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The Ethical Limits Of Attorney Social Media Investigations

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Over a billion. That is the number of people who interact on social media. Last quarter alone, Facebook boasted over 1.4 billion users.[1] LinkedIn has 347 million members, Instagram has 300 million, and Twitter has nearly 290 million.[2] YouTube acclaims more than a billion users.[3]

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Given these figures across a variety of different social media outlets, it did not take long for the legal profession and social media to intersect, and attorneys are catching on. Indeed, attorneys are increasingly turning to social media for investigative purposes and as an informal discovery tool. But while Rule 1.1 of the New York Rules of Professional Conduct ("NYRPC")[4] requires competent representation of a client, nowhere has an attorney's aptitude in social media been specifically delineated. But as social media continues to thrive, and ethics opinions proliferate regarding an attorney's use of social media, this is beginning to change.

Just last month, the Commercial and Federal Litigation Section of the New York State Bar Association ("NYSBA") revised its nationally recognized social media ethics guidelines. Notably, the NYSBA updated its guidelines to include a section on attorney competency, opining that a "lawyer has a duty to understand the benefits and risks and ethical implications associated with social media, including its use as a mode of communication, an advertising tool and a means to research and investigate matters."[5] Continuing, the NYSBA opines that attorneys "need to be conversant with, at a minimum, the basics of each social media network that a lawyer or his or her client may use."[6] Given the undisputed popularity of social media, the NYSBA's analysis is certainly a step in the right direction. In addition to clients, it will not be long before the social media networks of adversaries, jurors, and witnesses are similarly mandated grounds for investigation as well.

Given attorneys' taking to social media, it is also predictable that the ethical rules will further expand to mandate an attorney's active engagement in social media as well. Indeed, NYRPC 1.1(c) provides that an attorney shall not intentionally "fail to seek the objectives of the client through reasonably available means permitted by law and these Rules." With access to nearly every social media network by computer, tablet and smart phone, it can hardly be disputed that a plethora of free information is easily accessible and at an attorney's fingertips. Instances of attorney admonishment and sanctions for failing to do so are well documented.[7]

And what information is reasonably available? The examples of evidence and information to be obtained from social media are nearly limitless. In nearly any practice area, social media may reveal juror biases, provide material for impeachment or assist in identifying a witness. More specifically, social media may benefit a client in a case where physical, mental or emotional state are at issue, it may impact an Fair Labor Standards Act matter where nonwork-related activity is shared, business marketing may evidence breach of a noncompete, and infringing music or videos may be captured and preserved as evidence. The willingness of individuals to volunteer such information should hardly be surprising, since it is now commonplace for social media users to post content, comment, and share opinions on nearly anything and everything.

But while the legal profession is rightfully taking to social media for investigative purposes, attorneys must simultaneously caution themselves to maintain compliance with the ethics rules when doing so. In most instances, the prohibitions against attorney deceit and the "no-contact" rule with respect to represented parties and jurors are of most prominent implication. It must also be remembered that attorneys' ethical obligations are imputed to their agents, investigators and even clients under NYRPC 5.3 and 8.4. As many ethics opinions recognize, such considerations primarily turn on whether a person's social media webpage is public or private and, accordingly, when contact with the social media user is prohibited.

In the case of investigating a person's public social media webpage, attorneys may rest assured that the review and use of evidence from a person's public social media webpage is permissible under the ethics rules. Specifically, the NYSBA has opined that viewing the public portion of a person's social media page, like any other public information, is entirely permissible.[8] And so should it be, as social media is no different than other source of public information that an attorney can and should comb through on a client's behalf. And given the intentionally public nature of such social media profiles or posts, concerns of breaches of privacy are not implicated. Indeed, one court has gone so far as to liken posting a tweet to screaming out of a window.[9]

The same may also be said with respect to viewing a potential or sitting juror's public social media webpage. The NYSBA, New York City Bar Association ("NYCBA"), and the New York County Lawyers' Association ("NYCLA") all extend an attorney's investigative reach to public social media pages of potential and sitting jurors, the benefit of which continues even after a juror has been sworn in and throughout trial.[10] In doing so, the NYCBA goes so far as to opine that social media has "expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything possible to learn about the jurors who will sit in judgment on a case."[11]

Attorneys are even granted wide investigative latitude when viewing and using evidence from private or restricted social media webpages in some instances. Indeed, both the NYSBA and NYCBA opine that an attorney may contact an unrepresented party to request access to their restricted social media webpage, so long as the attorney uses their full name and an accurate profile, and does so in a manner that does not create false profile to mask their identity so as to avoid implicating NYRPC 4.3 and 8.4.[12] In this instance, the active engagement of social media can be an invaluable tool for obtaining information. This is particularly the case if it is an attorney's agent or investigator who contacts an unrepresented party. Even still, many social media users are not adverse to accepting online connection requests even if they do not know who the person is. However, should the unrepresented party request information of the attorney in response to such a request, the NYSBA opines that an attorney has the option to either accurately provide such information or withdraw. The NYCBA, on the other hand, opines

that such disclosures are unnecessary.

The liberal interaction between the benefits of social media and attorney investigations significantly constricts, however, in the instance of a private social media page of a represented party or juror. This is primarily due to the no-contact rule that attorneys must be diligent in observing. The NYSBA has specifically opined that an attorney cannot contact a represented person to request access to their restricted site unless an express authorization to do so has been given.[13] But this should come as no surprise under NYRPC 4.2. That said, however, attorneys may find solace in the emerging trend of courts to permit disclosure of some, if not all, of a restricted or private social media webpage.[14]

But while attorneys may endeavor to adhere to the no-contact rule to the letter, competence in social media platforms is of utmost importance to avoid any unintended communications. Specifically, great caution must be taken in that some social media sites, such as LinkedIn, may send automatic notifications to the owner or operator of a webpage when it is viewed. This can be problematic in that contact may be deemed to have occurred with a represented party upon receipt of such notification, or if the subject of investigation is alerted to the fact that opposing counsel viewed his social media webpage. Attorneys should be especially wary of such automatic notifications in the context of sitting or potential jurors, as such contact may be similarly prohibited under NYCRP 3.5. In fact, the NYCBA and the NYCLA have both opined that even such inadvertant contact by automatic messages or notifications may be considered an ethical violation.[15]

As is clear from the proliferation of judicial decisions and ethical opinions on the issue, social media is becoming an integral part of the legal profession, and it is here to stay. But while social media is undoubtedly another weapon in an attorney's investigative arsenal, attorneys must continue to be vigilant in abiding by all applicable ethical obligations when diligently representing their clients.

—By Michael A. Kolcun and Craig Weiner, Robins Kaplan LLP

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[1] http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/ (last accessed June 30, 2015).

[2] Id.

[3] https://www.youtube.com/yt/press/statistics.html (last accessed June 30, 2015).

[4] http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf

[5] http://www.nysba.org/socialmediaguidelines/ ("NYSBA Guidelines").

[6] Id.

[7] See, e.g. Cajamarca v. Regal Entm't Group, 11-cv-2780 (E.D.N.Y. Aug. 31, 2012) (reprimanding and eventually sanctioning an attorney, in part, for failing to investigate a client's Facebook activity, noting,

"plaintiff's lawyer should be roundly embarrassed. At the very least, he did an extraordinarily poor job of client intake in not learning highly material information about his client").

[8] See NYSBA Guidelines, citing NYSBA Op. 843 (2010).

[9] See People v. Harris, 949 N.Y.S.2d 590, 595 (N.Y. Crim. Ct. N.Y. Cty. 2012).

[10] NYSBA Guidelines; NYCBA Formal Op. 2012-2 (2012); NYCLA Formal Op. 743 (2011).

[11] NYCBA Formal Op. 2012-2 (2012).

[12] NYSBA Guidelines; NYCBA Formal Op. 2010-2 (2010).

[13] NYSBA Guidelines.

[14] See, e.g. Caputi v. Topper Realty Corp., 14-cv-2634 (E.D.N.Y. Feb. 25, 2015); Glazer v. Fireman's Fund Ins. Co., 11-cv-4374 (S.D.N.Y. April 4, 2012).

[15] NYCBA Formal Op. 2012-2 (2012); NYCLA Formal Op. 743 (2011).
