with other courts that have rejected the notion that commencement of a personal injury action renders a party’s entire Facebook account automatically discoverable.... Directing disclosure of a party’s entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation—such an order would be likely to yield far more nonrelevant than relevant information. Even under our broad disclosure paradigm, litigants are protected from ‘unnecessarily onerous application of the discovery statutes’.”
- ▶ “Rather than applying a one-size-fits-all rule at either of these extremes, courts addressing disputes over the scope of social media discovery should employ our well-established rules—there is no need for a specialized or heightened factual predicate to avoid improper ‘fishing expeditions.’”

5 ☐ **Ultimately:**

- ▶ “[T]he Appellate Division erred in modifying Supreme Court’s order to further restrict disclosure of plaintiff’s Facebook account, limiting discovery to only those photographs plaintiff intended to introduce at trial. With respect to the items Supreme Court ordered to be disclosed... defendant more than met his threshold burden of showing that plaintiff’s Facebook account was reasonably likely to yield relevant evidence. At her deposition, plaintiff indicated that, during the period prior to the accident, she posted ‘a lot’ of photographs showing her active lifestyle. Likewise, given plaintiff’s acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations. The request for these photographs was reasonably calculated to yield evidence relevant to plaintiff’s assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive.”
- ▶ “[T]he Appellate Division erred in concluding that defendant had not met his threshold burden of showing that the materials from plaintiff’s Facebook account that were ordered to be disclosed pursuant to Supreme Court’s order were reasonably calculated to contain evidence ‘material and necessary’ to the litigation.”

6 ☐ **Major Rule – *Stay Up To Date (Competence)***

- ▶ Many Courts, Rules and Commentators speak about attorney obligation to provide competent representation, maintain requisite knowledge and keep abreast of the benefits and risks of

technology.

- ▶ Cite to Prof'l Conduct Rule 1.1 and Comment 8 in NY.
- ▶ NYC Bar Opinion 2015-3 speaks to the issue of attorneys who fall victim to scams.
- ▶ If attorneys fall prey to vicious scammers, or fail to secure client data, could violate Rule 1.6 and 1.15.
- ▶ Have to confirm an e-mail is a legitimate prospective client. And, if receive funds, have to make sure they are confirmed and honored by the bank, as with all funds in the trust account, per Rule 1.15. Not just "check cleared".

7 ☐ **Other Rules of Concern When We Address Attorneys and Social Media:**

- ▶ These ethical issues bring into play Rules of Professional Conduct 1.1, 1.6, 1.9, 1.15, 3.1, 3.3, 3.4, 3.5, 4.1, 4.2, 4.4, 5.3, 8.3 and 8.4, among others.
- ▶ Those rules address, *inter alia*, competence, diligence, client information and property, communication, truthfulness, misconduct, communications with third parties, and attorneys' responsibility for the conduct of non-lawyers.

8 ☐ **Remember Duties and Responsibilities as Officers of the Court, Separate from Being Citizens**

- ▶ See Leigh v. Avossa, Civil No. 16-81612-CIV, Civil No. 16-81624-CIV, 2017 WL 2799617 (S.D. Fla. June 28, 2017).
- ▶ "[A]s a member of the Bar of this Court and The Florida Bar, [the attorney-litigant] cannot post on social media in connection with the practice of law in a manner that is prejudicial to the administration of justice.... Nor can he, in connection with the practice of law, knowingly, or through callous indifference, disparage, humiliate or discriminate against litigants, witnesses or other lawyers on any basis in his social media posts.... This is especially true when his posts are directed against defendants, deponents, or attorneys in two federal civil lawsuits pending before this Court. And, pursuant to the rules of this Court, [the attorney's] social posts related to litigation in this Court must be within the bounds of cooperation, professionalism and civility.... The Court has carefully considered the social media posts made by [the attorney], the arguments of all the parties in these two cases, and the applicable rules and law. This is a very serious matter with serious consequences."
- ▶ Citing Fla. Bar R. 4-8.4(d); S.D. Fla. L.R. 11.1(c).

9 ☐ **What About Security of Storage?:**

The "Cloud" or "Cloud Computing"

- ▶ According to *PCMag* in May 2016, "[i]n the simplest terms, cloud computing means storing and accessing data and programs over the Internet instead of your computer's hard drive. The cloud is just a metaphor for the Internet. It goes back to the days of flowcharts and presentations that would represent the gigantic server-farm infrastructure of the Internet as nothing but a puffy, white cumulus cloud, accepting connections and doling out information as it floats."
- ▶ "What cloud computing is not about is your hard drive. When you store data on or run programs from the hard drive, that's called local storage and computing. Everything you need is physically close to you, which means accessing your data is fast and easy, for that one computer, or others on the local network.... The cloud is also not about having a dedicated network attached storage (NAS) hardware or server in residence. Storing data on a home or office network does not count as utilizing the cloud.... For it to be considered "cloud computing," you need to access your data or your programs over the Internet, or at the very least, have that data synced with other information over the Web. In a big business, you may know all there is to know about what's on

the other side of the connection; as an individual user, you may never have any idea what kind of massive data processing is happening on the other end. The end result is the same: with an online connection, cloud computing can be done anywhere, anytime.”

- ▶ <http://www.pcmag.com/article2/0,2817,2372163,00.asp>. See also *ProExpress Distrib. LLC v. Grand Elec., Inc.*, 2017 WL 2264750, at *1 n.1 (Md. Ct. Spec. Apps. May 24, 2017) (citing *PC Mag*).

10 ☐ **For Example...**

- ▶ Dropbox is one example of Cloud computing/storage and file sharing.
- ▶ “You can store any kind of file in Dropbox, by either uploading to the website or adding it with the desktop apps. Those apps live in your file system so that you can easily move files from your computer to the cloud and vice versa by dragging and dropping them into your Dropbox folder. The service automatically and quickly syncs your files across all of your devices, so you can access everything, everywhere. There is no size limit on files you upload to Dropbox with the desktop or mobile apps, but larger files can take several hours to upload, depending on your connection speed.”
- ▶ *ProExpress Distrib. LLC v. Grand Elec., Inc.*, 2017 WL 2264750, at *1 n.3 (Md. Ct. Spec. Apps. May 24, 2017) (citing *CNET.com*).

11 ☐ **In re Jobdiva, Inc., 843 F.3d 936 (Fed. Cir. Dec. 12, 2016)**

- ▶ “‘Cloud computing,’ according to the Board, ‘is defined as “computing operations carried out on servers that are accessed through the Internet, rather than on one’s own personal computers.”’... By hosting its software remotely, [one of the parties] provides its clients a product without the need to download ‘cumbersome software ... onto office desktops or laptops.’” (quoting *Dictionary of Computer and Internet Terms* 434 (11th ed. 2013)).

12 ☐ **Different Clouds?:**

- ▶ “*Private cloud*. The cloud infrastructure is operated solely for an organization. It may be managed by the organization or a third party and may exist on premise or off premise.”
- ▶ “*Community cloud*. The cloud infrastructure is shared by several organizations and supports a specific community that has shared concerns (e.g., mission, security requirements, policy, and compliance considerations). It may be managed by the organizations or a third party and may exist on premise or off premise.”
- ▶ “*Public cloud*. The cloud infrastructure is made available to the general public or a large industry group and is owned by an organization selling cloud services.”
- ▶ “*Hybrid cloud*. The cloud infrastructure is a composition of two or more clouds (private, community, or public) that remain unique but are bound together by standardized or proprietary technology that enables data and application portability (e.g., cloud bursting for load-balancing between clouds).”

Google, Inc. v. U.S., 95 Fed.Cl. 661, 667 (Fed. Cl. 2011) (citing <http://csrc.nist.gov/groups/SNS/cloud-computing/cloud-def-v15.doc>). See also <http://searchcloudcomputing.techtarget.com/definition/private-cloud>

13 ☐ **Cloud Computing & Storage is Almost Routinely Subject of Discovery Demands**

- ▶ See *Digital Assur. Cert., LLC v. Pendolino*, 2019 WL 161981 (M.D. Fla. Jan. 10, 2019) (not all demands are appropriate, and not all motions to compel granted, though).
- ▶ See also, generally, *Wai Feng Trading Co. Ltd. v. Quick Fitting, Inc.*, 2019 WL 118412 (D.R.I. Jan. 7, 2019).

14 ☐ **Governing Rules of Professional Conduct**

- ▶ *NY Rule of Professional Conduct 1.6(a)* provides: "A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
 - (1) the client gives informed consent, as defined in Rule 1.0(j);
 - (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
 - (3) the disclosure is permitted by paragraph (b)."
- ▶ *NY Rule of Professional Conduct 1.6(c)* provides: "A lawyer [shall] make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b)." (*as amended Jan. 1, 2017*)
- ▶ *NY Rule of Professional Conduct 5.3* governs the work of non-lawyers, and provides that it must be adequately supervised by attorneys.
- ▶ See also NYSBA Ethics Op. 842 (2010).

15 ☐ **The Ethics Authorities Speak to:**

- ▶ Cloud Computing and storage of information as implicating "confidential information" of a client. Indeed, that makes intuitive sense – when most or all information of a client is stored electronically on a given file, no doubt some confidential information is included therewith.
- ▶ That implicates, at the least, NYRPC 1.6.

16 ☐ **NYSBA Ethics Op. 842 (2010)**

- ▶ Provides: "A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and should monitor the changing law of privilege to ensure that storing the information online will not cause loss or waiver of any privilege."

17 ☐

- ▶ NY County Lawyers Association Ethics Opinion 733.
- ▶ Addressed inquiries by a solo practitioner who wished to share office space, computers, and personnel with other professionals (an accountant and an investment adviser), but with each professional having their own, separate business entities.
- ▶ The Committee determined that regardless of whether the other professional were deemed a designated professional by the Appellate Division, computer services and access should not be shared.
- ▶ "The inquirer asked whether the arrangement could involve sharing computer services. Without

knowing what particular computer service the inquirer is referring to, and without having particular computer expertise of its own, the Committee believes that any computer services which involve communications with or contain client information and which are shared with or accessible to non-attorneys could run afoul of the attorney's ethical obligations to preserve client confidences. The attorney must diligently preserve the client's confidences, whether reduced to digital format, paper, or otherwise. The same considerations would also apply to electronic mail and websites to the extent they would be used as vehicles for communications with the attorney's clients."

- ▶ The Opinion also cited to NYSBA Op. 709 (1998) (use of Internet e-mail; attorney should exercise care in preserving privilege).

18 ☐ **Cloud is acceptable – IF SECURE**

- ▶ Secure third-party cloud-based file storage has been acknowledged by courts as acceptable security option to protect materials identified as confidential or protected in discovery proceedings.

See LeBlanc v. Halliburton Co., 2018 WL 566436 (D. N.M. Jan. 25, 2018) (Fouratt, M.J.)

- *More recently, though – be aware of the news stories concerning ambient recording by Alexa, Google Home, etc. If you utilize these in your office, you may need to take steps (including shutting them off) before engaging in protected/confidential discussions. Attorneys have begun to raise issues if the devices record or "listen" to confidential discussions. See also K. Forrest, "AI and the Fourth Amendment: When Alexa Can be a Witness Against You", N.Y. L.J. at 4 (Apr. 17, 2019).*

19 ☐ **Tennessee Supreme Court Board of Professional Responsibility, Formal Ethics Op. 2015-F-159**

- ▶ It was not opining as to specific standards of care. Instead, the opinion is a compendium of citations and guidance from numerous other jurisdictions, including Maine, Ohio, Vermont, Pennsylvania, Kentucky, Florida, Alaska, Alabama, New Hampshire, and New York.
- ▶ The Board stated: "Although cloud computing offers increased mobility and accessibility to client information, the placement of a service provider between the lawyer and confidential client information for which the lawyer is responsible adds a layer of risk and loss of direct control by the lawyer over the stored or transmitted information.... A lawyer owes the same ethical duties, obligations and protections to clients with respect to information for which they employ cloud computing as they otherwise owe clients pursuant to the Rules of Professional Conduct with respect to information in whatever form".
- ▶ Further, "[u]se of the technology is ethically proper if the lawyer abides by the Rules of Professional Conduct: to act competently, RPC 1.1, to take reasonable measures to protect the confidentiality, security, and accessibility of client information stored and transmitted through the cloud, RPC 1.6 and 1.9(c); by competently choosing the provider of the cloud services. The lawyer is not required by the rules to use infallible methods of protection."

20 ☐ **Additionally,**

- ▶ In citing to a Florida opinion (Fla. Ethics Op. 12-3 (2012)), it was said that "lawyers should 'consider whether the lawyer should use the outside service provider or use additional security in specific matters in which the lawyer has proprietary client information or has other particularly sensitive information.'"

- ▶ The Board also discussed the provisions of four specific ethics opinions, from Alabama, Maine, North Carolina and Pennsylvania, in which the commissions or ethics authorities in those states provided particular considerations and safeguards that attorneys should heed before engaging in any use of cloud storage.
- ▶ For example, as mentioned last week, in North Carolina, an attorney should consider: "An agreement between the cloud service provider and the lawyer or law firm that the provider will handle confidential client information in keeping with the lawyer's professional responsibilities... And [e]valuation of the cloud provider's (or any third party data hosting company's) measures for safeguarding the security and confidentiality of stored data." N.C. 2011 Formal Ethics Op. 6 (2012).
- ▶ In Pennsylvania and Maine, there are internal policies and procedures that lawyers should adopt for cloud storage, including: "backing up data to allow the firm to restore data that has been lost, corrupted, or accidentally deleted; [and] educating and training employees of the firm who use cloud computing to abide by all end user security measures, including, but not limited to, the creation and regular replacement of passwords." Pa. Formal Ethics Op. 2011-200; Me. Ethics Op. 207 (2013).

21 ☐ **Overall, the Tennessee Board Determined:**

- ▶ "A lawyer may use cloud-based services with regard to confidential client information. In using cloud-based services, a lawyer must use reasonable care to assure that client confidentiality is protected and client property is safeguarded. See, RPC 1.6(a) and 1.9(c). A lawyer must comply with his or her duty of competence in the selection and continued use of the providers of cloud-based services. See, RPC 1.1. A lawyer must use 'reasonable efforts' to ensure that the conduct of providers of cloud-based services is compatible with ethical obligations of the lawyer, and, if the lawyer is a partner or otherwise has managerial authority in a law firm, the lawyer must use 'reasonable efforts' to make sure that the firm has measures in place to assure that providers of cloud-based services engage in conduct compatible with ethical obligations of the lawyer. See, RPC 5.3(a) & (b)."

22 ☐ **Separately, In Ohio...**

- ▶ The Board of Professional Conduct of the Supreme Court of Ohio issued, in 2016, an Ethics Guide on Client File Retention. Toward the end of that Guide, on pages 7-8, the Board discusses digital media and cloud storage of client files.
- ▶ Attorneys should provide information to all clients if cloud storage is utilized, as some may have valid security concerns.
- ▶ In addition, the Guide advises attorneys, as have other authorities, that cloud storage vendors are considered non-attorney assistants, and thus attorneys have obligations under RPC 5.3 and "must use reasonable efforts to ensure that a vendor's 'conduct is compatible with the professional obligations of the lawyer.'"
- ▶ "The ABA has concluded that the Model Rules of Professional Conduct allow for the outsourcing of legal and nonlegal support services, if the lawyer ensures compliance with the rules relating to competency, confidentiality, and supervision."

23 ☐Much Like the Other Authorities, Ohio Warns

- ▶ “The use of ‘cloud’ storage systems should prompt the lawyer to consider a vendor’s compliance with the same confidentiality standards set forth in Prof. Cond. R. 1.6. In selecting a vendor, the lawyer must ‘act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer’s supervision or monitoring.’ Consequently, a lawyer using the services of an outside service provider for digital ‘cloud’ storage is required to undertake reasonable efforts to prevent the unauthorized disclosure of client information. This may require a reasonable investigation by the lawyer of the methods employed by the third-party vendor.”

24 ☐**The Ohio Guide Closes the Discussion With This Valuable Guidance:**

- ▶ “At a minimum, the lawyer employing ‘cloud’ storage methods should ensure that:
 1. The vendor understands the lawyer’s obligation to keep the information confidential;
 2. The vendor is itself obligated to keep the information confidential; and
 3. Reasonable measures are employed by the vendor to preserve the confidentiality of the files.”

25 ☐**In Summary,**

- ▶ Use of “Cloud” storage is not unethical, nor is it prohibited by the Rules of Professional Conduct. However, the use of cloud storage must, at the same time, be commensurate and compliant with the provisions of the Rules of Professional Conduct and the guidance contained in your jurisdiction’s relevant ethics opinions.
- ▶ An attorney who is going to utilize the cloud should certainly, amongst other things, understand the vendor’s operations; ensure that the vendor is reputable, secure and experienced; monitor the cloud vendor’s security measures and updates; and the attorney should maintain back-ups of any material and information that is stored on the cloud.
- ▶ **ALWAYS REMEMBER – RULES 1.1, 1.6, 1.15, 5.1, 5.3.**

26 ☐

- ▶ *One Final Note – Who Here Travels Internationally?*
- ▶ *Do you bring a device with you when you travel – tablet, iPhone or Droid, laptop computer?*
- ▶ *Can you refuse to allow Customs to review or search the device or material on the device?*
 - ❖ *Riley v. California was an important decision – a 9-0 opinion of the United States Supreme Court that law enforcement personnel must have a warrant under normal circumstances to search cell phones attendant to an arrest. Not same as looking for a weapon.*
 - ❖ ***BUT.... NOTE:** At the border, no suspicion or warrant is necessary to search electronic devices. The Fourth Amendment does not apply at the Border! See United States v. Touset, 890 F.3d 1227 (11th Cir. 2018) (distinguishing Riley, and citing United States v. Ramsey, 431 U.S. 606 (1977)). [We are only addressing the U.S. Border here, since other nations have their own laws and regulations.]*
 - ❖ *And, you may not refuse the request, and tell the Customs Agent to place you under arrest – for that may be subject to discipline under ethics Rule 8.4.*
 - ❖ *So, what can you do? Look to New York City Bar Opinion 2017-5 for guidance.*

Faculty Biographies

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Dr. Michael L. Fox is an Assistant Professor of Business Law in the School of Business at Mount Saint Mary College, in Orange County, New York. He teaches courses in the undergraduate business program and in the Master's of Business Administration program. He also serves as the College's Pre-Law Advisor. In addition, he is a Lecturer-in-Law in Professional Responsibility at Columbia University School of Law in New York City. Professor Fox has recently published a book on electronic discovery, social media and ethics, entitled *Primer for an Evolving eWorld* (Kendall Hunt Publishing Co. 2019).

Professor Fox received his Bachelor of Arts (B.A.) degree, Phi Beta Kappa and summa cum laude, from Bucknell University, in Lewisburg, PA, with a major in Economics and minor in Biology. He was elected to Phi Beta Kappa in his junior year. At graduation, he received the award for the highest standing in Economics, and he was active throughout his college career, among other things serving as a member of the Middle States Period Review Report Committee for Bucknell, and as a member of the University Judicial Boards.

Dr. Fox received his Doctor of Law (J.D.) degree from Columbia University School of Law, in New York City, where he was a Harlan Fiske Stone Scholar and an Articles Editor on the *Columbia Business Law Review*.

Professor Fox served as a law clerk to the Hon. Lawrence E. Kahn, U.S. District Judge, in the Northern District of New York, in Albany. He has been rated AV-Preeminent by Martindale-Hubbell since 2015 and has been selected to the Upstate New York Super Lawyers list in 2013, 2014, 2015 and 2016. He is admitted to practice in New York State, as well as in the Southern, Eastern and Northern Districts of New York, the Second Circuit U.S. Court of Appeals, and the United States Supreme Court.

Professor Fox previously worked as an associate in the litigation department of Stroock & Stroock & Lavan LLP, in Manhattan; and was, sequentially, an associate, senior counsel, and then partner, and the litigation managing attorney at Jacobowitz & Gubits, LLP, in New York's Hudson Valley. At Jacobowitz & Gubits his primary practice areas were Federal Practice, Electronic Discovery, Employment and Discrimination Law, Business Entity Disputes, Property Disputes, Estates Litigation, as well as general civil litigation. From February 2014 to November 2016, he served as Deputy Corporation Counsel and special labor counsel for the City of Port Jervis. Immediately prior to entering full-time academia, Professor Fox was special counsel at the Hudson Valley law firm of Catania, Mahon, Milligram & Rider, PLLC, from October 2015 through November 2016.

Professor Fox has been very active with the American Bar Association, New York State Bar Association, and Orange County Bar Association. He is presently the Vice President for the Ninth Judicial District of the NYSBA, and a member of the NYSBA Executive Committee and House of Delegates. He is a former Delegate to the ABA House of Delegates (2008-2014), and previously served as Delegate to the NYSBA House of Delegates (2008-2014), and as a Member-at-Large of the Executive Committee (2015-2017). He is a member of the Commercial & Federal Litigation Section and Trial Lawyers Section of NYSBA, and past Chairperson of the Young Lawyers Section (one of the largest NYSBA Sections). Dr. Fox also serves on the NYSBA Committee on Professional Discipline and Committee on Legal Education and Admission to the Bar, among others; and is Executive Committee Liaison to the Intellectual Property Law Section, and Committee on Technology & the Legal Profession. He is the Chair of NYSBA's Standing Committee on Communications and Publications. Professor Fox formerly chaired the Executive Committee Subcommittee on Association Publications; served as YLS Program Co-Chair for the 2009 two-day Bridge-the-Gap CLE Program during NYSBA annual meeting; and was Co-Chair of the 2012 and 2014 Trial Academy programs at Cornell Law School. He was a member of the Critique Faculty for the 2013, 2014, 2015 and 2016 Trial Academy programs, and in 2017 and 2018 he served as a team leader and lecturer at Trial Academy. Professor Fox is a member of the ABA's Business Law Section, and a former member of its Litigation Section. Professor Fox currently serves on the Board of Directors of the Orange County Bar Association and is a member of the New York City Bar.

In addition to his recent book, Professor Fox has authored or co-authored a number of articles and CLE materials, and spoken at approximately 100 programs and symposia, concerning Federal civil procedure, attorney-client privilege & work product, eDiscovery, evidence, professional ethics, employment law, diversity & inclusion, and pre-law advice.

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