

ETHICS, THE INTERNET AND SOCIAL MEDIA RESEARCH IN LITIGATION

(PART ONE IN A THREE PART SERIES)

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Introduction

The internet, and social media in particular, presents a new and interesting source of information about parties, witnesses, judges, and potential jurors. The use of social media research in litigation also presents a plethora of ethical and legal questions for attorneys and courts. To date, the use of information discovered on a social networking site (such as Facebook or Myspace) in evidence has not yet received significant attention in reported decisions. This Advisory, the first in a series of three, reviews the landscape in which these ethical and evidentiary issues will be resolved.

What are “social media” and “social networking”?

“Social media” is the term used to encompass social networking, internet forums, blogs, wikis, podcasts, picture and video-sharing, instant messaging, and most any form of communication that is facilitated over the internet. Social media websites include Facebook, Myspace, LinkedIn, Blogger, LiveJournal, WordPrss, Twitter, FriendFeed, Meetup.com, Match.com, Delicious, Yelp, Flickr, Photobucket, Snapfish, Gmail, YouTube, and Skype to name just a few. “Social networking” sites, such as Facebook, Myspace and LinkedIn, are a vibrant and fast growing subgroup of social media where people form social groups which interconnect through networks and “friends.”

Users of social networking sites create profiles which include personal information, such as education and employment information, birthdays and the status of relationships. Users can post status messages, photos, videos and notes about themselves. They also allow other users, called “friends”, to post comments on their “wall” – a bulletin board type feature that is typically visible only to the user’s “friends” and “network”, groups based on the user’s school or work. Most users set privacy settings to delineate who may see their information, but the default setting allows all of a user’s friends and everyone in the user’s network to see the user’s profile and everything posted there. Users frequently have in excess of 100 “friends.” What is more, some people “collect” friends – meaning that

Attorney Conduct & Liability Practice Group

Peter Beeson, Co-Chair
603.410.1712
pbeeson@devinemillimet.com

**Mitch Simon, Of Counsel
and Co-Chair**
603.228.1541
msimon@devinemillimet.com

Andy Dunn
603.695.8503
adunn@devinemillimet.com

Bob Dewhirst
603.695.8646
rdewhirst@devinemillimet.com

Shelagh C.N. Michaud
603.695.8703
smichaud@devinemillimet.com

Anne E. Trevethick
603.695.8725
atrevethick@devinemillimet.com

Joshua M. Wyatt
603.695.8517
jwyatt@devinemillimet.com

DEVINEMILLIMET.COM

they accept mostly every “friend request” regardless of whether they know the person or not.

How does social media research lend itself to litigation?

Depending on the litigation, a Facebook or MySpace page can provide useful and informative information about opposing parties and witnesses. “Given the open nature of social networking sites, and the abundance of information posted by members, litigators are increasingly discovering that properly seeking information for their cases from these sites can be a valuable tool in their arsenal. In fact, some attorneys now make it a regular part of their practice to search social networking sites to discover information about their adversaries, witnesses, and even potential jurors.” Brown, Daniel L. and Kahn, Aimee, R., *The Smoking Gun in an Adversary’s Network*, New York Law Journal (Sept. 11, 2009).

One judge recently used information from a Facebook profile to catch an attorney in a lie. The attorney, who was a Facebook friend of the judge, requested a continuance claiming that her father died. While visiting Facebook, the judge found that the lawyer was posting status updates about “her week of drinking, going out and partying.” When the attorney’s partner came back to request a second continuance, the judge denied the request and informed her about the information she found on Facebook. See [*Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*](#), July 31, 2009; [*What Happens Online Ends Up in Court*](#), Sept. 2009. Attorneys have used Facebook and Myspace information obtained through discovery to show that a claimant’s damages are far less than claimed or even that a claimed injury is non-existent. Others have upended a disability claim based upon a claimant’s blog entries detailing her daily activities.

Information posted on Facebook and MySpace lies in an amorphous territory of private information which is posted on a public, or semi-public, forum with privacy settings set by the user. Users may limit who can view their profiles, but many experts and some courts have questioned what expectation of privacy a person can have in information published to hundreds of people on Facebook or MySpace. That being said, there may be ethical limits to social media discovery - - particularly when the underlying purpose is concealed from the user. In the opinion summarized below, the Philadelphia Bar Association Professional Guidance Committee issued an opinion on this question.

The Philadelphia Bar Association’s Professional Guidance Committee Questions the Ethics of “Virtual Pretexting”

An attorney deposes an 18-year old witness who was not a party to the case. During her deposition, the witness reveals that she has Facebook and Myspace accounts. The attorney does not inquire about the contents of the pages or for permission to access the accounts, but believes that the pages “contain information relevant to the matter in which the witness was deposed, and that could be used to impeach the witness’s testimony should she testify at trial.” After the deposition, the attorney attempts to

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001

access both accounts and finds that they cannot be opened without the witness's permission.

The attorney then inquired of the Philadelphia Bar Association Professional Guidance Committee whether it was ethical for him to "ask a third person, someone whose name the witness will not recognize, to go to the Facebook and Myspace websites, contact the witness and seek to 'friend' her, to obtain access to the information on the pages." The attorney proposed that this person would use his or her real name, but "would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness." Additionally, if the person obtained information about the witness, he or she would "provide the information posted on the pages to the [attorney] who would evaluate it for possible use in the litigation."

The Committee concluded that the use of an agent to gain access to an individual's social network, such as a Facebook or MySpace account, by "friending" the witness without disclosing the agent's intent, and then using information on the page in litigation, violated Pennsylvania's Rule of Professional Conduct, Rules 5.3, 8.4 and 4.1. See Op. 2009-02, Phila. Bar Ass'n. Prof'l Guidance Comm., March 2009. The Committee found that using an agent who is not known to the witness to "friend" the witness and then gather information about the witness from the Facebook or MySpace pages constituted deceptive conduct which is not permitted by attorneys or at an attorney's direction. See id.

Deception is deception, regardless of the victim's wariness in her interactions on the internet and susceptibility to being deceived. The fact that access to the pages may readily be obtained by others who either are or are not deceiving the witness, and that the witness is perhaps insufficiently wary of deceit by unknown internet users, does not mean that deception at the direction of the inquirer is ethical.

Id.

The practice at issue in this opinion, known as "virtual pretexting," is quickly gaining widespread media attention and criticism. While trolling public social media profiles for information has some similarities to videotaping a party or someone doing yard work or shoveling the driveway, the Philadelphia committee drew the line at deceptively friending a social media user, finding that it is more akin to gaining access to a person's home under false pretenses and then surreptitiously videotaping the homeowner. See Phila. Bar Op. 2009-02. The issue for courts and states in the future will be whether this analogy is persuasive in the more complex world of social networking, in which users of Facebook and Myspace freely post private, sometimes intimate, information and often inadvertently publish this information to "friends of friends," or a large collegiate network of current students, faculty, staff and alumni, or even to "everyone." Many users indiscriminately accept "friend requests" with little

or no knowledge of the person making the request – large friends lists are seen by some as a badge of honor or a sign of acceptance. Gaining a person’s trust and therefore access to their personal information can be easier on the internet and in social networking environments.

So if a person grants access, to an imposter, is the information fair game? According to the Philadelphia Bar Association Professional Guidance Committee and comments in cyberspace, no. Using information obtained through non-deceitful practices – such as Googling a witness and searching publicly available social media, or reading a person’s blog entries which are not shielded from public view, or discovering Facebook or Myspace information which is open to “everyone” or a network of which the researcher is a member – is viewed by most as acceptable and ethical. Gaining access to a person’s personal information through “virtual pretexting” – even if it is otherwise shared with 100s of people – will clearly be more closely scrutinized.

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