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E-DISCOVERY

The Ethics on Evidence From Social Networking Sites


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Millions of people every day post their thoughts, concerns, and day-to-day experiences on Facebook, MySpace, Twitter and other social networking sites.[1] The contents of these sites have become a potentially invaluable source of information for attorneys preparing for litigation.

Divorce attorneys, for instance, routinely scour an adversary's Facebook page for evidence of infidelity.[2] In criminal cases, it is common for prosecutors to obtain and exploit incriminating evidence obtained from a defendant's social networking account.[3] And attorneys defending personal injury actions may find helpful impeaching evidence on a plaintiff's Facebook page.[4]

Indeed, there are an infinite number of contexts within which information posted on social networking sites may be relevant to litigation. With the growing use of social networking sites, lawyers need to be aware of the ethical issues such evidence presents.

Three recent ethics opinions have begun to define the ethical bounds within which New York lawyers may exploit information on social networking sites.

The most recent of these addresses the ethical limits within which lawyers may monitor jurors' social networking accounts during trial.[5] The other two, addressing the propriety of accessing social networking sites[6] and "friending" witnesses,[7] respectively, were previously discussed in Mark Berman's article appearing in the Nov. 2, 2010, issue of this publication.[8]

For the sake of completeness, below we provide a brief synopsis of the two prior opinions before discussing the latest guidance.

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State Bar Opinion

In Opinion 843, the New York State Bar Association addressed whether a lawyer "may access the Facebook or MySpace pages of a party other than his or her client in pending litigation…if the lawyer does not "friend" the party and instead relies on public pages posted by that party that are accessible to all members in the network."

The state bar opined that such conduct was permissible based on the similarity between obtaining information from a Facebook or MySpace profile and obtaining information in publicly accessible online or print media. The bar group emphasized, however, that accessing a party's Facebook or MySpace profile is ethical only so long as "the lawyer neither 'friends' the other party nor directs someone else to do so."

City Bar Opinion

In Formal Opinion 2010-2, the New York City Bar addressed whether a lawyer may "either directly or through an agent, contact an unrepresented person through a social networking website and request permission to access her page to obtain information for use in litigation."

The city bar concluded "that an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request."

An attorney may not, however, "friend" a witness using a make-believe name, or create a fake profile "tailored to the background and interests" of a witness to increase the likelihood that the witness will accept the "friend" request.

Engaging in either of these practices would violate Rule 4.1 of New York's Rules of Professional Conduct, which prohibits acts involving "dishonesty, fraud, deceit or misrepresentation," and Rule 8.4 (c), which proscribes knowingly making "a false statement of fact or law to a third person" while "in the course of representing a client."

Lawyers should note that there is no uniform approach among jurisdictions for determining whether "friending" a witness amounts to unethical misrepresentation. Unlike the city bar, for example, the Philadelphia Bar Association has opined that it would be unethical for a lawyer to ask a third party to "friend" an unrepresented witness to gain access to the witness' Facebook and MySpace pages if the third party does not reveal being affiliated with the lawyer.[9]

According to the Philadelphia bar, even if the third party were to use his or her real name, such a communication would be deceptive because it would omit a "highly material fact—namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness."

Monitoring Jurors

Most recently, in Opinion 743 the New York County Lawyers' Association considered whether lawyers may monitor jurors and prospective jurors' social networking sites.

NYCLA held that "passive monitoring of jurors, such as viewing a publicly available blog or Facebook page," is permissible so long as lawyers have no direct or indirect contact with jurors during trial. Of note, NYCLA emphasized that lawyers "may not act in any way by which the juror becomes aware of the monitoring."

In endeavoring to comply with ethical standards, lawyers should know that at least some social networking sites—like Twitter and LinkedIn—allow users to view who has recently accessed their profile. NYCLA strongly suggested that accessing such social networking sites may very well constitute "an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."

Aside from considering the general propriety of monitoring jurors' social networking activities, NYCLA also considered whether lawyers must inform the court of any juror misconduct of which they become aware through social networking sites. NYCLA concluded that "if a lawyer learns of juror misconduct, including deliberations that violate the court's instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must…bring such misconduct to the attention of the court, before engaging in any further significant activity in the case."

Other Potential Pitfalls

Although the three New York opinions addressing some of the ethical parameters within which lawyers may exploit information from social networking sites provide much needed guidance, they address only a few of the many ethical issues lawyers may confront. In a recent article published in the Delaware Law Review, attorney Margaret DiBianca identified a number of these novel ethical issues,[10] some of which we analyze below.

• Competent Representation

Rule 1.1 of New York's Rules of Professional Conduct imposes upon lawyers a duty to provide competent representation.

Given the increasing use of social networking sites, does the duty of competent representation require that lawyers obtain a basic understanding of navigating social networking sites, and keep informed of rulings on the discoverability and admissibility of evidence obtained from these sites?

In at least some instances, standard practice among practitioners of a particular legal discipline may dictate the minimum amount of familiarity with social networking sites that lawyers within that discipline should have.

The American Academy of Matrimonial Lawyers, for instance, "reports that 66 percent of divorce attorneys use Facebook as their primary source of online evidence." It would seem, therefore, that divorce attorneys lacking familiarity with social networking sites would be hampered in their ability to provide competent representation, particularly when their adversaries are likely availing themselves of all available online content.

• Diligent Representation

New York Rule of Professional Conduct 1.3 requires that lawyers "act with reasonable diligence and promptness in representing a client."

Presumably this rule would require lawyers to search the internet not only for information favorable to his or her client's case, but also for information detrimental to the client for the sake of being better prepared to advocate on the client's behalf. Not knowing that a client routinely posts information on social networking sites, and not knowing how to navigate such sites for information, could compromise a lawyer's ability to identify where relevant information is located, and may thus hamper a lawyer's effective and diligent representation.

As people continue to populate social networking sites with content relevant to ongoing and future litigation, it will become increasingly important for lawyers to familiarize themselves with the potential benefits and drawbacks these sites represent.

• Preservation of Evidence

Under Rule 3.4 (a) (1) of New York's Code of Professional Conduct, a lawyer may "not suppress any evidence that the lawyer or the client has an obligation to reveal or produce." The duty to preserve relevant evidence—including "computerized information"—attaches upon the reasonable foreseeability of litigation.[11]

Upon learning that a client's social networking site contains information that is potentially harmful to a claim or defense, a lawyer may be tempted to advise the client to remove the harmful content.[12] To do so, however, would risk running afoul of Rule 3.4 (a), and incurring sanctions for spoliation of evidence.[13]

A lawyer cannot, however, attempt to preserve that which he does not know exists. This is yet another reason why lawyers should familiarize themselves with clients' online activities—to ensure compliance with the rules of discovery.

Third-Party Communication

Although it did not specifically consider the issue, in Opinion 843 the state bar explained in a footnote that Rule 4.2—which prohibits lawyers from communicating with a party that is represented by counsel in connection with the matter to which the communication relates—governs lawyers' attempts to "friend" a "represented party in a pending litigation."[14]

In this footnote, the state bar cleared the doubts of those for whom it is not immediately apparent that a "friend" request that one can send to a complete stranger with a mere click of a mouse in the privacy of one's own room may constitute a "communication."

Conclusion

Although various bar groups throughout the country have begun addressing the ethical implications of lawyers' use of social networking sites for evidence gathering, lawyers would benefit from further guidance from both the courts and state bar associations.

Despite the lack of clear ethical guidelines, however, one thing is very clear. As people continue to populate social networking sites with content relevant to ongoing and future litigation, it will become increasingly important for lawyers to familiarize themselves with the potential benefits and drawbacks these sites represent.

1. As of July 2011, Facebook alone reported having over 750 million users, with the average user creating 90 pieces of online content each month. http://www.facebook.com/press/info.php?statistics (last visited July 22, 2011).
2. See Stephanie Chen, Divorce attorneys catching cheaters on Facebook, June 1, 2010, http://www.cnn.com/2010/TECH/social.media/06/01/facebook.divorce.lawyers/index.html?hpt=C2 (last visited July 22, 2011).
3. See, e.g., *United States v. Ragland*, 2011 U.S. App. LEXIS 14845, at *3 (11th Cir. July 20, 2011) (upholding armed robbery conviction over defendant's argument that it was improper for the district court to admit a music video obtained from defendant's MySpace account admitting involvement in separate armed robberies); *Griffin v. State of Maryland*, 2011 WL 1586683 (Md. Apr. 28, 2011) (overturning murder conviction on the basis that prosecutor failed to authenticate incriminating evidence introduced at trial, which allegedly was obtained from the defendant's girlfriend's MySpace page).
4. See *Romano v. Steel Case Inc.*, 2010 N.Y. Slip Op 20388, at *3-*4 (N.Y. Sup. Ct. Sept. 21, 2010) (admitting contents of personal injury plaintiff's Facebook page which undermined her claims that she was bed-ridden and confined to her home).
5. New York County Lawyer's Association Committee on Professional Ethics, Formal Op. 743, May 18, 2011.
6. New York State Bar Association Committee on Professional Ethics, Formal Op. 843, Sept. 10, 2010.
7. The New York City Bar Committee on Professional Ethics, Formal Op. 2010-2, September 2010.
8. See Mark A. Berman, The Ethics of Social Networking Discovery, NYLJ, Nov. 2, 2010.
9. Philadelphia Bar Op. 2009-2 (March 2009).
10. See Margaret M. DiBianca, Ethical Risks Arising From Lawyers' Use of (and Refusal to Use) Social Media, 12 DEL. L. REV. 179 (2011).
11. See Comment 2 to New York Rule of Professional Conduct 3.4; see also H. Christopher Boehning & Daniel J. Toal, How Early Does the Duty to Preserve Arise in Litigation, NYLJ, June 9, 2011.
12. See supra, note 3 at 183.
13. See *Micron Tech. v. Rambus Inc.*, 255 F.R.D. 135 (D. Del. 2009).
14. New York State Bar Association Committee on Professional Ethics, Formal Op. 843, Sept. 10, 2010.