

Today's litigator cannot rest on his or her skill-set of ten or even five years ago. The relevant question is: If you are going to use a tool in the practice of law, shouldn't you be sufficiently knowledgeable and competent in its use *not* to place your clients at risk? If, as one public defender did, you post a photo of a client's leopard print underwear with a disparaging caption on Facebook so that it is available for all to view, would you not realize that such a posting would be a "public communication." When you express your frustrations over a judge's ruling on your public blog, isn't that a "public communication?" Nowadays the standard communication forum consists of far more than a single telephone call, or a press conference, or a throng of reporters with microphones and audio recorders. It is often us: Lawyers using ESM and losing sight of our professional boundaries via the quick and easy outlet ESM allows. We have become an extension of the Fifth Estate²⁰. With that, we are both the message and the medium.

²⁰ Going back to the Middle Ages, three broad social orders, or "Estates," were created and referred to in order of their importance: the clergy (the First Estate), the nobility (the Second Estate), and the commoners (the Third Estate). The term "Fourth Estate" came later and includes all those who were outside the recognized hierarchy of the times, now commonly referred to as the independent media. The Fifth Estate—even lower in the social order—is comprised of bloggers, citizen journalists, and any media outlet that operates outside of what we consider to be the mainstream.