

# Social Media Creates Complex Ethical Issues

Social media networks are indispensable tools used by legal professionals and have transformed the way lawyers communicate with each other and their clients. However, as social media networks proliferate and become more technologically advanced, so too do the ethical issues they present to lawyers.

Indeed, due to the ethical quandaries that social media communications sometimes create for attorneys, the Commercial and Federal Litigation Section of the New York State Bar Association at its January 2014 Annual Meeting presented a CLE entitled “Social Media in Your Practice: The Ethics of Investigation, Marketing, and More.”<sup>1</sup> At this

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CLE, section members used their mobile devices to answer questions concerning various hypothetical social media scenarios. We discuss below some of the issues raised by the hypothetical scenarios as well as the percentage of responses to each question.

## Must Understand Technology

Lawyers who practice in 2014 cannot use a social media account without understanding the ramifications of how information is posted or shared on such platform. It is crucial that lawyers be conversant with the nuances of each social media network that they or their clients use.

[I]t is incumbent upon the attorney to understand the functionality of any social media service she intends to use for ... research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site.<sup>2</sup>

Indeed, the comment to Rule 1.1 to the Model Rules of Professional Conduct of the American Bar Association was recently amended to provide:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.<sup>3</sup>

## Friending of Unrepresented Person

*Hypothetical:* An attorney, when “friending”<sup>4</sup> an unrepresented witness on Facebook, must reveal his or her: [you may pick multiple answers]

- Real Name (84 percent)
- Real Profile (36 percent)
- Profession (55 percent)
- Name of Law Firm (49 percent)
- Name of Client (42 percent)
- The purpose of the communication (66 percent)

Almost 50 percent of the respondents answered that a lawyer was ethically required to affirmatively reveal the name of her law firm to an unrepresented person being “friended,” and more than 50 percent also believed that a lawyer is required to affirmatively identify her profession and the purpose of the “friending” to the unrepresented person.

However, the above three disclosures, in fact, are not required in New York when seeking to “friend” an unrepresented person. While a New York ethics opinion has stated that a lawyer shall not “friend” an unrepresented individual using “deception,”<sup>5</sup> it opined that it is ethically proper for a “friending” lawyer or her agent to use her “real name and profile” when seeking to be connected with, and thereby being able to view, an unrepresented person’s social media account. In New York, a lawyer is not specifically required to disclose her profession, the name of her law firm or the reasons for making the “friend” request to the unrepresented person.<sup>6</sup>

Ethics opinions from other states, however, have opined differently. New Hampshire requires that a request to a “friend” must “inform the witness of the lawyer’s involvement in the disputed or litigated matter,” the disclosure of the “lawyer by name as a lawyer” and the identification of “the client and the matter in litigation.”<sup>7</sup> San Diego requires disclosure of the lawyer’s “affiliation and the purpose for the request.”<sup>8</sup> Philadelphia notes

that the failure to disclose that the “intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness” constitutes an impermissible omission of a “highly material fact.”<sup>9</sup> Finally, Oregon has opined that if the person being sought out on social media “asks for additional information to identify [the l]awyer, or if [the l]awyer has some other reason to believe that the person misunderstands her role, [the l]awyer must provide the additional information or withdraw the request.”<sup>10</sup>

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### Client Friending

The question that next arises is when your client seeks to “friend” a person and then provides counsel with a copy of private or restricted information the client obtained from being granted access to that “friend’s” social media site. Although New York has not addressed this issue, New Hampshire has opined that a lawyer’s client may send a “friend” request and, if access is granted, the client can provide the information to her lawyer,

but the ethical propriety of same “depends on the extent to which the lawyer directed the client who is sending the [social media] request,” and that the lawyer has complied with all other ethical obligations. In addition, the client’s profile needs to “reasonably reveal[] the client’s identity”<sup>11</sup> to the other person.

Rule 4.2(b) of the New York Rules of Professional Conduct provides that, notwithstanding the prohibition under Rule 4.2(a) that a lawyer shall not “cause another to communicate about the subject of the representation with a party the lawyer knows to be represented,”

a lawyer may cause a client to communicate with a represented person ... and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person’s counsel that such communications will be taking place.

Thus, in New York, lawyers need to use caution when communicating with a client *about* her connecting to or “friending” a represented person and obtaining private information from that person’s social media site.

### Viewing Juror’s Social Media Posts

*Hypothetical:* Is it permissible for an attorney preparing for or in the midst of a trial to view a juror’s public social media postings when the attorney is also a member of such social media platform?

- Yes (54 percent)
- No (30 percent)
- It depends (16 percent)

New York ethics opinions draw a distinction between public and private juror information,<sup>12</sup> and permit viewing the public portion of a juror's social media profile. However, ethics opinions prohibit attorneys from attempting to access private juror information from a juror's social media network through a "friend request" or by other means.

Significant ethical concerns would be raised by sending a "friend request," attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog or "following" a juror's Twitter account. We believe that such contact would be impermissible communication with a juror.<sup>13</sup>

When researching jurors, attorneys must have a clear understanding of the functionality of any social media network where they may search for public information.

[W]hile an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.<sup>14</sup>

In response to the questions raised in the above hypothetical, 16 percent of the audience correctly answered "it depends." On the other hand, 54 percent of the audience believed it was ethically permissible, without restriction,

to view a juror's public social media postings when the attorney is also a member of such social media platform. Very few lawyers understand that if they perform a simple Google search and click on a link to a social media account of a juror that an automatic message may be sent by that social media network, such as LinkedIn, to the person whose profile is viewed. This notification would identify the name of the person viewing the juror's social media account.

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When researching jurors, attorneys must have a clear understanding of the functionality of any social media network where they may search for public information.

In New York, such an "automatic" communication with a juror is prohibited and a

request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the "sender" was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.<sup>16</sup>

Currently, LinkedIn is the social media platform that would most likely cause an attorney to run afoul of such prohibition. Thus, in order

for an attorney's profile not to be identified through LinkedIn when viewing a person's public social media profile, a user must change her settings so that she is anonymous or, alternatively, be fully logged out of her LinkedIn account.

Attorneys in jury trials would be wise to take note that opening a juror's LinkedIn profile page may result in such communication. This issue nearly caused a mistrial in a recent federal trial where an associate looked up a juror's LinkedIn profile during the course of the trial without taking the above precautions. The juror then sent the judge a note complaining of being cyberstalked by the defense and indicated that she felt intimidated and not objective. The trial proceeded after the court directed the jury to disregard the communication.

#### Attorneys' Listings on LinkedIn

*Hypothetical:* May an attorney or law firm identify areas of expertise on LinkedIn under the categories "specialty" or "skills & expertise"? [you may pick multiple answers]

- An attorney may identify his areas of expertise under "specialty" (30 percent)
- A law firm may identify its areas of expertise under "specialty" (27 percent)
- An attorney may identify her areas of expertise under "skills & expertise" (72 percent)
- A law firm attorney may identify its areas of expertise under "skills & expertise" (66 percent)

Another recent New York ethics opinion focused on what an attorney and law firm can post as

part of their social media profile. The New York State Bar Association opined that listing areas of law practice

under a heading of “Specialties” would constitute a claim that the lawyer or law firm “is a specialist or specializes in a particular field of law” and thus, absent certification as provided in Rule 7.4(c), would violate Rule 7.4(a) ... . *We do not in this opinion address whether the lawyer or law firm could, consistent with Rule 7.4(a), list practice areas under other headings such as “Products & Services” or “Skills and Expertise.”*<sup>17</sup>

It is remarkable that 30 percent of the audience believed that it would be ethically appropriate for a lawyer to identify her areas of expertise under the “Specialties” heading, even if she was *not* certified by the appropriate accrediting body, where New York has expressly opined that this is not permissible.

In March 2012, LinkedIn deleted the “Specialties” heading as an option for an individual’s LinkedIn profile, but it remains available for law firms. Therefore, law firms need to use caution in listing practice areas under the “Specialties” heading. NYSBA Opinion 972, however, expressly does not address the question of whether a lawyer or law firm can list practice areas under other headings such as “Skills & Expertise.” Other bar associations have opined on this issue, including Philadelphia, which found listing areas of practice under “Skills and Expertise” to be permissible.<sup>18</sup> South Carolina would prohibit use of the term “expert” or

“expertise” by an uncertified “specialist” under the LinkedIn heading “Skills and Expertise.”<sup>19</sup>

Technology has created many new tools that attorneys can take advantage of in their practice. Technology equally presents challenges as social media networks are constantly changing and new social media applications and platforms are being created. The one constant, however, is that attorneys must have a broad understanding of the social networks that they and their clients are using.



1. The CLE was moderated by co-author Mark A. Berman and the panelists were: U.S. Magistrate Judge Lisa Margaret Smith, Southern District of New York; U.S. Magistrate Judge Ronald J. Hedges, (ret.) District of New Jersey; Prof. Jonathan I. Ezor; Touro Law School; Nicole Black, Esq., and Ignatius A. Grande, Esq., Hughes Hubbard & Reed, also a co-author of this article.

2. The Association of the Bar of the City of New York (NYCBA) Formal Op. 2012-2.

3. Model Rules of Professional Conduct of the American Bar Association, Rule 1.1 Comment (emphasis added).

4. “Friending” is the process through which a member of Facebook designates another person as a “friend” in response to a request by that person to be able to view and respond to restricted information of the member. “Friending” may enable a member’s “friends” to view the member’s restricted content. “Friending” may also create a publicly viewable identification of the relationship between the two members.

5. NYCBA Formal Op. 2010-2.

6. Id.

7. New Hampshire Bar Association Ethics Committee Advisory Op. 2012-13/05.

8. San Diego County Bar Legal Ethics Op. 2011-2.

9. Philadelphia Bar Association Professional Guidance Committee Op. Bar 2009-02.

10. Oregon State Bar Formal Ethics Op. 2013-189.

11. New Hampshire Bar Association Ethics Committee Advisory Op. 2012-13/05.

12. See New York County Lawyers Association (NYCLA) Formal Op. 743 (2011); NYCBA Op. 2012-2.

13. NYCLA Op. 743 (2011).

14. NYCBA Op. 2012-02.

15. NYCBA Op. 2012-02; see NYCLA Op. 743 (2011).

16. NYCBA Op. 2012-02.

17. New York State Bar Association Committee on Professional Ethics (NYSBA), Ethics Op. 972 (2013) (emphasis added).

18. See Philadelphia Bar Association Professional Guidance Committee Op. Bar 2012-8; see also New Hampshire Bar Association, Ethics Corner Opinion (June 21, 2013) (“[Y]ou may list your areas of practice under Skills and Expertise, so long as you are careful not to identify yourself as a specialist. Also, be mindful that LinkedIn sometimes changes its headings. The profile section now identified as ‘Skills and Expertise’ used to be ‘Specialties,’ and listing your areas of practice as ‘Specialties’ could be problematic.”). But see Florida Bar Advisory Advertising Opinion (Sept. 11, 2013).

19. See <http://abnormaluse.com/2013/03/the-south-carolina-bar-and-the-linkedin-loop-hole.html>.

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