

TECHNOLOGY FOR THE SOLE PRACTITIONER & SMALL FIRM

Ethics: Social Media, Trial Publicity and Professionalism

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Main Topics

- Why seek data from social media platforms
- How to access social media evidence
- Ethical pitfalls to avoid
- Admissibility issues
- Researching jurors' social media sites
- Advertising and providing advice through social media
- Privacy Issues
- Jurors and Social Media
- Advertising on Social Media



WHAT IS SOCIAL MEDIA?

Why Seek Data From Social Media Platforms and How

- Necessity of knowing how to obtain and use evidence available on social media
 - Cases where use of social media is an integral element of the claim
 - Cases where plaintiff's day-to-day activities are an issue
 - Cases involving assets
 - *In re Mangum* (2012)
 - *Fitzgerald v. Duff* (2013)

Competency Requirement

- ABA RPC 1.1, comment 8
- Statutes and laws governing the use of social media
 - Stored Communications Act



What To Tell Your Client

- Reviewing and adjusting privacy settings
- Dangers of advising your client to remove certain content
- Recent spoliation cases
 - *Gatto v. United Air Lines, Inc.* (2013)
 - *Katiroll Company, Inc. v. Kati Roll and Platters, Inc.* (2011)
- Advising your client to add content

How to Get Social Media Evidence Informally

- Starting with publicly available information
 - *Indep. Newspapers, Inc. v. Brodie* (2009)
 - New York State Bar Assn. Comm. on Prof'l Ethics, Op 843 (2010)
- Beware of automatic alerts
- Preserving and organizing information
 - *E.C. v. R.H.* (2015)
- Avoiding delay
 - *Guzman v. Farrell Building Co.* (2012)

Ethical Pitfalls to Avoid



- If the social media account is privacy protected and if the owner is represented by counsel: avoid pretexting
 - RPC 4.2 and 8.4(c)
 - *Robertelli v. New Jersey Office of Attorney Ethics*
- If person is not represented by counsel
 - Split of opinions on whether a lawyer must state his purpose in accessing the site
 - Using information obtained by your client who “friends” the witness

How to Get Social Media Evidence Through Formal Discovery

- Subpoenaing social media
 - Stored Communication Act prevents social media from divulging private communications
 - *Crispin v. Audigier* (2010)
 - Many platforms provide guidelines to owners on how to download content
 - Subpoena to reveal identity of anonymous poster-*Dendrite standard*



Obtaining Social Media Evidence Through Formal Discovery From Your Adversary or Witness

- Make discovery demands specific
 - Use broad definition of social media website
- Scope of social media discovery permitted by courts: two approaches
 - Requiring showing of factual predicate
 - *Mailhoit v. Home Depot USA, Inc.* (2012)
 - *Abrams v. Pecile* (2011)
 - *Caraballo v. City of New York* (2011)
 - Allowing Broad Discovery
 - *Romano v. Steelcase* (2010)
 - *Nucci v. Target Co.* (2015)



Obtaining Social Media Evidence Through Formal Discovery From Your Adversary or Witness (cont'd)

- Methods of accessing and downloading social media
 - Requiring owner to provide login and password
 - *Largent v. Reed* (2011)
 - Providing access by consent
 - *Gatto v. United Airlines* (2013)
 - In camera review
 - *Douglas v. Riverwalk Grill, LLC* (2012)
 - *Tompkins v. Detroit Metropolitan Airport* (2012)
 - Court “friending” a party
 - *Barnes v. CUS Nashville, LLC* (2013)
 - Court order requiring account owner to search for and produce data

Social Media in the Workplace

- Employers' ability to monitor employees' activity on its devices and on its network
- *Stengart v. Loving Care (2010)*



Researching Juror's Social Media Sites

- Voir Dire
 - Lawyer may research juror's social media profile
 - Opinion 466
 - Do not 'friend'
 - *Carino v. Muenzen* (2010)
- Jury Instructions
 - *United States v. Fuomo* (2011)
 - Insist on charges
- During Trial
 - Hard to know of violations
 - Monitor posts/tweets
 - Notify court

Researching Juror's Social Media Sites

(cont'd)

- Juror Research: Post Verdict
 - New York Rule 3.4(a)
 - Attorneys can communicate with jurors after jury discharged
 - New Jersey
 - Judges cannot communicate with jurors post trial
- Research by Jurors
 - *In re Kaminsky* (2012)
 - Fined for researching
 - Florida
 - Juror tried to 'friend' defendant
 - Sentenced to 3 days in jail

Advertising and Providing Advice Through Social Media

- Advertising on Social Media Allowed
 - RPC 7.2 Advertising
 - General rules apply to Internet advertising
 - Lawyer's personal use does not implicate advertising
 - Internet posting with purpose to secure retention is subject to rules
 - If site is used for private and public purposes, assume rules apply

Lawyer Has Duty To Monitor Postings On His/Her Social Media

- NJRPC 7.1, 7.2, 7.4
 - Attorney profile information must be truthful
- Tit for tat endorsements may violate RPC 7.2
- NY County Lawyer Op. 748
 - Lawyer's LinkedIn profile that include areas of practice, etc. is considered advertising

Disclaimer Requirement

- NJ Comm. on Attorney Advertising Op. 38 (2005)
 - Websites containing attorney ads and/or listings **MUST** contain disclaimer alerting visitors that listings are advertisements

Advertising on Social Media Through Use of Testimonials

- Comply with RPC 7.1 and Committee Opinions on Testimonials
- NJ Comm. on Attorney Advertising Op. 33 (2005)
 - Testimonials and client endorsements may be used only for purpose of addressing satisfaction of client based on interaction between lawyer and client

Advertising Through a Personal Contact

- Blogs are treated like websites
- Lawyer may provide general answers to legal questions asked on social media sites

Dealing With Client's Negative On-Line Posts

- Guard confidentially per RPC 1.6
- Resist responding to negative comments
- PA Bar Association Ethics Committee Opinion 2014-200
 - “A lawyer’s duty to keep client confidences has few exceptions and in an abundance of caution, I do not feel at liberty to respond in a point-by-point fashion in this form. Suffice it to say that I do not believe that the post represents a fair and accurate picture of events.”