ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I have found that accessing various forms of social media has become a highly useful tool in my practice. However, I want to know if there are limits as to how Facebook, Twitter, LinkedIn and the like can be used in connection with handling my various client matters. For example, what are the recommended methods for conducting research on adverse witnesses or potential jurors through the use of social media? What other electronic means can be utilized to conduct such research? Most important, what ethical obligations come into play when one uses social media in these contexts?

Sincerely,
I. Tweet

Dear I. Tweet:

In recent years, the social media explosion in the legal profession has raised numerous ethical considerations. Although the New York Rules of Professional Conduct (RPC) provide some guidance for attorneys when using social media (and we will review the applicable provisions of the RPC here), the reality is that we all practice law in a rapidly evolving environment in which the rules have yet to be fully articulated. That said, lawyers need to be fully competent in social media usage and the ethical provisions arising from such usage.

As noted in the May *Forum* (which discussed the use of mobile technology in 21st century legal practice), Rule 1.1 of the RPC states our ethical obligation to provide competent representation. Like it or not, this means that we must understand how technologies are utilized and become familiar with them. The use of social media by attorneys falls within this obligation. It is imperative that attorneys utilizing social media educate themselves as to the functionality of the social media sites which they wish to access, whether for research or other purposes.

Multiple ethics opinions of the New York State Bar Association (NYSBA) and other bar associations provide guidance to our profession. In N.Y. State Bar Op. 843 (2010), NYSBA's Committee on Professional Ethics (the Committee) found that "[a] lawyer representing a client in a pending litigation may access the public pages of another party's social networking website for the purpose of obtaining possible impeachment material for use in the litigation." The Committee additionally found that "accessing the social network pages of the [opposing] party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction)" so long as the attorney does not friend the other party or direct another person to do so. *Id.* The Committee was careful to distinguish between public social networking pages and private pages where attempts to access such private information would ordinarily be impermissible. In the view of the Committee, accessing publicly available social media data "is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service." *Id.* Therefore, publicly available social media information would be very useful for conducting research on adverse witnesses or even potential jurors.

In the same month that the NYSBA Committee released Opinion 843, the Committee on Professional Ethics for the New York City Bar Association (NYCBA), in Formal Opinion 2010-2, addressed the question whether a lawyer, acting either alone or through an agent such as a private investigator, may "resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds." *Id.* NYCBA found that an attorney who seeks to obtain information maintained on a social networking site should utilize "informal discovery" practices, which may include "truthful 'friending' of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page." *Id.* Furthermore, NYCBA suggested 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. *Id.* In concluding its opinion, NYCBA stated that "a lawyer may not use deception to access information from a social networking page" since such acts violate both Rule 4.1 ("a lawyer shall not knowingly make a false statement or fact or law to a third person") and Rule 8.4(c) ("a lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation"). *Id.* So for example, if an attorney or another person acting at the attorney's direction sets up a Facebook page or Twitter feed as a ruse for

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the purpose of drawing in the opposing party in an attempt to access that party's private information, such conduct (often called "pretexting") would almost certainly run afoul of Rules 8.4, 4.1 and 5.3(b).

In May 2011, the New York County Lawyers' Association (NYCLA) Committee on Professional Ethics published Opinion 743, which focused on the use of social media for juror research and the application of Rule 3.5.

Rule 3.5(a)(4) states that a lawyer shall not

> communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order.

Furthermore, Rule 3.5(a)(5) states that a lawyer shall not

> communicate with a juror or prospective juror after discharge of the jury if: (i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service.

As stated in the NYCLA opinion, lawyers do not escape the reach of Rule 8.4(a) by using third parties; lawyers are prohibited from doing indirectly what they cannot do themselves. *Id.* This should come as no surprise as most of us know that a lawyer may not direct a nonattorney employee of his or her firm or a retained private investigator to make contact in any way with prospective jurors to learn more about them.

The NYCLA opinion concluded that the passive monitoring of jurors (which would include viewing publicly available social media pages) may be permissible. *Id.* However, the NYCLA opinion cautioned that the lawyer (or agent) conducting online searches of social media pages is precluded from having "contact or communication with the prospective juror and the lawyer does not seek to 'friend' jurors, subscribe to their Twitter accounts, send juror tweets or otherwise contact them." *Id.* Those familiar with Internet research understand that getting information about a particular person is often as simple as plugging the name of a person into an Internet search engine (such as Google). Often, the search may yield the various social media accounts associated with that person, and the information posted to such accounts could be easily accessible. Depending on security settings, this may include biographical information, status updates on Facebook or LinkedIn, as well as tweets on Twitter. As with all things relating to social media usage, attorney professionalism – not to mention common sense – suggests that the prudent practitioner exercise both caution and discretion when conducting such searches in order to avoid a potential ethical minefield. Last, the NYCLA opinion reminded us that, under Rule 3.5(d), if the lawyer learns of improper conduct by a juror, or by another toward a juror or a member of the juror's family, the lawyer then has an obligation to reveal the misconduct to the court.

The use of social media for juror research was also addressed by NYCBA in Formal Opinion 2012-2. Although the opinion states that a lawyer can use social media websites for juror research, it stressed that there must be no communication occurring between lawyer and juror as a result of the research. Unlike others who have weighed in on this subject, NYCBA may have slightly pushed the proverbial envelope by suggesting that there is possibly another side of this coin. Notwithstanding the prohibitions prescribed by Rule 3.5(a)(4) and (5), "standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on the case." *Id.* In other words, NYCBA suggested that the attorney seeking to learn about potential jurors should use all reasonable means to conduct his or her research but should always use caution when conducting such research.

NYCBA Formal Opinion 2012-2 also dealt with the question of what constitutes a "communication" for purposes of Rule 3.5, noting that attorneys may not research jurors if the result of the research is that the juror will receive the communication. For example, a communication which may be prohibited will depend on the mechanics and privacy settings of each service. Some services (such as LinkedIn) will notify a party if his or her profile has been viewed, while others provide notification only if another user initiates an interaction (which is one of the integral parts of the experience of using social media sites such as Facebook and Twitter). Such communications may be prohibited even when inadvertent or unintended. *Id.* What this means is that attorneys who use social media *must* become fully familiar with the functionality of various social media sites (as per the requirements of Rule 1.1) before utilizing them for research purposes. One click of the mouse on the wrong part of a social media page can mean a world of trouble. Saying that you "*accidentally*" clicked on the part of a social media page that seeks access to a potential juror's private site may not get you off the hook.

Although the ethics opinions discussed here explore issues which may arise from usage of the more popular social media sites (i.e., Facebook, Twitter, YouTube and LinkedIn), social media sites primarily geared towards sharing visual content (such as Instagram, Vine and Pinterest, respectively) also should be noted. The publicly available information on these sites may contain a treasure trove of information since users oftentimes post everything they do on a given day. These sites also carry with them the same cautions applicable when accessing the more popular social media sites. Like Twitter, Instagram and Vine allow you to "follow" users so that you can both observe and comment

on various user postings. Both sites also contain privacy control features which prevent public viewing. User postings which have not been made private can be readily accessible by way of an Internet search engine (such as Google). However, as the opinions discussed here demonstrate, attorneys (or someone acting at their direction) should not attempt to contact a party or adverse witness who has engaged privacy settings in order to gain access to that user's privately posted content, unless they clearly state the purpose for making such contact.

Social media is a rapidly evolving area of technology which provides countless benefits for all those who use it. Attorneys are strongly advised to be knowledgeable of how these sites operate and the ethical concerns which arise from the usage of social media in their practices. We believe that common sense usage of social media will help you avoid many ethical pitfalls both known and unknown.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq., and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am always conscious about running up unnecessary legal fees in litigation matters and I am acutely aware that, in this current economic climate, clients scrutinize legal bills more carefully than ever. I recently succeeded in winning summary judgment on liability for my client in a breach of contract matter and the trial court subsequently directed a hearing on damages in which my adversary, David Delayer (Delayer), moved for a stay in the appellate court. The stay was granted, however, on the condition that Delayer's client post an undertaking. The day after the stay was granted, I emailed Delayer asking if his client would be posting the undertaking directed by the appellate court. His response was, "We have not made that determination as of yet." A few days later, at a conference before the trial court, Delayer said that his clients "were not seeking to obtain an undertaking." Since Delayer represented that he was not going to seek an undertaking, the trial court scheduled a damages hearing at the conference to occur in 30 days. The day after the conference and in preparation for the hearing, I served a document subpoena upon Delayer, which he moved to quash. That motion was argued a few days before the damages hearing and was granted in part by the trial court. The following morning, I was informed by Delayer that his client had posted the undertaking directed by the appellate court which it had required in order to stay the damages hearing. That afternoon, counsel for the insurance company (which issued the undertaking) informed me that Delayer had applied for the bond "weeks earlier." This is the first I had heard about the timing of the application for the bond, and from past experience I know that a bond is usually issued in a matter of days (if not the same day). Had I known that Delayer had applied for the bond weeks ago (and assuming it was issued shortly after he applied for it), then I would not have been forced to spend unnecessary time opposing his motion to quash since he likely knew weeks prior that the bond was issued, thereby staying the damages hearing.

I believe that Delayer's actions are unprofessional. At a minimum, Delayer's behavior is a clear example of uncivil (perhaps unethical) conduct motivated solely for the purpose of increasing my client's litigation expenses.

My questions for the Forum: Did my adversary act unprofessionally? Is Delayer's conduct sanctionable?

Sincerely,
A. Barrister

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