

UNIQUE ISSUES IN TECHNOLOGY, SOCIAL MEDIA, AND COLLECTIONS

PRESENTED BY:

ROBERT BERNSTEIN, ESQ.

PARTNER, BERNSTEIN-BURKLEY

KIRK BURKLEY, ESQ.

PARTNER, BERNSTEIN-BURKLEY

RAY WENDOLOWSKI, ESQ.

ASSOCIATE, BERNSTEIN-BURKLEY

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POLLING QUESTION 1

- In your business role, do you interact with lawyers?
 - YES
 - NO

INTRODUCTION

- Technological advances help to reduce cost, increase efficiency, and provide better clients service
- Credit and legal professionals must understand developments in technology that affect both cases and practices overall



AMERICAN BAR ASSOCIATION
MODEL RULES ON
PROFESSIONAL CONDUCT

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ABA MODEL RULES

- Rule 1.1 – Competence
- Rule 1.4 – Communications
- Rule 1.6 – Confidentiality of Information
- Rule 5.3 – Responsibilities Regarding Non-Lawyer Assistants



USE OF TECHNOLOGY

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USE OF THE CLOUD

- Places client data on remote servers outside of the lawyer's direct control
- Specific requirements by state
- Vendor contract
- Data breach laws

E-DISCOVERY

- Metadata
 - 2012 amendment
 - Issues in e-discovery

INTERPLAY WITH CONFIDENTIALITY RULE

- Comment 18 to Rule 1.6
- Factors considered when determining the reasonableness of the lawyer's efforts
- Other laws governing data privacy or breach notification requirements may impose additional requirements



SOCIAL MEDIA

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POLLING QUESTION 2

- Please identify each social media platform you use on a regular basis. Click all options that apply.
 - Facebook
 - Twitter
 - LinkedIn
 - Other

POLLING QUESTION 3

- Does your company use social media?
 - Yes
 - No

SOCIAL MEDIA

- As more and more people become Internet savvy and the world trends toward online communication, debt collectors will have to evolve. While these technological advances provide great tools to assist with the collection of debts, they also present a number of pitfalls that must be avoided.

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ISSUES AND CASE LAW

- “A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.” 15 U.S.C. § 1692e. This is by far the greatest opportunity for a violation of the FDCPA by a debt collector.
- Case law on the issue of social media is sparse, but a number of the actions involved can be evaluated using existing case law.

POLLING QUESTION 4

- Please identify each social media platform you have used to locate a debtor. Click all options that apply.
 - Facebook
 - Twitter
 - LinkedIn
 - Instagram
 - Other

FACEBOOK

- Skip Tracing – Facebook can be an effective tool to locate debtors and obtain information.
 - Cannot mislead or threaten
 - Public Information – If your debtor has a public profile and allows all Facebook users to view, then you are probably okay to search their page.
 - Private Information – Fake profiles are not advised.

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FACEBOOK – FAULTY FRIEND REQUESTS

- This involves using an alias in an attempt to “friend” a debtor on Facebook. This shouldn’t be a surprise, but courts are going to universally find that this is a violation of the FDCPA. The act itself is misleading.

FACEBOOK – FAULTY FRIEND REQUESTS

- Beachham v. Mark One Financial, LLC. – This is an unreported opinion, but it involved the creditor’s use of Facebook to contact the debtor regarding collection of a \$362.00 car loan. The creditor used a fake profile to “friend” the debtor. See, USA Today, March 9, 2011, Mark Winters, ABA Journal, July 2011, Brian Sullivan.

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LINKEDIN AND TWITTER

LINKEDIN

- Public vs. Private Profiles
- The same concerns as Facebook

TWITTER

- “Follow” a debtor to find out more about them
- Third party disclosures

DO'S AND DON'TS OF USING SOCIAL MEDIA IN COLLECTIONS

DO'S

- E-learning
- Skip tracing or locating debtors
- Accepting debtor payments
- Researching collection tools, such as software or skip tracing tools
- Credit reporting
- Use database technology to maintain account information on customers that owe you money
- Access consumer payments only with authorization for EACH specific payment or transaction
- Researching place of employment

DON'TS

- Emailing debtors about a debt if you are a third party collector
- Instant messaging a debtor about a debt
- Initiating more payments on a bank account when additional transactions have not been authorized.
- Sending debt collection emails, faxes or text messages
- Don't send a "friend request" to a debtor on any social networking website

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WHAT YOU CAN OR CANNOT DO

CAN DO

- Locate or find someone
- Verify information
- Maintain account information
- Obtain employment or mailing information

CANNOT DO

- Never converse with a debtor using social media sites, utilizing the email feature or comment feature.
- Do not email a debtor about a debt if you think a third party can ever see that email.
- Do not instant message a debtor about a debt.
- If a debtor doesn't respond to your email after authorizing you to email them, stop emailing and use traditional methods to try and collect, such as phone calls or letters.
- Do not send any communication that could be seen by a third party.
- Never "publish" a list of names of debtors anywhere online.
- Do not make false reports to a credit bureau.
- Do not use a fake name or company name.
- Do not request to be added as a "friend" by a debtor on a social networking site

SERVING LEGAL PAPERS VIA SOCIAL MEDIA

With any application to the Court for substituted service the Affidavit material needs to show that:

- Reasonable steps have been taken to attempt to serve the subject document/s;
- The proposed method of service is likely to bring the existence and nature of the documents to the attention of the person sought to be served;
- The extent to which the person to be served could become aware of the existence and nature of the documents in question by means of an advertisement or some other means of communication that is reasonably available;
- The likely costs to the Applicant of the proposed substituted service;
- The proposed substituted service is a cost-efficient method; and
- Why the discretion ought be exercised in favor of granting the requested substituted service.

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Additionally if the Court is asked to allow service by way of social media, the Court must also be satisfied on the evidence presented that:

- The person who created the relevant social media page is indeed the Respondent;
- The relevant social media profile was in fact the profile of the Respondent;
- The Respondent was regularly accessing his relevant social media account; and
- The Respondent would reasonably get notice of the relevant document/s, if a private message or email was sent to his account.



MARKETING

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INTERNET AND WEBSITE ADVERTISING

- **Solicitations, Rule 7.3**
 - Includes contact in-person, telephone, or email
 - Excludes written communications such as direct mail

LEAD GENERATION SERVICES

- Services are permitted, as long as certain safeguards are followed
 - Should not vouch for the lawyer's credentials and abilities
 - Also should not create the impression that the referral is made without payment, or was determined based on the possible client's legal problems

PROSPECTIVE CLIENT DUTIES

- What constitutes a consultation?
 - Depends on situation from which they arise

CONCLUSION

- What does this all mean?



Q&A

THANK YOU



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www.BernsteinLaw.com

707 Grant Street, Suite 2200 Gulf Tower, Pittsburgh, PA 15219
Wheeling, WV - Philadelphia, PA - Erie, PA - Stuart, FL