The Ethics of Social Media Research

By James M. Dedman IV

Lawyers now find themselves well into the era of social media discovery. Time was, Internet evidence was a novelty, and courts eyed such issues with wonder and skepticism. **Cf. St. Clair v. Johnny's Oyster & Shrimp, Inc.,** 76 F. Supp. 2d 773, 774 (S.D. Tex. 1999) ("[A]ny evidence procured off the Internet is adequate for almost nothing . . . ."). These days, these inquiries are routine. Accordingly, corporate counsel should be aware of the ethical principles governing social media research in litigation (whether they be conducting such research internally or relying on outside counsel to do so).

First and foremost, lawyers must familiarize themselves with legal technology issues. Generally, "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ." *See* ABA Model Rule of Prof'l Conduct 1.1, cmt. In fact, North Carolina has applied this requirement to social media specifically, noting that "[c]ompetent representation includes knowledge of social media . . . ." *See* NC 2014 Formal Ethics Opinion 5.

Certainly, reviewing publicly accessible social media information is generally acceptable. In litigation, "[a] lawyer may access publicly available information on a social networking website." *See* Oregon State Bar Ethics Committee Op. 2013-189. More specifically, "[a] lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation." *See* NY State Bar Opinion No. 843 (2010). That said, practitioners should be aware of the courts' increasing appreciation of an individual's privacy in this context. **Cf. Riley v. California,** 134 S. Ct. 2473, 2490 (2014) ("An Internet search and browsing history . . . could reveal an individual's private interests or concerns.") (noting privacy implications of mobile phone searches). In light of the recognition of these privacy issues, courts have increasingly limited the scope of social media discovery requests. *See* **Smith v. Hillshire Brands,** No. 13–2605, 2014 WL 2804188, at *4 (D. Kan. June 20, 2014) ("[T]he record does not support defendant's extremely broad discovery request for all-inclusive access to plaintiff's social media accounts."); **Pereira v. City of New York,** No. 26927/11, 2013 WL 3497615, at *2 (N.Y. Sup. Ct. June 19, 2013) ("[D]ue to the likely presence of material of a private nature that is not relevant to this action, this court shall conduct an in camera inspection of [plaintiff's social media sites.]"). In sum, lawyers should narrowly tailor these discovery requests to avoid an unnecessary discovery dispute.

When research prompts a desire to contact the owner of a social media profile, ethical issues abound. Obviously, a lawyer should refrain from sending a friend request to a represented party. "As long as the lawyer does not 'friend' the other party or direct a third person to do so, accessing the social network pages of the party will not violate [the ethical rule]." *See* NY State Bar Op. No. 843 (2010); *see also* San Diego County Bar Association Opinion 2011-2 ("[T]hose rules bar an attorney from making an ex parte friend request of a represented party."). As always, ex parte conduct is prohibited.

Lawyers should also remain cautious when contacting witnesses via social media. "[T]he attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request." San Diego County Bar Ass'n Op. 2011-2; *see also* Philadelphia Bar Ass'n Professional Guidance Committee, Op. 2009-02 (finding friend request to fact witness "deceptive" because it "omit[ted] 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"). That said, "[a] lawyer may request access to non-public information if the person is not represented by counsel in that matter and no actual representation of disinterest is made by the lawyer." *See* Oregon State Bar Ethics Committee Op. 2013-189. In light of the foregoing, "friend" witnesses at your peril.

Of course, these are not the only ethical principles governing social media research. In light of the duty to stay abreast of such issues, corporate counsel should consider these rules before beginning such research or instructing outside counsel to do so on their behalf.

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