

IAFL Introduction to European Family Law 'Virtual Kyiv' Webinar

Digital information and social media: challenges for family lawyers (of different generations)

Friday 19th March 2021

Supporting Documents



Chaired by: <u>Suzanne Todd</u> (England) Panel: <u>Charlotte Butruille-Cardew</u> (France), <u>Alison Edmondson</u> (Scotland), <u>James Stewart</u> (England), and <u>Silvia Katzenmaier</u> (Germany)

- Page 1: Alison Edmondson presentation
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- Page 15: Charlotte Butruille-Cardew paper
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Innovative Scottish legislation:
Abusive Behaviour and Sexual Harm (Scotland) Act 2016
Domestic Abuse (Scotland) Act 2018

Sharing intimate images without consent

The use of digital technology to share a sexual image of a person with others, in order to cause humiliation or hurt, known as "revenge porn".



Abusive Behaviour and Sexual Harm (Scotland) Act 2016

- A criminal offence
- If a person ("A") discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person ("B") in an intimate situation...

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Abusive Behaviour and Sexual Harm (Scotland) Act 2016

- by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and
- the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent



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Abusive Behaviour and Sexual Harm (Scotland) Act 2016

If the offence involves abuse of a partner or ex-partner, this must be taken account of in sentencing. Applies where:

(a) the person intended to cause their partner or ex-partner to suffer physical or psychological harm, or

(b) the person was reckless as to whether committing the offence would cause their partner or ex-partner to suffer physical or psychological harm.



Case study

Your client Jim discovered that his wife had been having an affair after finding intimate videos and photos sent to her by another man, her colleague Andrew. Andrew appears in the material Jim found. Jim found these videos and pictures on the family computer.

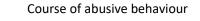


What if....

- Jim and his wife have an argument and he shouts at her that she better be careful or those images will go viral?
- Jim wants to send the videos and photos to you as evidence of adultery?
- Jim posts the images on his own social media?



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- new offence of engaging in an abusive course of conduct against a current partner or an ex-partner
- physical violence
- threats
- psychological abuse
- emotional abuse



Domestic Abuse (Scotland) Act 2018

Behaviour that has as its purpose the effect of: (a)making B dependent on, or subordinate to, A, (b)isolating B from friends, relatives or other sources of support,

(c)controlling, regulating or monitoring B's day-to-day activities,

(d)depriving B of, or restricting B's, freedom of action, (e)frightening, humiliating, degrading or punishing B.



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Domestic Abuse and digital technology

- ٠ Use of messages
- Social media privacy ٠
- ٠ Online gaming
- Spyware, surveillance and safety •
- Choosing and using apps ٠
- Internet of Things / Home Automation •

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Practical advice for clients

- Be password savvy
- Check security settings
- Be aware of location settings
- Consider how you might be tracked Break the connections
- Think about tech in the automated home
- Secure the home WiFi network
- Be camera aware





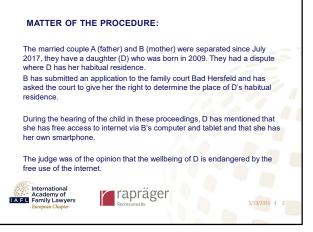




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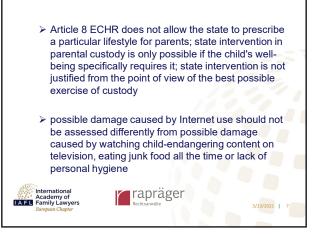


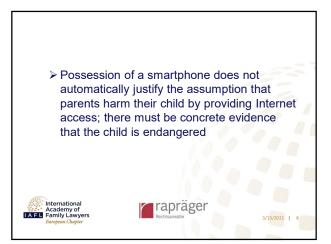












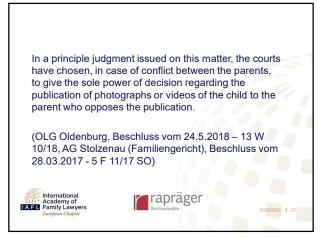




Influencers are people who reach a large number of people on the Internet with their content, providing insight into their private lives and directly or indirectly advertise a product. In the target group of 14-19 year olds, 50% choose a product because it was recommended by an influencer.







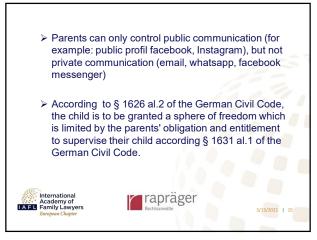




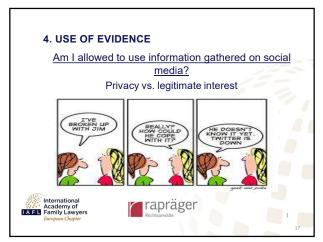
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 Thank you for your attention !

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DIGITAL INFORMATION AND SOCIAL MEDIA – CHALLENGES FOR FAMILY LAWYERS (OF DIFFERENT GENERATIONS!)

Social media can be defined as "forms of media that allow people to communicate and share information using the internet or mobile phones"¹.

Popular media platforms of course include Twitter, Facebook, Instagram, WhatsApp, Snapchat, YouTube and LinkedIn.

As a divorce can be highly stressful and women who have been through a divorce are 24% more likely to suffer a heart attack², the perfect way to let all one's feelings out is through social media.

Venting all one's emotions in one short publication allows a spouse to share his or her experiences with the people he or she knows. Social media usually lead people to relax and drop their guard when expressing themselves.

However, what is said on social media is not just private and can have - and usually has - an influence on ongoing proceedings. During a divorce, social media can be damaging and dangerous since they can be used against the media user.

The transformation brought by social media has therefore changed the practice of family law around the globe.

As clients use social media, lawyers must master these media and understand how they can be used.

I. The use of social media and digital information in our day-to-day practice

Where should the limits be drawn regarding lawyers' use of social media? For example, can a lawyer send a "friend request" to a judge?

The answer is not that simple and differs from one country to the other. For example, in **France**, the Court of Cassation has held that being a friend on Facebook does not amount to a friendship in real life.³

On the Ethical Commission website, we see that, although it is not forbidden to mention as a contact (a "friend" on Facebook, for example) the name of a judge or any other professional (approved expert, notary, etc.), "this must be done in a neutral manner, without the lawyer highlighting the functions or profession of his contacts". In any case,

¹ Cambridge dictionary

² Circulation: Cardiovascular Quality and Outcomes study of 2015

³ Cass. 2nd civil chambre, 5 Jan. 2017, No. 16-12.394; Cass. 2nd civil chambre, 28 Sept. 2017, No. 16/17.583

the name and, *a fortiori*, the title of a person presented as a contact can only be indicated with his or her agreement (acceptance of the "contact request" on LinkedIn for example).

while, in **Belgium**, a judge who was a friend on Facebook with one of the parties was considered to lack impartiality.

4 Lawyers' marketing on social media in France: principles and limits

Social media are an effective way for lawyers to advertise their services, in particular on a market where competition keeps growing.

Even Courts have active social media accounts. In Australia, besides publishing judgments using this tool – which is already a great novelty – they even use social media to advise parties about court appointments.

In France, there are no clear principles as to how lawyers should act on social media.

The limits are set by the ethical rules applicable to each lawyer after he or she swears the Oath. The National Bar Code indeed provides that, "*A lawyer participating in a blog or a social media should comply with the essential principles of the profession*"⁴.

In 2015, the Paris Bar Council published Guidelines on digital ethics⁵, where it is specified that "*a lawyer's presence on a social media constitutes a form of personal advertising when his or her profession is mentioned. It is therefore subject to the regulations applicable in this field* (...)."

Further, the National Bar Code provides that **French lawyers** must act conscientiously, with dignity, independence, probity and humanity. Moreover, its Article 1.3 specifies that a French lawyer must comply with the essential principles of honour, loyalty, equality and non-discrimination, disinterestedness, fraternity, sensitivity, moderation and courtesy.

Finally, like in most countries, French lawyers are subject to confidentiality and must therefore comply with the secrecy of any interactions with the client. Confidentiality is general, absolute and unlimited in time (Article 2.1.).

These principles apply to any solicitation by lawyers on social media in **France** and have given rise to other principles. Indeed, both the National and Paris Bar Codes specify that any solicitation must provide truthful information on the nature of the services proposed and the methods for determining their cost (articles 10.3).

While advertising by lawyers must, in general, be communicated to the Bar Council forthwith, the 2015 Guidelines specify that the creation of a social media profile is not subject to this

⁴ Article 10.6 RIN

⁵ Vademecum de la déontologie du numérique

obligation. However if a lawyer is not certain of the lawfulness of his or her profile, they can always refer to the Bar Council, for which a specific email address has been created (for Paris: <u>delegationgenerale@avocatparis.org</u>).

Article 10.2 of the National and Paris Bar Codes also sets out important prohibitions. Indeed, **French lawyers** may not engage in:

- Any misleading or false advertising;
- Solicitation of clients through text messages, telephone calls or a physical approach;
- Any comparative or disparaging reference;
- Any reference likely to create in the public mind the appearance of a non-existent structure and/or an unrecognised professional qualification;
- And any reference to roles or activities unrelated to the legal profession's practices.

4 The use of social media by lawyers and freedom of speech

Lawyers are more and more active on social networks, especially on Twitter and LinkedIn, either to advertise their firm or to comment on a new law/jurisprudence.

a. One famous case is that of **"Me. Eolas**", the pseudonym of a **French** anonymous lawyer known for explaining and trying to simplify the law on Twitter, notably through humour and sarcasm.

On the 1st of February 2017, the Versailles Court of Appeal convicted him for "insults": **on Twitter**, he had criticized the "Institute for Justice" Association – which wanted a toughening of criminal law – notably by calling its petition "fake" and accusing it of manipulation.

Although this judgment demonstrated that lawyers must always be careful with their use of social media, the Court of Cassation decided to completely acquit him, ruling that his words did not exceed the admissible thresholds of freedom of speech (Crim., 8 Jan. 2019, No. 17-81.396).

b. To the question: "Is a lawyer "freer to speak" on a blog than on his or her website?"

The answer from the Ethical Commission is **NO**. "Lawyers must always be careful with their statements and ensure that they comply with the essential principles" (Article 10.5 of the National Ethical Code, last paragraph).

Lawyers must be careful and always keep the principles of dignity and thoughtfulness in mind, even in their private life.

A French lawyer was sanctioned by the Pyrénées-Orientales's Bar for having posted photographs of a sexual nature on the internet, which was thereafter confirmed by the Montpellier Court of Appeal (Montpellier Court of Appeal, 24 Oct. 2016, No. 16/05233).

c. Recently, many lawyers and most of the French Bar associations' have been very active on social media to express their opposition to the pension reform and its impact on the status of lawyers.

4 *Limits to ethical rules: what lawyers can and cannot do on social media.*

a. It is forbidden for a law firm's website to provide a link to a social media if the social media does not comply with the essential principles of the profession (Opinion of the **Paris** Bar Ethical Directorate No. 121/22.5875, 13 March 2012).

b. Lawyers must comply with the <u>ethical principles of dignity and thoughtfulness</u>, which precludes them from communicating detailed information on their clients.

Hence, even if a publication on a social media does not mention their client's name or other details and therefore does not breach attorney-client privilege, it may be in breach of these principles.

A French firm must not advertise the fact that it has dealt with famous and important clients by citing them on its social media without breaching <u>attorney-client privilege</u>.

Such a disclosure could be considered an ethical violation and also lead to a civil suit if the client has suffered a prejudice because of this disclosure.

However, there is nothing to prevent the client, who is not bound by attorney-client privilege, from disclosing the name of his or her lawyer and assessing the lawyer's services on any platform (2015 Guidelines of the Paris Bar Council).

c. A French lawyer was sanctioned for having lacked restraint and publicly denigrated another lawyer on Facebook, even though the Paris Bar Council took into consideration the fact that her strong feelings related to medical liability subsequent to a child's death, which she had personally experienced (Decision of the French Bar Council Disciplinary Board 273809, 28 June 2016).

d. A French lawyer does not have the right to appear wearing his or her robe outside court areas, except in exceptional circumstances such as protests – which we are very familiar with in France. Therefore, although there are no concrete cases where lawyers have been sanctioned, all the ones appearing with their robe on Instagram, or any social media, are theoretically not allowed to do so.

Storing clients' information on "the Cloud"

It has always been the norm to archive the data in our clients' files in professional, protected archives. Today, we receive countless digital data that we store in computerized systems.

Using Cloud computing to store and process data can be very dangerous for lawyers since this information is in the hand of a third party (usually in non-EU Member States).

The **European Union** Bars Council (EUBC) therefore warned European lawyers who want to use the Cloud to store their data and provided some recommendations on 7 September 2012. Although the CCBE first describes Cloud computing's advantages (such as cost reductions and the simplification of the firm's management), it insists on the risks related to compliance with attorney-client privilege, confidentiality and data retention.

Hence, although this text does not provide clear obligations, it advises European lawyers to be vigilant regarding where the information is stored, especially if it is a third country, as well as the potential risks for the client. Secondly, it recommends being transparent towards clients and informing them of this action.

To avoid all these risks, a private Cloud called "e-Dentitas" was created specifically for lawyers in **France**.

Finally, with the entry into force of the EU General Data Protection Regulation No. 2016/679 in May 2018, Data Protection law in European Union Member States has imposed multiple new obligations on anyone processing and storing data. In particular, this Regulation ensures the security of data processing which can be breached by the use of new digital ways to store data, such as a Cloud.

Therefore, while new practical technologies exist for lawyers today, their use might be in conflict with the strict obligations applicable within the European Union.

4 The evolution of communication between lawyers, their clients and the Courts

Social media have also changed the way lawyers communicate with their clients.

Indeed, until recently, lawyers had to wait for hours for a fax to arrive and had to stay at the office to be certain it was received. Everything was therefore slower.

Today, besides emails which have completely changed our way of working since it allows us to work from home – which we might regret at times –, we even communicate with clients via WhatsApp.

The relationship between lawyers and clients is therefore less formal and less technical but evolves much faster than before.

It must, however, be noted that such practices require care because not all social media are secure, and all the information exchanged through these media can endanger attorney-client privilege, for example if they were to be hacked.

Nevertheless, the dematerialization of interactions has – finally – spread in France. Indeed, lawyers and Courts communicate via an electronic platform (Lawyers Private Virtual Network) and some documents cannot be provided in paper anymore.

In some jurisdictions, it is possible to communicate with prosecutors, for example, directly by email. This is far from true with Family Court judges in Paris or their clerks today.

Lawyers can communicate with each other electronically, via emails which are confidential and which the lawyers may not disclose, except correspondence marked "OFFICIEL".

II. The use of digital information and social media within a judicial proceeding

4 Social media and the production of evidence

While referring to text messages and emails as evidence in family law disputes is not new, the use of social media posts against the other party has increased in the last 10 years.

For example, according to a 2010 survey conducted by the American Academy of Matrimonial Lawyers, 81% of **US** divorce attorneys stated they had seen an increase in the number of cases using social networking evidence. Of the online evidence used, 66% said Facebook was the most frequent source relied upon.⁶

In **France**, "*a spouse may not produce at the hearing a means of proof which he or she obtained by violence, duress or fraud*" (Art. 259-1 of the Civil Code) and cannot present evidence obtained in an unlawful manner.

This principle raises the question of the use of evidence gathered on social media. It appears that, in France, a spouse's right to privacy is not enough to oppose the communication of his or her personal information on social media because the main consideration is only whether the exhibit has been obtained unlawfully or not.

The unlawful nature of evidence from a social media will therefore be examined based on the specific facts of the case.

French Courts have held that, "The procurement of documents was considered manifestly fraudulent when the husband went to his wife's mailbox to transfer messages, and the wife had not voluntarily given him access to her mailbox, and when the husband was no longer authorized to reside in the marital home and he had in any case left on the date on which he accessed his wife's mailbox" (Lyon Court of Appeal, 21 March 2011, No. 10/01789).

However, evidence based on public information on social media – i.e. that anyone can access – can clearly be presented before French Courts.

For example, in the case regarding the estate of the famous **French** singer Johnny Halliday, Instagram photos and geo-tracking information were presented to the judges who then confirmed that Johnny Halliday and his wife did live in France most of the time and were therefore French residents.

⁶ <u>https://www.lexology.com/library/detail.aspx?g=a625d128-5072-4075-b25e-888059febba7</u>

Social media indeed play an important role regarding the location of a person's residence. For instance, in **Canada**, a mother's Instagram posts and comments showed that she improperly relocated the children's residence without the father's consent (*Stokes v. Stokes, 2014 ONSC 1311*).

In family law disputes, social media evidence can be used to demonstrate, in particular:

- ➤ <u>A person's state of mind</u>: for example, an aggressive twitter tirade about a partner could be evidence of the party's attitude to parenting or, more generally, his or her character.
- Evidence of a behaviour. Photos on Instagram of a person with a glass of wine which is not rare in France – could go as far as demonstrating the party's inability to care for the children.

Some pictures can reveal an infidelity. Regarding dating sites, while being on one does not constitute a fault in itself in **France**, the fact that one of the spouses "*maintains intimate correspondence, sends compromising photos and clearly seeks extramarital affairs*" constitutes a fault and justifies the granting of the divorce (Court of Appeal of Lyon, 7 February 2011, No. 09/06238).

The same is also true when one of the spouses engages in "sustained and abusive use of the Internet on dating or pornographic sites" (Paris Court of Appeal, 19 December 2017, No. 07/03365).

These principles can be explained by the fact that the duty of fidelity is not only physical but also emotional.

Proof of employment, lifestyle or income. For instance, a party's previous employment history or side business listed on LinkedIn that they forgot to disclose could constitute evidence of their failure to provide true and total disclosure on his or her income.

Further, even if the party has removed their former spouse from their friends' or followers' list and even blocked them, they are likely to still have mutual friends. Aggrieved exes can even go as far as creating fake accounts to monitor the other's behaviour after the break-up.

Finally, in England and Wales, as in many other places, an injunction can be used as a **gag order**, in which certain details of a legal case, including identities or acts, may not be published.

As gag orders do not exist in France, it is very complicated to prevent the publication of information from a judicial proceeding online. We recently had a case where the daughter of one our clients posted videos on Youtube where she blackmailed her father and exposed different elements of the judicial procedure.

For these reasons, it is always better to recommend at the beginning of a divorce proceeding that a client privatize his or her profile, delete potentially damaging information or even

deactivate his or her social media altogether, and to always think about the potential consequences when considering posting any content.

While social media can be very dangerous for a client, this is also true for lawyers. Indeed, before social media, information could only be obtained through a longer and more complex process, for example by having recourse to a private detective. Thanks to all the information available on social media, family lawyers can – at times – become their own private detectives.

♣ Service by social media

The importance of social media in the practice has grown so much that, in the near future, we may be able to serve judicial papers on the opposing party by WhatsApp or Facebook.

This is possible today in the **United States**. In the State of New York, a man legally served his ex-wife with legal documents on Facebook after he proved to the Court that he was unable to do so through traditional methods.⁷

Although, in this case, a condition of impracticability exists, it clearly shows that judges are more and more willing to let social media enter the sphere of proceedings.

In Canada, it is already possible to serve someone via their email address. Further, in Québec, when no other way is available to serve the other party (Superior Court of Quebec, 15 June 2011, *N. (E.) c. M. (J.)*, EYB 2011-192302). Similarly, an Ontario power utility was granted permission by a deputy judge to serve legal papers by Facebook Messenger. However, it does seem that such a possibility is only accepted by the Courts as an exception. Indeed, a Canadian lawyer did serve a statement of claim over Instagram because all other means had been exhausted.⁸

The European Commission was questioned about the possibility of serving judicial documents on 11 February 2009 (No. E-0736/09).

In this regard, the Commission first answered that no harmonization at the European level exists regarding the serving of documents, which means that each Member State regulates this subject at their discretion.

Concerning cross-border cases, the Commission vaguely specified that service by way of social media is neither authorized nor forbidden but that the aim of providing speedy transmission must be balanced with the parties' rights in terms of language, data protection, authentication of the parties and signature of the documents.

⁷ <u>https://www.mckinleyirvin.com/resources/digital-divorce-a-guide-for-social-media-digital/social-media-divorce-evidence/</u>

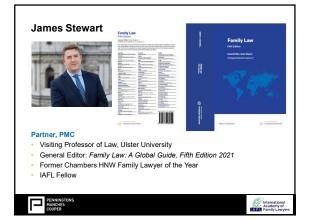
⁸ <u>https://www.cbc.ca/news/canada/kitchener-waterloo/why-a-lawyer-could-soon-serve-you-papers-over-social-media-1.5320637</u>

In contrast, such a possibility has been clearly discouraged by academics in other countries, such as Belgium, where authors advise lawyers to never use social media in order to communicate with their clients or colleagues.⁹

In **France**, this matter has yet not been debated, which indicates that the French system is not ready yet to introduce such a process.

⁹ A. CRUQUNAIRE, J.F. HENROTTE, « *la déontologie de l'avocat et le web 2,0 : comment assurer l'interopératibilité* ? », rev. Des droits de la technologie et de l'information n ° 32, 2008, p.396 in J.-P. BUYLE, *La présence des avocats sur les réseaux sociaux*, LARCIER, 2014, p.43 et s





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Social Media pitfalls for Family Lawyers

Privacy

- Access to personal information
 Location
- Removing information on SM is difficult

Duty of confidentiality

 'you keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents'. (SRA code)

Reputation

One misplaced comment can impact on your reputation.

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Academy of

Educating your clients

- Don't forget to change your passwords
- Open new email and mobile phone accounts
- Don't take photographs (including screenshots) at court
- Don't criticise your former spouse on SM
- Don't allow yourself to be tagged in compromising posts or photographs
- Don't post anything which you wouldn't want to be used against you
- Above all respect your children's privacy.

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