

Don't Get Tagged – Avoiding Ethical Missteps with Social Media Investigations

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Blog Post

As the number of people who interact on social media surpasses the one billion mark, attorneys are catching-on and turning to various platforms for investigative purposes and as informal discovery tools. We all know that the Model Rules of Professional Conduct require competent representation, but now some of the more progressive bar associations are mandating aptitude in social media. For example, the New York State Bar Association recently revised its nationally-recognized *Social Media Ethics Guidelines* to include a section on competency, opining 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.”

As many ethics opinions recognize, the propriety of social media investigations primarily turns on whether the target – such as an opposing party or witness – maintains a social media page that is accessible to the public. As a general rule, public pages are fair game, and just like any other public information, they should be. The courts are even getting in on the action, with one finding that: **“If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy.”** See *People v. Harris*, 949 N.Y.S.2d 590, 595 (N.Y. Crim. Ct. N.Y. Cty. 2012). The same is also true with respect to viewing a potential or sitting juror’s public social media page unless the presiding judge specifically bars such conduct.

The liberal interaction of 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. In most instances, attorneys can be guided by the familiar “no-contact” rule and the obvious prohibition of employing deceit.

Competence in the numerous social media platforms to be employed is of utmost importance to avoid any inadvertent contact that can lead to an ethical mishap. For example, caution must be taken in that some sites, like LinkedIn, send automatic notifications when a social media profile is viewed. Attorneys should be especially wary with respect to sitting and potential jurors, as two local New York bar associations opine that such unintended contact may technically amount to an ethical violation.

Attorneys should also remember their ethical obligations are imputed to their agents. Just a few months ago, the Supreme Court of New Jersey considered a case where attorneys directed their paralegal to submit a friend request and monitor an opposing party’s Facebook profile. See *Robertelli v. N.J. Office of Atty. Ethics*, 134 A.D.3d 963 (N.J. 2016). Even though the paralegal did not use a false identity, her friend request did not disclose that she was working for the other side. The New Jersey Supreme Court went so far as to allow the state’s Office of Attorney Ethics to investigate the matter even after a local ethics committee declined to pursue the potential attorney misconduct.

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