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A New Era—Ohio Adopts the Federal Rules Governing Discovery: What Ohio Attorneys Need to Know About Their Ethical and Professional Obligations Under the New Rules

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A NEW ERA: OHIO ADOPTS THE FEDERAL RULES GOVERNING DISCOVERY—AND IT'S A GOOD THING TOO!

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On July 1, 2020, Ohio amended its civil rules governing discovery to match the federal rules. These amendments significantly change the way discovery is to be conducted in Ohio state courts and require attorneys (on both sides) to do a lot more work very early in the case—but the work is worth it.

New requirements like Initial Disclosures, the mandatory Rule 26(F) Discovery Planning Conference, and a written Discovery Plan being filed with the court—all occurring within 60 days of the defendant responding to the complaint—force the parties to get together, put their cards on the table, and discuss—and find solutions to—the inevitable discovery issues that will arise, especially in cases involving the discovery of electronically stored information (which, nowadays, is basically every case).

Going forward, if you hear opposing counsel (who might not be familiar with the new requirements) say things like, "we can deal with these discovery issues down the road" or "you can ask those questions during depositions"—your response should be something like, "I hear you, but that is the old way of doing things," and you should point them to the new rules.

This article is intended to be a reference outline covering three of the major changes to Ohio Civ. R. 26 (titled "General Provisions Governing Discovery"):

1) The New Scope of Discovery—Relevant and Proportional;
2) Mandatory Initial Disclosures; and
3) The Rule 26(F) Early Mandatory Discovery Planning Conference & Written Discovery Plan.

This reference outline provides helpful citations to the new Ohio rules, the Staff Notes, and the corresponding federal Committee Notes which you can bring to the attention of opposing counsel (and if necessary, the court) if opposing counsel continues to try to do things the "old way."

RULE 26(B)(1): THE NEW SCOPE OF DISCOVERY—RELEVANT & PROPORTIONAL

A. PROPORTIONALITY IS EXPRESSLY ADDED TO THE TEXT OF CIV. R. 26(B)(1)

1. **Same as Federal Rule 26(b)(1)**. The scope of discovery under Ohio Civ. R. 26(B)(1) is now identical to Fed. R. Civ. Pro. 26(b)(1) (as amended in 2015), and most of the Staff Notes are pulled directly from the 2015 Committee Notes to the federal rule. A blacklined version of the new rule is included in the end notes.[1]
2. **Relevant and Proportional**. "Parties may obtain discovery regarding any nonprivileged matter that is ***relevant*** to any party's claim or defense and ***proportional to the needs of the case***[.]" Civ. R. 26(B)(1).
3. **Proportionality Factors**. Parties and courts are directed to consider proportionality in light of six factors:
   a) "the importance of the issues at stake in the action"
   b) "amount in controversy"
   c) "parties' relative access to relevant information"
   d) "parties' resources"
   e) "importance of the discovery in resolving the issues"
   f) "whether the burden or expense of the proposed discovery outweighs its likely benefit"
4. **No More "Reasonably Calculated**." The phrase "~~reasonably calculated to lead to the discovery of admissible evidence~~" has been deleted from the Rule.

   As the federal Committee Notes explain: "The 'reasonably calculated' phrase has continued to

create problems . . . and is removed by these amendments." Fed. R. Civ. Pro. 26, Committee Notes 2015, para. 19.

The new rule simply states: "Information within the scope of discovery need not be admissible in evidence to be discoverable." Ohio Civ. R. 26(B)(1).

5. **Proportionality is Not New.** Most of the proportionality factors were already contained in Civ. R. 26(B)(4) and the corresponding federal rules.

   As the federal Committee Notes point out: "The present amendment restores the proportionality factors to their original place in defining the scope of discovery." Fed. R. Civ. Pro. 26, Committee Notes 2015, para. 18.

B. PROPORTIONALITY IS A BALANCING TEST

1. **Parties Must Identify and Discuss the Burdens and Benefits.** Every proportionality analysis starts with the parties figuring out what the actual burden is of preserving and producing discoverable information.

   "The parties may begin discovery without a full appreciation of the factors that bear on proportionality. ***A party requesting discovery, for example, may have little information about the burden or expense of responding.*** A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. ***Many of these uncertainties should be addressed and reduced in the parties' Civ. R. 26(F) conference*** and in scheduling and pretrial conferences with the court." Civ. R. 26(B)(1), Staff Notes 2020, para. 3.

   "***A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination***. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery." Civ. R. 26(B)(1), Staff Notes 2020, para. 3.

2. **Information Asymmetry**. "With regard to the parties' relative access to relevant information, some cases involve what often is called 'information asymmetry.' One party—often an individual plaintiff—may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that ***the burden of responding to discovery lies heavier on the party who has more information, and properly so.***" Civ. R. 26(B)(1), Staff Notes 2020, para. 4.

3. **Monetary Stakes Are Only One Factor.** The 2015 Committee Notes to Fed. R. Civ. Pro. 26 state: "[M]onetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized 'the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus, the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.' Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values." Fed. R. Civ. Pro. 26, Committee Notes 2015, para. 14.

C. WHETHER ESI IS NOT REASONABLY ACCESSIBLE BECAUSE OF UNDUE BURDEN OR COST—SAME RULE SINCE 2008

1. **ESI Identified as Not Reasonably Accessible**. "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Civ. R. 26(B)(5).

2. **Same as Federal Rule**. The language in Civ. R. 26(B)(5) is identical to the corresponding Fed. R. Civ. Pro. 26(b)(2)(B).

3. **Same Since 2008**. The "reasonably accessible" language in Civ. R. 26(B)(5) has not changed since 2008.

4. **Party Claiming Undue Burden Has Burden of Proof**. "On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost." Civ. R. 26(B)(5).

5. **Can Still Obtain the Discovery For Good Cause Shown**. "If that showing [not reasonably accessible because of undue burden or cost] is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause." Civ. R. 26(B)(5).

6. **Procedure for Resolving Claims of Undue Burden—Key is Meaningful Discussions Between the Parties**. The Committee Notes to Fed. R. Civ. Pro. 26(b)(2)(B)—which is identical to Ohio Civ. R. 26(B)(5)—describe what is expected of a party who claims that a source of ESI is not reasonably accessible:

   Must Identify Sources Not Searched. "The responding party must also ***identify, by category or type, the sources containing potentially responsive information*** that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to ***enable the requesting party to evaluate the burdens and costs*** of providing the discovery and the likelihood of finding responsive information on the identified sources." Fed. R. Civ. Pro. 26(b)(2), Committee Notes 2006, para. 6.

   Preservation of Sources Not Searched. "A party's identification of sources of electronically stored information as not reasonably accessible ***does not relieve the party of its common-law or statutory duties to preserve evidence***. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. ***It is often useful for the parties to discuss this issue early in discovery.*** " Fed. R. Civ. Pro. 26(b)(2), Committee Notes 2006, para. 7.

   Parties Must Discuss the Burdens and Benefits. "If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the ***parties should discuss the burdens and costs of accessing and retrieving the information***, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate." Fed. R. Civ. Pro. 26(b)(2), Committee Notes 2006, para. 8.

   Discovery May Be Needed to Test Assertion of Undue Burden. "If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The ***requesting party may need discovery to test this assertion*.** Such discovery might take the form of requiring the responding party to conduct a ***sampling of information*** contained on the sources identified as not reasonably accessible; allowing some form of ***inspection of such sources***; or taking ***depositions of witnesses knowledgeable about the responding party's information systems***." Fed. R. Civ. Pro. 26(b)(2), Committee Notes 2006, para. 9.

7. **Discovery About a Party's ESI Systems is So "Deeply Entrenched in Practice"—It Goes Without Saying.**

   The old Civ. R. 26(B)(1) contained language that expressly allowed discovery of the "existence, description, nature, custody, condition and location of . . . electronically stored information . . . and the identity and location of persons having knowledge of any discoverable matter." Such language was deleted from the new rule.

The 2015 federal Committee Notes explain why such language was no longer necessary: "Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. ***Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources***." Fed. R. Civ. Pro. 26, Committee Notes 2015, para. 17.

D. IMPORTANT OHIO STAFF NOTES

1. **Greater Judicial Involvement**. "Civ. R. 26(B)(1) now includes language bearing on proportionality, which contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." Civ. R. 26(B)(1), Staff Notes 2020, para. 1.

2. **ESI Disputes Cause Delays**. "The scope of available information, including the ***increase and pervasiveness of electronically stored information***, has greatly increased both the potential cost of wide-ranging discovery and the ***potential for discovery to be used as an instrument for delay or oppression.*** The present amendment reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management." *Id.*

3. **Early, Effective and Cooperative Case Management Reduces Delays and the Need for Judicial Involvement**. "It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own." *Id*.

4. **Boilerplate Objections Prohibited—Counsel Must Know What Burden Is Before Claiming Undue Burden.** "This change does not place on the party seeking discovery the burden of addressing all proportionality considerations. ***Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.*** The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." Civ. R. 26(B)(1), Staff Notes 2020, para. 2.

E. ADVANCES IN TECHNOLOGY CONTINUE TO EXPAND WHAT IS REASONABLY ACCESSIBLE

1. **More ESI Than Ever Before**. The Rules recognize there has been an explosion of ESI. That also means there has been an explosion of potentially relevant and discoverable electronic evidence.

2. **ESI is Easier to Get Than Ever Before**. Advances in technology have dramatically reduced the burdens and costs of preserving and producing ESI. What was not reasonably accessible because of undue burden or cost in 2006 or 2010 or even 2015, may very well be reasonably accessible today.

   Back in 2006, the federal Committee Notes made the following factual observations about advances in technology:

   "***Electronic storage systems often make it easier to locate and retrieve information.*** These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case." Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 4.

   "***Information systems are designed to provide ready access*** to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used." *Id*. at para. 5.

3. **ESI is Easier to Search Than Ever Before.** Human review time is by far the largest expense of responding to discovery. Technologies like document review platforms, search tools, and artificial intelligence have significantly reduced the amount of human review time required in finding relevant documents. In 2015, the federal Committee Notes made the following observations about computer-assisted review:

"The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. ***Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information.*** Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available." Fed. R. Civ. Pro. 26, Committee Notes 2015, para. 16.

F. KEY TAKEAWAYS AND PRACTICE TIPS

1. **Proportionality Means—as a Starting Point—We Get Everything That's Relevant and Easy to Get.** The Staff Notes recognize a party "may have vast amounts of information, including information that can be ***readily retrieved*** and information that is more ***difficult to retrieve***." Civ. R. 26(B)(1), Staff Notes 2020, para. 4.

   Practically speaking, the proportionality balancing test means we will get the stuff that's readily retrievable, we won't get the stuff that's difficult to retrieve, and everything in the middle will be determined on a case by case basis and will ultimately be up to the individual judge.

2. **Our Job is to Figure Out the Easiest and Cheapest Way for a Producing Party to Give Us What We Want**. We must show the court how easy and cheap it is for a producing party to preserve and produce the ESI we are seeking.

   The nuts and bolts of preserving and producing ESI will vary from case to case, but generally speaking the overall process for a producing party will come down to the same 3 steps in every case. A producing party will need to:

   (1) ***Identify*** the Sources of Potentially Relevant ESI—that is, make a list.

   (2) ***Preserve*** the Sources of ESI—that is, make a back-up copy of the ESI. This is usually done most efficiently through bulk collection (e.g., downloading all emails—or all emails within a certain date range—and saving them to a computer or flash drive so they can be sorted out later). Additionally, forensic imaging of a phone, computer, laptop, tablet, etc.—which will make a back-up copy of everything on the device—can be done for under $500.

   (3) ***Search*** the ESI—that is, once a back-up copy has been made, the relevant documents will need to be separated from the non-relevant documents. Here, document review platforms, search terms, and technology assisted review are a huge help and have become extremely cheap to use.

3. **Talk to or Depose Opposing Party's IT Person.** By far, the best way to learn about an opposing party's information systems and figure out an easy and cheap way for the party to give you want you want is by talking to the party's IT person.

   An IT person will not only be able to help identify all the opposing party's sources of ESI, but they will be able to walk you through the steps of making a back-up copy of the ESI (e.g., they can tell you exactly how to download every single email on a company's server and that they can do it in under 30 minutes).

   Indeed, the federal Committee Notes explicitly recognize that "***identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful***." Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 34. And the new Ohio Civ. R. 26(F)(2) expressly allows a court to order a party representative (e.g.,

an IT person) to attend the Rule 26(F) Discovery Planning Conference.

A meet and confer with the opposing party's IT person (if opposing counsel will allow it) can be very helpful and very efficient, but obviously with a deposition you get the added benefit of having a transcript you can cite to in a brief.

4. **Talk to/Hire an Expert.** It often helps to consult with your own IT expert and/or have an IT expert involved in the meet and confer process (e.g., Michael Zinn with Micro Systems Management here in Cleveland, www.msmctech.com). These kinds of experts will be able to explain how easy it is to preserve and produce ESI across all kinds of information systems.

5. **Do Not Fall for the Trap—You Have the Burden**. Technically, the producing party has the burden to show responding to discovery would be an undue burden, but do not fall into that trap. It is incredibly easy to make the collection, searching, and production of ESI seem incredibly complicated and expensive. But it's not. We must take the initiative, as contemplated by the Rules, to learn about a party's information systems and come to a common understanding with opposing counsel about what the actual burden is—and be prepared to provide the court with *evidence* of what the actual burden is (e.g., deposition testimony of IT person).

6. **Use Available Discovery Tools to Identify the ESI and Understand the Burden.** You should make a list of the sources of ESI you think need to be searched and then figure out the most efficient way to preserve and search the ESI. You should start the list and add to it as you learn more about the producing party's information systems. As discussed above, the rules recognize the producing party may need to provide detailed information about its information systems. *See* Fed. R. Civ. Pro. 26, Committee Notes 2015, para. 17 ("***Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources***.").

The meet and confer process can go a long way here, but often an IT person will need to be involved in the meet and confer process or be deposed. Here is a quick outline of the discovery tools available to learn about an opposing party's information systems.

a) Rule 26(F) Discovery Planning Conference (discussed in more depth below). Send a list of questions/discussion topics in advance of the meet and confer.

b) Additional Meet and Confers with Counsel. Conduct additional meet and confers with opposing counsel after they have obtained additional information from their client.

c) Meet and Confer with IT Person. Ask for an informal off-the-record meet and confer with a producing party's IT person. Those conversations can go a long way.

d) Deposition of IT Person. If you or opposing counsel want the conversation with the IT person on the record, notice the deposition of the IT person.

e) 30(B)(5) Deposition. If opposing counsel wants to receive a list of topics in advance of the deposition, put together a 30(B)(5) Notice.

f) Inspection. Conduct a Rule 34 Inspection of the premises to identify sources of ESI.

g) Interrogatories. Serve interrogatories early to identify the names of the opposing party's IT-type persons.

h) Requests for production. Receiving even a small number of documents while the meet and confer process is ongoing can often be a great help in understanding the opposing party's information systems.

RULE 26(B)(3): EARLY MANDATORY INITIAL DISCLOSURES

A. INITIAL DISCLOSURES—CONTENT

Without waiting for a discovery request, a party must disclose to the opposing party the following information:

1. **Names of Witnesses**. A party must disclose the names of all persons who have information that ***supports the party's case***, including each person's address and phone number, if known, and the subjects of information possessed by each person.
2. **Documents/ESI/Tangible Things**. A party must produce a copy—or a "description by category and location"—of all documents, ESI, and tangible things that ***support the party's case***, unless it would be used solely for impeachment.
3. **Damage**s. A party must produce a "computation" of each category of damages being claimed.
4. **Insurance Coverage**. Not applicable to most plaintiffs.

B. INITIAL DISCLOSURES—TIMING

1. **Parties Can Stipulate**. Pursuant to Civ. R. 26(B)(3)(c), Initial Disclosures must be produced before the initial case management conference, unless otherwise ordered by the court or agreed upon by the parties.
2. **Practice Tip**. You want to exchange Initial Disclosures before the Rule 26(F) conference so the meet and confer can be as productive as possible. Thus, as soon as you receive an answer or motion to dismiss from a defendant, send an email to opposing counsel to set an agreed upon date to exchange Initial Disclosures.

Rule 26(F): Early Mandatory Discovery Planning Conference & Written Discovery Plan

A. RULE 26(F)—SUCCESSFUL HISTORY

In the year 2000, the federal Committee Notes stated: "***The Committee has been informed that the addition of the [Rule 26(f)] conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide***." Fed. R. Civ. Pro. 26, Committee Notes 2000, para. 31.

In 2020, Ohio adopted the federal requirement of the 26(f) conference and written discovery plan: "***This amendment introduces to Ohio's civil rules the concept of an early, mandatory conference among the attorneys and any unrepresented party, and requires the filing of a written report outlining the results of that conference***." Civ. R. 26(F), Staff Notes 2020, para. 10.

B. RULE 26(F)(1)—TIMING

1. **Courts Must Issue Scheduling Order in First 60 Days.** "The court shall issue the scheduling order as soon as practicable, but unless the court finds good cause for delay, the court shall issue it within . . . 60 days after any defendant has responded to the complaint." Civ. R. 16(B)(2).
2. **Scheduling Conference With Court in First 60 Days**. Because courts are now required to issue a scheduling order within 60 days of any defendant responding to the complaint, the scheduling conference must also occur within the same 60 days (unless the court is going to issue a scheduling order without having a scheduling conference).
3. **Rule 26(F) Discovery Planning Conference in First 30 Days.** "[P]arties shall confer as soon as practicable – and in any event no later than 21 days before a scheduling conference is to be held." Civ. R. 26(F)(1).

   Thus, the parties should plan to have the Rule 26(F) Discovery Planning Conference within about 30 days of the defendant responding to the complaint (or on day 39 at the latest as that would be 21 days before day 60).
4. **Written Discovery Plan Filed Within 14 Days of 26(F) Discovery Planning Conference**. A Joint Report outlining the parties' discovery plan must be filed with the court within 14 Days of the Rule 26(F) Discovery Planning Conference. Civ. R. 26(F)(2).

C. RULE 26(F)(2)—DISCOVERY PLANNING CONFERENCE

1. **Use the Rules as an Agenda.** Rule 26(F) and Cuyahoga County's Local Rule 21.3 provide a list of discovery issues that must be discussed at the Discovery Planning Conference and addressed in

the written Discovery Plan. You can use the Rules as an agenda for the Discovery Planning Conference.

2. **Parties' Responsibilities**. "In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Civ. R. 26(A)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan." Civ. R. 26(F)(2).

3. **Discuss Party's Information Systems.** "It may be important for the parties to discuss those [information] systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the ***parties can develop a discovery plan that takes into account the capabilities of their computer systems***." Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 34.

4. **Discovery From Persons With Special Knowledge of Party's Computer Systems.** "In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful." Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 34.

5. **Identify Sources of ESI and Burden of Retrieving and Reviewing ESI.** Parties "may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information." Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 35.

6. **Forms of Production**. "The parties may be able to reach agreement on the forms of production, making discovery more efficient. . . . ***Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms***." Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 35.

7. **Preservation**. Parties "should discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. ***Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes***." Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 36.

8. **Cuyahoga County's Local Rule 21.3.** Local Rule 21.3's "Schedule A" template report provides an excellent ***guide/agenda/checklist*** for identifying, discussing, and resolving ESI issues. In any Cuyahoga County case that involves ESI issues, the Schedule A template report—which is required to be submitted to the court by Local Rule 21.3(C)(2)—should just be merged with the Rule 26(F) Joint Report.

   Some helpful topics identified in Local Rule 21.3 include:

   a. "The general nature of any ESI reasonably believed to be potentially relevant, the location where it is stored, the devices on which it is stored, and whether any party believes it should be preserved or should be subject to a litigation hold."

   b. "The scope and nature of the efforts each party will take to identify and preserve potentially relevant ESI, including but not limited to whether the ESI will be preserved by forensic cloning or some other method."

   c. "The scope of email discovery and any protocol for searching emails for production."

   d. "The scope of production of metadata and embedded data."

   e. "The scope of any search of, and production of ESI contained on, back-up or archival systems."

f. "Whether any ESI in a party's possession is not reasonably accessible or subject to production without undue burden."

g. "Who will bear the costs of preservation, collection, and production of ESI."

h. "The reasonably usable form and format in which ESI shall be produced."

9. **Counsel Must Be Prepared for the Meet and Confer.** "Counsel and unrepresented parties ***shall be prepared*** for the meet and confer. Counsel shall, in advance of the meet and confer, be ***reasonably informed*** regarding the issues likely to be in dispute in the case, their ***clients' information management systems, and their client's practices with respect to retention, destruction, purging, arching and backing-up ESI reasonably expected to be potentially relevant***." Cuyahoga County Local Rule 21.3(C)(3).

D. RULE 26(F)(3)—WRITTEN DISCOVERY PLAN

1. **Discovery Plan**. "A discovery plan **shall state** the parties' **views and proposals** on" items (a)-(h) below.

"The litigants are expected to attempt in good faith to ***agree on the contents of the proposed discovery plan***. If they cannot agree on all aspects of the plan, their ***report to the court should indicate the competing proposals*** of the parties on those items, as well as the ***matters on which they agree***." Fed. R. Civ. Pro. 26, Committee Notes 1993, para. 51.

Practice Tip. Send a draft Discovery Plan to opposing counsel with your views and proposals written out on each discovery issue as necessary and ask opposing counsel to write down their competing proposals if they disagree with your proposals. You can label paragraphs in the Discovery Plan "Plaintiff's Views and Proposals" and "Defendant's Views and Proposals." Opposing counsel will often be more agreeable once they have to put a competing proposal in writing.

Rule 26(F)(3) ***requires*** the parties to put their views and proposals in writing on the following issues:

a. Initial Disclosures. Civ. R. 26(F)(3)(a) ("what changes should be made in the timing, form, or requirement for disclosures under Civ. R. 26(B), including a statement of when initial disclosures were made or will be made").

In most cases, Initial Disclosures should be exchanged before the Rule 26(F) conference so the conference can be as productive as possible. In complex cases, it may be more useful to have the conference before exchanging Initial Disclosures.

b. Proposed Case Management Schedule. Civ. R. 26(F)(3)(b) ("agreed-upon deadlines for discovery and other items that may be included in a case schedule to be issued under Rule 16").

The goal here is for the attorneys to agree upon and submit a proposed scheduling order to the court before the court has to issue a scheduling order. *See* Rule 16(A) (attorneys "shall endeavor in good faith to agree on all the schedules contemplated by this rule and courts shall consider such agreements in the establishment of any such schedule").

c. Subjects of Discovery. Civ. R. 26(F)(3)(c) ("the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues").

A requesting party should be prepared to explain why they believe discovery on certain subjects is important to the case. Civ. R. 26(B)(1), Staff Notes 2020, para. 3 ("A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them.").

d. ESI Issues. Civ. R. 26(F)(3)(d) ("any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced").

Again, Cuyahoga County's Local Rule 21.3 and its corresponding "Schedule A" template report provide an excellent ***guide/agenda/checklist*** for

identifying, discussing, and resolving ESI issues.

e. **Public Records**. Civ. R. 26(F)(3)(e) ("disclosure and the exchange of documents obtained through public records requests").

f. Privilege Issues. Civ. R. 26(F)(3)(f) ("any issues about claims of privilege or of protection as trial-preparation materials").

The parties should discuss predictable issues related to privilege and the form of a privilege log. A privilege log is required by Civ. R. 26(B)(8)(a): "When information subject to discovery is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is ***sufficient to enable the demanding party to contest the claim."***

g. Changes to Limitations. Civ. R. 26(F)(3)(g) ("what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed").

h. Other Orders. Civ. R. 26(F)(3)(h) ("any other orders that the court should issue under Civ. R. 26(C) or under Civ. R. 16(B) and (C); and any modifications required or to be requested under any scheduling order issued under Civ. R. 16").

Civ. R. 26(C) relates to "Protective Orders." The parties should anticipate and discuss whether a protective order will be needed to keep certain documents confidential.

Here, disputes are usually about the scope of documents that get designated as confidential. Thus, an important part of this discussion will be about developing a protocol for challenging the confidentiality designation of documents the receiving party believes should not be subject to the protective order. Below is an example protocol for challenging confidentiality designations:

"If the confidentiality designation for certain documents is challenged and agreement cannot be reached through the meet and confer process, the objecting party can send the designating party a formal written objection pursuant to this paragraph which identifies the documents for which the confidentiality designation is being challenged. Upon receipt of a formal written objection pursuant to this paragraph, the designating party will have 14 days to file a motion to maintain the confidentiality designation of the documents identified in the formal written objection. If the designating party fails to file such a motion within 14 days of receiving the formal written objection, the confidentiality designation of the documents identified in the formal written objection is waived and such documents will no longer be subject to the confidentiality designation. If the designating party files a motion to maintain the confidentiality designation of the documents identified in the formal written objection within 14 days of receiving the formal written objection, the documents identified in the formal written objection will maintain their confidentiality designation until the Court rules on the matter."

E. PRACTICE TIPS

1. **Send Email to Opposing Counsel to Set Dates**. As soon as the defendant responds to the complaint (with an answer or motion to dismiss) you should send an email to opposing counsel to schedule the 26(F) Discovery Planning Conference, the date the Joint Discovery Plan will be filed, and the date Initial Disclosures will be exchanged.

2. **Send Opposing Counsel a Draft Discovery Plan Before the Conference.** To have a productive Discovery Planning Conference, you need to have an agenda and a draft report to guide the discussion. Send the draft report to opposing counsel well in advance of the meet and confer so they have time to prepare and obtain information from their client. Write out the expected ESI issues in the draft Joint Report as you would in a 30(B)(5) notice. You

should also include the reasons you believe the ESI is relevant to the case.

3. **After the Conference**. After the conference you will have 14 days to finalize the Discovery Plan and file it with the court. Immediately send opposing counsel an email (or an updated draft report) summarizing the discussion and identifying the issues for which they said they would get back to you with more information. As mentioned above, put your views and proposals in writing in the draft report and ask opposing counsel to either agree or put their alternative proposals in writing.

CONCLUSION

The 2020 changes to the Ohio Rules governing discovery are significant and will require a lot more upfront work by the attorneys. But by complying with the new requirements and taking our meet and confer obligations seriously, we will resolve issues early, prevent future delays due to discovery disputes (especially ESI disputes), and minimize the need for judicial involvement. Ohio has finally adopted the federal rules governing discovery—and it's a good thing too!

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[1] Civ. R. 26(B)(1) now reads: "In General. ~~Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.~~ Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' access to resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

OHIO ASSOCIATION for JUSTICE

TRIAL LAWYERS HELPING PEOPLE

OAJ 2021 Annual Convention

Professional Conduct Session

Tuesday, June 15, 2021

Ethics in the Digital Age: How to Combat Negative Online Reviews, Engage with Social Media, and Market your Firm Online

Jami Oliver, Esq.

Ethics in the Digital Age: How to Combat Negative Online Reviews, Engage with Social Media, and Market your Firm Online

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Ohio Association for Justice
Annual Convention
Columbus, Ohio

Tuesday, June 15, 2021
2:15 p.m. to 3:00 p.m.

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Ethics in the Digital Age: How to Combat Negative Online Reviews, Engage with Social Media, and Market your Firm Online

by Jami S. Oliver, Esq.

I. ATTORNEY COMMUNICATIONS IN GENERAL

As a general rule, a lawyer may communicate information regarding the lawyer's services through *any media* as long as it is not "false or misleading." This Rule applies to all communications, including marketing materials.

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading. Prof. Cond. R. 7.1[1]

If an attorney does communicate information, that communication which was made pursuant to the authority granted by Prof.Cond.R. 7.2 *must include* the name and business address of least one lawyer or law firm responsible for its content. This may seem obvious, and it should be. However, sometimes lawyers using outside vendors forget that the Rule still applies.

In a case titled *In re Anonymous,* the Supreme Court of Indiana held that an attorney's relationship with improper advertising maintained by nationwide lawyers' organization warranted a private reprimand.

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[1] The Supreme Court of Ohio adopted the Ohio Rules of Professional Conduct effective February 1, 2007, amended on April 1, 2015. It is important to note that these Rules *replace* the Ohio Code of Professional Responsibility as of February 1, 2007. There is an Appendix A, Correlation Table which contains a numerical listing of the former Ohio Code of Professional Responsibility with cross-references to provisions of the Ohio Rules of Professional Conduct for those who wish to cross-check the older DRs with the new Code sections that address substantially similar subject-matter. The Ohio Code of Professional Responsibility shall continue to apply to govern conduct occurring prior to February 1, 2007 and shall apply to all disciplinary investigations and prosecutions relating to conduct that occurred prior to February 1, 2007.

In that case, The American Association of Motorcycle Injury Lawyers, Inc. (AAMIL), a for-profit Arizona corporation that offers franchise opportunities including the use of the term, “Law Tigers.” AAMIL contracted with law firms and lawyers throughout the United States. The company allowed those lawyers and firms to obtain licenses for the exclusive use of the Law Tigers name and other trademarks owned by AAMIL.

Respondent and his firm entered into a license agreement with AAMIL to be an exclusive licensee in Indiana for a term of 3 years. Respondent distributed AAMIL-produced informational materials within their assigned territory, including “promotional backers.” The promotional backers contained a toll-free telephone number for the Law Tigers service, the Law Tigers website address, and the names of Respondent and his firm. However, the promotional backers did not contain Respondent's address. The Supreme court of Indiana found that there was attorney misconduct for misleading or false communication and a failure to include an office address in public communication. The lawyer received a private reprimand. *In re Anonymous,* 6 N.E.3d 903, 904 (Ind. 2014). *In re Anonymous*, 6 N.E.3d 903, 904 (Ind. 2014)

In a case in Wyoming, Respondent’s advertising agency purchased several ads in the Sweetwater County Telephone directory, which Respondent approved prior to publication. Three of the ads did not contain the Respondent’s office address or certain required disclaimers. The Supreme Court of Wyoming found a violation of Wyoming Rules of Professional misconduct because all three ads posted by Respondent were missing the Respondent’s office address. Respondent agreed to a public censure, stipulated the issuance of a press release, and paid $550 in court-related costs. *Bd. of*

Pro. Resp., Wyoming State Bar v. Metler, 2012 WY 26, ¶ 8, 273 P.3d 507, 509 (Wyo. 2012).

On the other hand*, In the Matter of Scimeca*, an attorney placed an advertisement without the required attorney's name and the panel regarded it as a mere technical violation. Notably, he also committed ten other violations and was suspended indefinitely from the practice of law. Matter of Scimeca, 265 Kan. 742, 743, 962 P.2d 1080, 1081, 1084 (1998), reinstatement granted sub nom. In re Scimeca, 277 Kan. 307, 84 P.3d 1046 (2004).

Directory listings and group advertisements that list lawyers by practice area do not constitute impermissible "recommendations" and are permitted in Ohio. Prof.Cond.R. 7.2, cmt. 2.

While lawyers are permitted to communicate their services to the public, lawyers are prohibited by the Rules from engaging in "direct solicitations" by Prof.Cond.R. 7.3 which states as follows:

> A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:
>
> (1) lawyer;
>
> (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
>
> (3) person who routinely uses for business purposes the type of legal services offered by the lawyer. Prof.Cond.R. 7.3.

To determine whether a communication is considered a "direct solicitation," the Rules state that it is not a solicitation if it is directed to the general public, such as through a billboard, an **Internet banner advertisement**, a website or a television commercial, or if it is in response to a request for information ***or is automatically***

generated in response to electronic searches. Prof.Cond.R. 7.3, Cmt. 1. Emphasis added.

The Comment to Rule 7.3 has also provided lawyers access to chat rooms, text messages, "or other written communications" where the dangers of "in person" pressure is easily ignored or "disregarded," although the Rule continues to prohibit direct solicitation by telephone. These Rules of Professional Conduct and the Comments to them have expanded the realm of advertising and marketing possibilities from the old days of newspapers, billboards, and television commercials to online blogs, websites, and social media posts offering legal services to the general public.

There is a difference between advertising to the general public and direct solicitations. Direct solicitation, according to Prof.Cond.R. 7.3(c), is:

> Every written, recorded, or electronic communication from a lawyer soliciting professional employment from **anyone whom the lawyer reasonably** believes to be in need of legal services need to comply with ALL of the following:
>
> 1. Disclose accurately and fully the manner in which the lawyer or law firm became aware of the identity and specific legal need of the addressee;
> 2. Disclaim or refrain from expressing any predetermined evaluation of the merits of the addressee's case;
> 3. Conspicuously include in its text and on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication the recital – "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY"

A solicitation is a communication initiated by the lawyer that is directed to a **specific person** and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not

constitute a solicitation if it is (a) directed to the general public, such as through a billboard, an Internet-based advertisement, a web site, or a commercial, (b) in response to a request for information, or (c) automatically generated in response to Internet searches. Prof.Cond.R. 7.3.

Furthermore, if a communication is sent within 30 days of an "accident or disaster that gives rise to a potential claim for personal injury or wrongful death," a special document must be included in the written material, "Understanding Your Rights", which is located at page 172 of the Ohio Rules of Professional Conduct.

II. SOCIAL MEDIA ENGAGEMENT

In Ohio, a lawyer may advertise services through written, recorded, or electronic communication, *including public media*. Prof.Cond.R. 7.2(a). This Rule allows:

> [P]ublic dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and *other information that might invite the attention of those seeking legal assistance*." Prof.Cond.R. 7.2, Cmt. 2. Emphasis added.

The prohibition of the use of the Internet for advertising attorney services would impede the flow of information to many sectors of the public. Prof.Cond.R. 7.2, Cmt. 3. There are, however, unique challenges with internet and social media advertising and marketing. For example, a lawyer must remember that confidentiality still exists when engaging in social media posts.

The ABA released Formal Opinion 480 in March 2018 regarding Confidentiality Obligations for Lawyer Blogging and Other Public Commentary. This opinion concluded that "Lawyers who blog or engage in other public commentary may not reveal

information relating to a representation, including *information contained in a public record*, unless authorized by a provision of the Model Rules." ABA Formal Op. 480 (2018).[2] Emphasis added.

It also concluded that attorneys who communicate about legal topics in the public commentary must comply with the Model Rules of Professional Conduct, including any rules related to maintaining confidential information. The ABA included Twitter and the like in its use of the term "Blogs." ABA Formal Op. 480 (2018).

Accordingly, just because it is in the public record, including the results of a trial or verdict, does not make it fodder for public comment in a blog or YouTube Video without the informed consent of the client. This Rule is contrary to what most lawyers understand to be their ethical obligations for client confidentiality so understanding this in social media is important.

According to the ABA Formal Opinion, ABA Model Rule 1.6 does *not* provide an exception for information that is "generally known" or contained in a "public record." Accordingly, if a lawyer wants to publicly reveal client information, the lawyer must comply with Model Rule 1.6(a). ABA Formal Op. 480 (2018), p. 4.[3] However, the footnotes to Formal Opinion 480 seem to imply that the prohibition might only apply if

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[2] According to the American Bar Associations website, Ohio adopted the ABA Model Rules of Professional Conduct on August 1, 2006. Please note some of Ohio's Rules do differ from the ABA model rules in terms of whether some rules are a "shall/ must" or "may" as it pertains to attorney conduct. Alphabetical List of Jurisdictions Adopting Model Rules (March 28, 2018).

[3] According to Footnote 14 in ABA Formal Op. 480 (2018), "Model Rule 1.9 addresses the duties lawyers owe to former clients. Rule 1.9(c)(1) permits a lawyer, who has formerly represented a client, to use information related to the representation that has become generally known to the disadvantage of a former client, and Rule 1.9(c)(2) prohibits a lawyer from revealing information relating to the representation except as the Rules permit or require with respect to a current client. This opinion does not address these issues under Model Rule 1.9. The generally known exception in Rule 1.9(c)(1) is addressed in ABA Formal Opinion 479." ABA Formal Op. 480 (2018), Footnote 14.

the information is used as a *disadvantage* to the former client.[4] Accordingly, it may be okay to share a nice verdict that is in the public records but it may not be acceptable to share an adverse verdict. When in doubt, get signed, informed consent.

Questions sometimes arise as to whether posts with non-lawyers create an attorney-client relationship of some type with the reader or with members of the public. The ABA cautions lawyers to be careful using social media to comment or respond to postings or feeds. These comments and responses could later indicate that an attorney-client relationship had been established. Such comments could also contradict the position the lawyer or his law firm have taken on behalf of another client in a pending case. It is imperative that lawyers include some limiting language on their public media posts and comments to avoid any misunderstandings about the creation of an attorney client relationship. ABA Formal Op. 480 (2018), Footnote 4, states as follows:

> Lawyers should take care to avoid inadvertently forming attorney-client relationships with readers of their public commentary. Although traditional print format commentary would not give rise to such concerns, lawyers interacting with readers through social media should be aware at least of its possibility. A lawyer commenting publicly about a legal matter standing alone would not create a client-lawyer relationship with readers of the commentary. See Model Rule 1.18 for duties to prospective clients. However, the ability of readers/viewers to make comments or to ask

[4] In addition to the requirements of Rules 1.6(a), a lawyer may consider other practical client relations and ethics issues before discussing client information in public commentary to avoid disseminating information that the client may not want disseminated. For instance, Model Rule 1.8(b) reads: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." Rule 1.8(b) could be read to suggest that a lawyer may use client information if it does not disadvantage a client. The lawyer, nevertheless, has a common-law fiduciary duty not to profit from using client information even if the use complies with the lawyer's ethical obligations. See RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS § 60(2) (1998) ("a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made"). Accord D.C. Bar Op. 370 (2016) ("It is advisable that the attorney share a draft of the proposed post or blog entry with the client, so there can be no miscommunication regarding the nature of the content that the attorney wishes to make public. It is also advisable, should the client agree that the content may be made public, that the attorney obtain that client's consent in a written form.") ABA Formal Op. 480 (2018), Footnote 16.

> questions suggests that, where practicable, a lawyer include appropriate disclaimers on websites, blogs, and the like, such as **"reading/viewing this information does not create an attorney-client relationship."** Lawyer blogging may also create a positional conflict. See D.C. Bar Op. 370 (2016) (discussing lawyers' use of social media advising that "[c]aution should be exercised when stating positions on issues, as those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict.") See also Ellen J. Bennett, Elizabeth J. Cohen & Helen W. Gunnarsson, Annotated Model Rules of Professional Conduct 148 (8th ed. 2015) (addressing positional conflicts). See also Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 50-51 (11th ed. 2018) ("[S]ocial media presence can pose a risk for attorneys, who must be careful not to contradict their firm's official position on an issue in a pending case"). This opinion does not address positional conflicts. ABA Formal Op. 480 (2018), Footnote 4. Emphasis added.

In a Formal Opinion issued by the Bar Association of the State of California, the Committee considered under what professional responsibility rules and standards an attorney's social media postings would fall. The State Bar of California Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2012-186 (2012)

California found that, if an attorney has a personal profile page on a social media website, not limited to Facebook, and makes posts to her personal page, even if that page is limited to "Followers" or "Friends", those posts may be limited by advertising rules *if the post is deemed a "communication*."[5] It is helpful to note five examples of communications the Bar Association found the attorney had engaged in:

[5] The opinion states on page 2 that the committee did not consider whether social media postings are advertisements to the general public or more direct solicitations. Specifically, "What may be less clear is whether a posting on Facebook or Twitter, like that described in the hypothetical, is considered "directed generally to members of the public and not to a specific person," as required under section 6157(c)'s definition of an advertisement. This opinion does not take a position on this point because, whether or not the hypothetical posting constitutes an "advertisement" as defined in section 6157(c), it nonetheless will be subject to the same requirements as any other advertisement by virtue of rule 1-400 – provided it is a "communication," as specified in section 6157(c) and rule 1-400(A).7" In footnote 4 of the Opinion, the committee specifically states that firm websites are indeed attorney advertising materials subject to advertising rules. The State Bar of California Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2012-186 (2012).

1. “Case finally over. Unanimous verdict! Celebrating tonight.”
    * This is not considered a “communication” because it is not a message or offer “concerning the availability for professional employment.”

2. “Another great victory in court today! My client is delighted. Who wants to be next?”
    * The addition of the text, “who wants to be next”, meets the definition of a “communication” because it suggests availability for professional employment

3. “Won a million-dollar verdict. Tell your friends to check out my website.”
    * This is a “communication” because the second half of the message conveys availability for professional employment

4. “Won another personal injury case. Call me for a free consultation.”
    * This is a “communication” primarily due to the second sentence.

5. “Just published an article on wage and hour breaks. Let me know if you would like a copy.”
    * This is not a “communication” because it does not concern availability for professional employment and is relaying information about article publication and copies available.

The State Bar of California Standing Comm. on Prof’l Responsibility and Conduct, Formal Op. 2012-186 (2012).

Practically speaking, it is best if lawyers include limiting language and, if applicable, advertising language, in every possible online presence, including their website pages, Facebook pages, blogs, Instagram, LinkedIn posts, and any other place where lawyers may engage in sharing their opinion or arguably advertising their services to the online public.

III. ONLINE REVIEWS

Along with the obvious benefits of being able to converse directly with the online public, share ideas, and market your legal services, there exist unique challenges. Google My Business, Yelp and other online reviews and third-party sites often allow individuals to publicly award stars, post reviews, and make comments about

businesses, including law firms, with very little identifying information about the person posting and little, if any, ability to track them. Some reviews are legitimate and fair, some are not. There is nothing to prevent an unhappy potential client whose case was not accepted or even reviewed to post a bad review. There is likewise nothing preventing a competitor or employee of a competitor from doing so without identifying themselves. This lack of oversight can have devastating results in a world where 90 percentage of consumers read online reviews before approaching a business.

- 90% of consumers read online reviews before visiting a business.
- 67.7% of purchasing decisions are impacted by online reviews.
- 84% of people trust online reviews as much as a personal recommendation.
- Businesses risk losing 22% of business when potential customers find one.
- negative article on the first page of their search results
- Four or more negative reviews and businesses are likely to lose 70% of potential customers.

  Ryan Erskine, 20 Online Reputation Statistics That Every Business Owner Needs to Know (Sep. 19, 2019, 09:09 AM).

False and misleading online reviews are fraught with difficulties and unique challenges for lawyers. Under the Ohio Model Rules, a lawyer cannot reveal any information relating to the representation of a client, including information that is protected by the attorney-client privilege, unless the client gives informed consent. Prof.Cond.R. 1.6(a). The confidentiality rules apply not only to matters communicated in confidence by the client, but all information relating to the representation of the client regardless of its source. Prof.Cond.R. 1.6(a), cmt. 3.

There is an exception to attorney-client privilege called the self-protection exception. The self-protection exception allows lawyers to reveal information relating to

the representation of a client, including information that is protected by the attorney-client privilege, if the lawyer reasonably believes disclosure is necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client. Prof.Cond.R. 1.6(b)(5).

The self-protection rule is set out below:

> **(b)** A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary for any of the following purposes: **(1)** to prevent reasonably certain death or substantial bodily harm; **(2)** to prevent the commission of a crime by the client or other person; **(3)** to mitigate *substantial* injury to the financial interests or property of another that has resulted from the client's commission of an *illegal* or *fraudulent* act, in furtherance of which the client has used the lawyer's services; **(4)** to secure legal advice about the lawyer's compliance with these rules; **(5)** to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client; **(6)** to comply with other law or a court order; **(7)** to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a *firm*, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. **(c)** A lawyer shall make *reasonable* efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to information related to the representation of a client. **(d)** A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary to comply with Rule 3.3 or 4.1.
>
> Prof.Cond.R. 1.6(b).

The Ohio Supreme Court has upheld the general concept of self-protection as an exception to the attorney-client privilege at common law.

> Ohio Recognizes a common law self-protection exception to the attorney-client privilege codified in R.C. 2317.02(A). Thus, when the attorney-client relationship has been placed at issue ***in litigation*** between an attorney and a client or former client, the self-protection exception permits discovery of the evidence necessary to establish a claim or defense on

behalf of the attorney. Squire Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 127 Ohio St.3d 161, 176 (2010). Emphasis added.

The case law and ethics rules on the self-protection exception and the strict application of the attorney-client privilege suggests that replying to false, fake or simply negative reviews with any information that relates to the representation of the client could be found to be a violation of Prof.Cond.R. 1.6(a). It appears that the self-protection exception would not apply to online reviews because they are not legal claims or disciplinary charges. So be careful and tread cautiously when responding to Google or Yelp reviews.

In a Pennsylvania matter, the Pennsylvania Bar Associations' Legal Ethics and Professional Responsibility Committee was asked to issue an opinion as to whether a lawyer could respond to an online review and reveal the existence of the attorney-client relationship or any public information on the case. The Committee found that the prohibition against disclosing information relating to representation is interpreted very broadly, not just limited to secrets and confidences, and it includes information available in the public record[6]. Lawyer's Response to Client's Negative Online Review, Pennsylvania Bar Formal Opinion 2014-200.

In Texas Bar Ethics Opinion No. 662 (August 2016), a Texas lawyer contacted the state Bar asking for an Opinion in advance about whether he could ethically respond to a former client's online review that he believed was utterly false. He further asked to be permitted to provide just enough information to prove the review was false. In that

[6] "Information relating to representation" is generally recognized to be very broad and is not limited to secrets or confidences." Pennsylvania Ethics Handbook, 2011 Ed., § 3.3 at 51; Iowa Supreme Court Att'y Discipline Bd. v. Marzen, 779 N.W.2d 757, 765–67 (Iowa 2010) (concluding that" the rule of confidentiality is breached when a lawyer discloses information learned through the lawyer-client relationship even if that information is otherwise publicly available"). Lawyer's Response to Client's Negative Online Review, Pennsylvania Bar Association Formal Opinion 2014-200,p. 2.

opinion, the Texas Bar followed the same analysis outlined in the Pennsylvania formal opinion, stating that:

> The exceptions to Rule 1.05 cannot reasonably be interpreted to allow public disclosure of a former client's confidences just because a former client has chosen to make negative comments about the lawyer on the internet. This approach is consistent with the guidance issued by the ethics authorities in other jurisdictions. See, e.g., Los Angeles County Bar Association Prof'l Responsibility and Ethics Comm., Formal Op. 525 (2012); Bar Association of San Francisco Ethics Opinion 2014-1 (Jan. 2014); New York State Bar Association Ethics Opinion 1032 (Oct. 2014); Pennsylvania Bar Association Formal Ethics Opinion 2014-200 (2014); and Texas Bar Ethics Opinion No. 662 (August 2016).

The Texas Bar suggests that a response *could* be posted publicly to the negative or false review, but it must be "proportional and restrained" and not violate client confidences. Following other states' suggestions, the Texas Bar suggested a response as follows:

> ***"A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."***
>
> Texas Bar Ethics Opinion No. 662 (August 2016)

The Texas Bar then pointed out that there was nothing preventing the lawyer from seeking "judicial relief against a former client who commits defamation or other actionable misconduct through an internet publication." Texas Bar Ethics Opinion No. 662 (August 2016).

The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 496 in January of 2021, stating that online criticism is *not* considered a proceeding under the Model Rules and responding online is not necessary to "establish

a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved." The ABA Committee concluded that a negative online review due to its informal nature is not a "controversy" between the lawyer and client within the meaning of Prof.Cond.R. 1.6(b)(5). ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 496 (2021).

The ABA's website published an article by Cynthia Sharp entitled *How to Ethically Respond to Negative Reviews from Clients*, which provides a list of some State Ethics opinions setting out examples of how *not* to respond to a negative review. A summary is below:

- In a 2014 Georgia matter, counsel should not have posted a matrimonial client's name, employer, amount paid in legal fees and further stated online that her former client had a boyfriend;

- An attorney in a 2015 Colorado case should not have revealed "highly sensitive and confidential information," publicly shaming clients in response to their online complaints;

- In responding to an adverse review, a lawyer in a 2014 Illinois case improperly stated the client's "own actions in beating up a female co-worker are what caused the consequences he is now so upset about"; and
- After being found to have violated the duty of confidentiality in disclosing specific information about a client, a Washington, D.C. attorney got into deeper trouble in 2016 by making a subsequent false post, claiming he had been cleared by the District of Columbia's office of disciplinary counsel.

  Cynthia Sharp, How to Ethically Respond to Negative Reviews from Clients (June 1, 2020, 12:45 AM CDT).

In addition to negative reviews by real former clients, there is the added concern of completely fake or false reviews from imposters – individuals who are not and never were clients. Accordingly, the duty of confidentiality applies only to former or current clients. It is important to know how to remove, or at least attempt to remove, fake online reviews from Facebook and Google. This article is a good place to start. Stacey E.

Burke, P.C., What Lawyers Can Do About Negative Reviews (May 15, 2019), https://www.staceyeburke.com/blog/what-lawyers-can-do-about-negative-reviews/.

Attorneys have a first amendment right to communicate truthful information about their services that is not "false or misleading. Bates v. State Bar, 433 U.S. 350 (1977); Prof.Cond.R. 7.1. A communication becomes "false or misleading" if the communication contains a material misrepresentation of fact or law or omits a fact that would make the statement materially misleading. Prof.Cond.R. 7.1

In a 2018 North Carolina State Bar Opinion, the Bar decided that North Carolina lawyers are permitted to participate in an online service for soliciting client reviews. There were conditions in place, including the requirement that the client's name and contact information be kept confidential unless informed consent is obtained. To obtain informed consent, the lawyer must explain that the lawyer uses an online service called "Repsight.com" and must disclose the Repsight.com process. The use of this service, if adequately explained to the clients, allows the lawyer to limit reviews that are posted to the public only to those reviews that are 4 stars or higher. Subject to certain conditions, a lawyer is permitted by that service to contact the client to address client concerns if given a negative review (three stars or fewer). Online Review Solicitation Service, North Carolina State Bar, Formal Op. 7 (2018).

Other than hiring a service like Repsight.com, what is one to do? Some marketing experts suggest that their business clients respond to each negative review and ask the customer to contact them so that they can remedy whatever problem the customer reported. However, not every marketing or Public Relations professional believes in this approach. There is something called the 'Streisand Effect,' which is the

idea that it is better to ignore the wrong or fake reviews and not call attention to them and that, by calling attention to them, it is likely to have more people see the negative review than had it just been ignored in the first place. Melissa Heelan Stanzione, *Lawyers Itch to Fight Online Flaming With Ethics Rules Saying No* (April 7, 2020, 4:51 AM), https://news.bloomberglaw.com/us-law-week/lawyers-itch-to-fight-online-flaming-with-ethics-rules-saying-no.

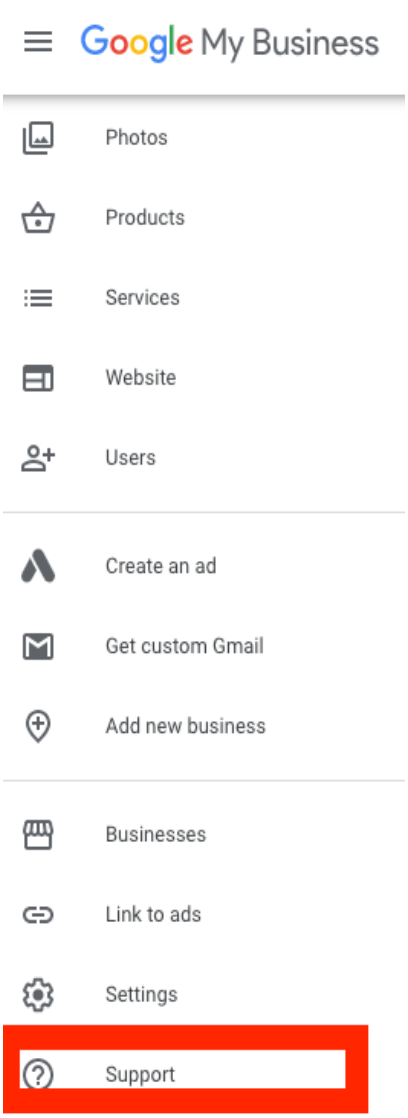
Fighting or removing fake or false reviews is almost impossible – for normal businesses and attorneys alike. Google's Prohibited and Restricted Content Page does contain a section dedicated to Spam and Fake Content. Reviewers are cautioned as follows:

> *Your content should reflect your genuine experience at the location and should not be posted just to manipulate a place's ratings. Don't post fake content, don't post the same content multiple times, and don't post content for the same place from multiple accounts.*

But under the Guidelines page there is a disclaimer that Google will not get involved in disputes where businesses and customers disagree about facts.

If you go to Google Business/Get Help, there is a "Contact Us Page" where you can report the issue leaving detailed information and a callback number. Many commentators have provided their own reviews of Google's Help Page stating it is not all that helpful. Google has been accused of refusing to remove fake reviews just because the fake reviews did not violate "community standards", even when the same fake review was posted up to four times.

Regardless, below is a screenshot of what to look for if you decide to dispute a fake review on Google. Try to follow the steps as closely as possible.


Google My Business
Photos
Products
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Users
Create an ad
Get custom Gmail
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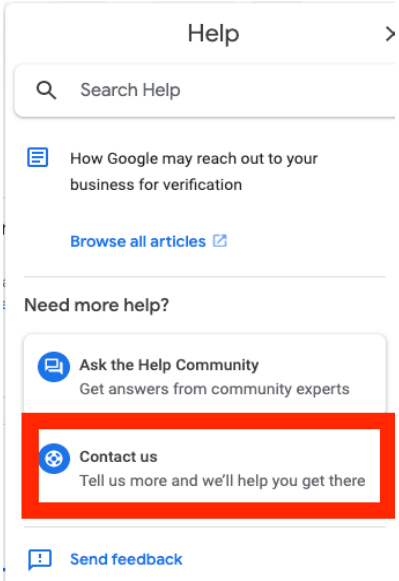
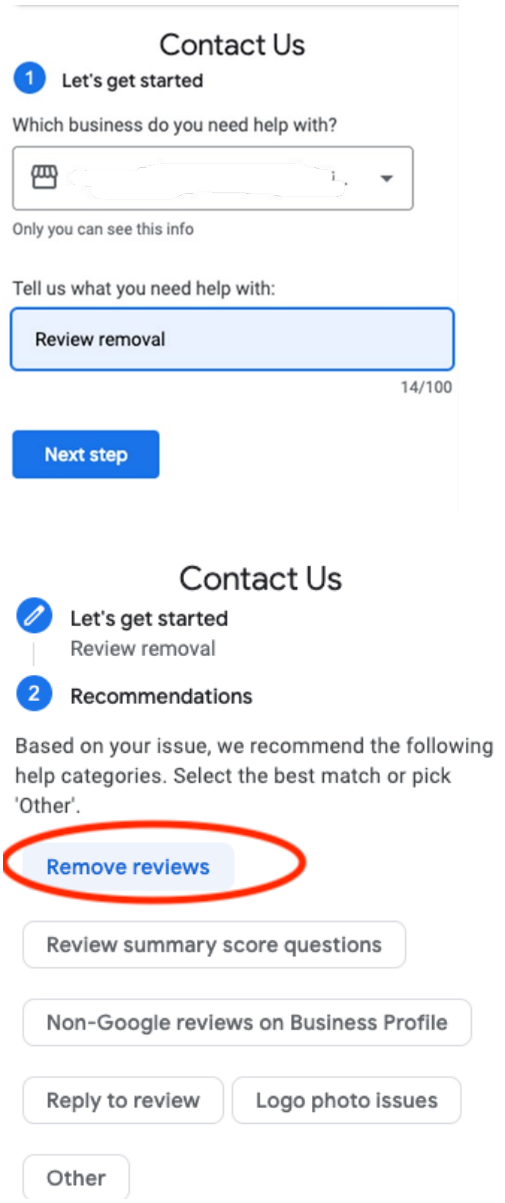
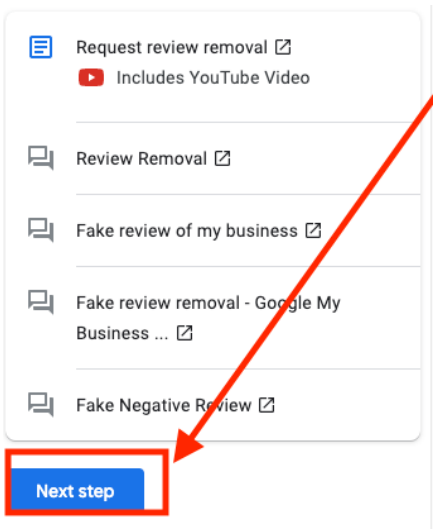

Help
Search Help
How Google may reach out to your business for verification
Browse all articles
Need more help?
Ask the Help Community
Get answers from community experts
Contact us
Tell us more and we'll help you get there
Send feedback



Once you have followed these steps, it will give you all the community posts.

SCROLL PAST these to the BOTTOM.



You will then be asked to provide your name, relationship to business, email, phone number, business name and address, and the URL to the Google maps listing on the website (it explains how you can find that below the field), the business website, whether you have flagged the review yet, and a description of the issue you are having. Be specific without violation the Ethics Rules.

If in doubt, consider getting more positive reviews. Perhaps eventually the ABA will consider recommendations providing attorneys with the ability to dispute crippling reviews that are false or malicious but that do not technically violate Google's verbiage rules. Until that time, tread cautiously.

OHIO ASSOCIATION for JUSTICE

TRIAL LAWYERS HELPING PEOPLE

OAJ 2021 Annual Convention

Professional Conduct Session

Tuesday, June 15, 2021

Ethics in the Digital Age: How to Combat Negative Online Reviews, Engage with Social Media, and Market your Firm Online

Daniel Michel, Esq.

Clayton Crates, Esq.

PROFESSIONALISM IN A POST-COVID WORLD

I. What is Professionalism?

- Supreme Court's Professional Ideals
  - The Golden Rule: Do unto others ….
  - The blunt edge of the zealous advocacy knife
  - Would I act this way [dress this way] [prepare this way] [file this action/brief] if my mother [my mentor] [my toughest professor] [my favorite judge] was watching?

- Common sense notions:

Preparation	Integrity
Communication	Knowledge of Law/Rules
Honesty	Commitment to Serve
Cooperation	Pro Bono Work
Competence	Assist in Legal Education
Respect	Confidentiality
Courtesy	Following the Law
Efficiency	Dress and Attire

II. Why is it Important?

Reputation
- -with the public
- -with the courts
- -with colleagues

Livelihood
Public Image
Happy Clients
Respect

III. Have we let things slide?

A. What has lack of in-person meetings, in-person hearings, and in-person depositions done to the practice?
- Dress
- Communications between lawyer and client during examination
- Are virtual appearances taken as seriously?

B. Are *our* filings up to snuff?
- Complaints and Answers
- Motions

IV. Communications with Clients

A. Communicate promptly, honestly and *professionally*.
- -with "sympathetic detachment"
- -clearly in terms they can understand
- -without condescension
- -in a way to avoid becoming the next viral Youtube video

B. Respect who they are, and the station from which they come.
- -listen, listen, listen

-humility
-treat the janitor client the same as the physician client

C. Don't let your powers be used for the forces of evil.
- Don't aspire to be the biggest bully on the block
- Don't be afraid to give voice the powerless; but do refrain from giving voice to those looking to harass, gain baseless revenge or oppress.
- Don't take unfair advantage

V. Conduct in Virtual Depositions, and other professionalism issues with our Colleagues of the Bar

A. Conduct in Depositions

- Conduct yourselves as though the Court reporter and the opposing counsel are in the same room

B. Conduct in Communications with Opposing Parties
- be respectful
- cooperation
- courtesy/civil
- respond promptly
- accurately prepare documents
- clearly identify changes in documents

VI. Conduct in Virtual Hearings
- If the party was testifying in court, would his attorney be seated next to him (i.e., able to whisper responses in his ear)?
- If the party was testifying in court, would his attorney be able to send him/her signals?
- Just because hearing can be more easily arranged, is the issue something that requires the Court's attention?
- respect the court's time and resources
- respect towards the court (demeanor and appearance)
- candor
- avoid appearances of impropriety
- understanding of the court's need for informed and impartial decision making