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Zealous Counsel or Unethical Social Media Maven – How Far Can a Lawyer Go?

Social media has opened a Pandora's box of information about just about everyone today, including jurors, witnesses, opposing counsel, defendants and plaintiffs.

As lawyers we want to leave no stone unturned in pursuing a client's interest, but just how far can we go without jeopardizing our case? For instance, can counsel (or someone acting at counsel's direction, such as a paralegal) review a publicly available Facebook page to learn about the background and likes of a potential witness or party? (Most likely, yes). May attorneys "friend" that witness to gain access to the witness's full Facebook page? (It depends). Can an in-house lawyer advise an employee to remove posts from the employee's Facebook page because the lawyer thinks the post could be damaging in an ongoing lawsuit? (Most likely, not). Can a lawyer "friend" a potential juror? (No). All counsel need to be cognizant of evolving trends in ethics rules on social media use and contacts.

The New York State Bar Association recently released extensive "Social Media Ethics Guidelines" to address lawyers' utilization of social media, particularly as to interactions with clients, prospective clients, witnesses, and jurors.[1] The Guidelines are a non-binding advisory publication based on New York's Rules of Professional Conduct (and precedent in other states) and issued by the Social Media Committee of the New York State Bar Association's Commercial and Federal Litigation Section. While the Guidelines provide instruction to New York lawyers, they represent the most comprehensive statements on the ethical constraints on lawyers' use of social media to gather information in litigation. Consequently, other states will likely use the Guidelines in crafting their own policies.

1 The Guidelines are available at: https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html).

Several other states have either provided some limited guidance as to social media accounts and parties/witnesses/jurors, or are reviewing these issues. This article provides a brief summary of recent developments, utilizing the New York Guidelines as a guide and an example of how other states may view similar situations.

Reviewing Public Posts

New York Guideline No. 3.A provides that a lawyer may review the "public portion" of a person's social media profile or public posts, even if that person is represented by counsel. Under the Guidelines, such access is permissible for obtaining information about the person, including impeachment material for use in litigation. "Public" means: "information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed." (Comment to New York Guideline No. 3.A). The Guideline cautions, however, that attorneys should be aware that some social media automatically notify a person when someone views that person's account.

Reviewing Restricted Posts – Unrepresented Parties

Going one step further, New York Guideline No. 3.B allows a lawyer to request permission to view the restricted portion of an unrepresented person's social media account. The lawyer must use his or her full name and an accurate profile. Attorneys may not create fake or different profiles to mask their identities. If the person asks for additional information in response to the request, the lawyer is required to accurately provide that information, or withdraw the request. Earlier, the New York City Bar Association, in Formal Opinion 2010-2, ruled that an attorney or agent may ethically "friend" an unrepresented party without disclosing the true purposes, but may not use trickery.[2]

Reviewing Restricted Posts – Represented Parties

New York Guideline No. 3.C bars lawyers from contacting represented persons to seek to review the restricted portion of a person's social media profile unless the person (presumably, through counsel) furnished an express authorization. This includes persons represented individually or through corporate counsel. Interestingly, the Guideline advises that lawyers should use caution before deciding to view "a potentially private or restricted social media account or profile of a represented person which a lawyer rightfully has a right to view, such as a professional group where both the lawyer and represented person are members or as a result of being a 'friend' of a 'friend' of such represented person."[3]

2 See "Obtaining Evidence from Social Networking Websites," Formal Opinion 2010-2, available at http://www.nycbar.org/pdf/report/uploads/20071997-FormalOpinion2010-2.pdf.

3 Comment to New York Guideline No. 3.C.

Instructing Others

Lawyers may not direct others, such as paralegals and office staff, to engage in conduct through social media in which the lawyer may not engage. (New York Guideline No. 3.D). The comment to the Guideline makes clear that this prohibition includes a lawyer's investigator, legal assistant, secretary, other agent, or even the lawyer's client.

Using Information Provided by Clients

In situations where a client provides to his lawyer the contents of a restricted portion of a represented person's social media profile, that the lawyer may review the information, provided certain criteria are met. (Guideline No. 4.D). The lawyer may not have caused or assisted the client to: inappropriately obtain confidential information from the represented party; invited the represented person to take action without the advice of his or her lawyer; or otherwise overreach regarding the represented person. "Overreaching" in this context means situations where the lawyer is "converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient." Lawyers should be very careful not to advise a client to "friend" a represented person to obtain private information.

Deletion of Social Media Information

The New York Guidelines also address whether a lawyer can advise a client to remove content on the client's social media account (whether posted by the client or someone else). A lawyer may advise a client as to what content may be taken down or removed, as long as there is no violation of law – whether statutory or common law – or of any rule or regulation relating to the preservation of information. If the party or nonparty is subject to a duty to preserve, he or she may not delete information from a social media profile unless an appropriate record of the data is preserved.

Special Considerations Regarding Jurors

The New York Guidelines allow lawyers to research and view a prospective or sitting juror's public social media website, account, profile and posts. However, Guideline No. 5.B cautions that lawyers should be careful to ensure that no communication with the juror takes place – including automatic notices sent by social media networks. The Guidelines also preclude attorneys from making misrepresentations or engaging in deceit to be able to view a juror's social media account, profile, or posts, or directing others to do so. An earlier opinion of the New York City Bar, Formal Opinion 2012-2, concluded that attorneys may use social media websites for juror research as long as

no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. Further, neither the lawyer, nor anyone acting at her direction, may use deception to gain access or to obtain juror information.

In April, the American Bar Association ("ABA") issued Formal Opinion 466, concluding that lawyers may look at information available to everyone on a potential or actual juror's social media accounts or website. In other words, observing postings on a public portion of a social media account does not constitute improper ex parte contact with a juror.[4] However, ABA Formal Opinion 466 states that lawyers may not send access requests to jurors. Such a "communication" would constitute a prohibited ex parte contact.[5] However, under the ABA's opinion, a social media network's automatic notification to an individual that an attorney has reviewed that person's social media account is not violative of the prohibition on communicating with jurors (thus differing from the New York City Bar opinion 2012-2). The ABA considers the notification to be made by the social media platform, not the attorney. Both the New York Guidelines and ABA Formal Opinion 466 advise lawyers to review the terms of use of social networks regarding automatic subscriber notifications. Some social networks allow viewers to anonymize their viewing, for instance, which may be a useful course of action.

New York Principles Followed and Expanded in Other Jurisdictions

Other states take a similar approach to public information, generally permitting a lawyer to review the public information of a party, witness, or juror, and prohibiting a friend request or similar request to access non-public information of a juror. As to witnesses, some Bar authorities (such as those in New Hampshire) specifically allow lawyers to request access to the non-public social media profiles of witnesses, provided the attorney does not use deception. Virginia bar rules prevent lawyers from "pretextually 'friending' someone online to garner information useful to a client or harmful to the opposition," as pretexing violates Virginia Rule 8.4(c) prohibition against "dishonesty, fraud, deceit or misrepresentation." In New Hampshire, a lawyer must also inform the witness of the lawyer's involvement in the matter. In Oregon, the State Bar Ethics Committee ruled that a lawyer may access an unrepresented individual's publicly available social media information but "friending" a known represented party is impermissible absent express permission from party's counsel.[6] The San Diego Bar opined that an attorney attempting to access the non-public Facebook pages of certain high-ranking employees of the opposing party

4 Formal Opinion 466 is available at: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf/ ("ABA Formal Opinion 466").

5 ABA Formal Opinion 466 at 4.

6 Oregon State Bar Ethics Committee Op. 2013-189 (available at https://www.osbar.org/_docs/ethics/2013-189.pdf).

without disclosing the motivation of the friend request violates California Rule of Professional Conduct 2-100 (prohibiting communication with a represented party unless the attorney has the consent of the other lawyer). Interestingly, the opinion concluded "high-ranking employees" of a represented corporate adversary are considered "represented parties" for purposes of the rule.[7]

As a general rule, deceptive practices used to gain access to private social media pages may result in proceedings by bar authorities or other adverse actions. An Ohio prosecutor was fired after his office found out he had created a fake Facebook profile and "friended" a defendant's alibi witnesses, seeking to influence them against the defendant.[8]

On the subject of deleting social media pages, a Virginia court sanctioned a plaintiff and his attorney for deleting a Facebook profile and pages that contained photographs that could have negatively impacted a widowed husband's claim for damages from the wrongful death of his wife in an automobile accident.[9] While counsel denied having instructed his client to delete the postings, testimony supported a claim that the attorney directed his paralegal to tell the Plaintiff to "clean up" his Facebook entries. The court sanctioned the Plaintiff $180,000, and the Plaintiff's counsel $542,000. Plaintiff's counsel later agreed to a five year suspension. The suspension order stated that the attorney violated ethics rules that govern candor toward the tribunal, fairness to opposing party and counsel, and misconduct.[10]

The New York Guidelines provide a useful reminder to practitioners that social media communications cross state lines and may implicate other states' ethics rules. Counsel should consider Bar rules in states where counsel is admitted, as well as the jurisdiction of any pending case. In the case of misconduct in a state where counsel is not admitted, it is certainly possible for that state to make a referral to a state where an attorney is barred. While social media presents a trove of potentially useful information, all counsel need to be aware of, and abide by the ethical restrictions and to tread carefully, particularly as to non-public information. Bar rules and opinions in this area continue to develop to keep pace with technology trends. Counsel should continue to monitor further ABA and state bar rulings, particularly before conducting any research pertaining to non-public social media profiles and pages or seeking to communicate with parties, witnesses or jurors.

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7 See San Diego County Bar Association Legal Ethics Opinion 2011-2, available at https://www.sdcba.org/index.cfm?pg=LEC2011-2.

8 See Ifrah Law's blog coverage at http://crimeinthesuites.com/prosecutor-fired-for-lying-on-facebook-to-wtinesses-in-murder-case/.

9 Lester v. Allied Concrete Co., Case No. CL09-223 (Va. Cir. Ct. Sep. 1, 2011); Lester v. Allied Concrete Co., Case Nos. CL08-150, CL09-223 (Va. Cir. Ct. Oct. 21, 2011).

10 See In the Matter of Matthew B. Murray, available at http://www.vsb.org/docs/Murray-092513.pdf.

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