NEW HAMPSHIRE BAR ASSOCIATION

Social Media Contact with Witnesses in the Course of Litigation

Ethics Committee Advisory Opinion #2012-13/05

ABSTRACT:

The Rules of Professional Conduct do not forbid use of social media to investigate a non-party witness. However, the lawyer must follow the same rules which would apply in other contexts, including the rules which impose duties of truthfulness, fairness, and respect for the rights of third parties. The lawyer must take care to understand both the value and the risk of using social media sites, as their ease of access on the internet is accompanied by a risk of unintended or misleading communications with the witness. The Committee notes a split of authority on the issue of whether a lawyer may send a social media request which discloses the lawyer's name – but not the lawyer's identity and role in pending litigation – to a witness who might not recognize the name and who might otherwise deny the request. The Committee finds that such a request is improper because it omits material information. The likely purpose is to deceive the witness into accepting the request and providing information which the witness would not provide if the full identity and role of the lawyer were known.

ANNOTATIONS:

Merely viewing a Facebook's user's unrestricted Facebook page or following a Twitter user's public feed is not a "communication" as contemplated by Rules 4.2 and 4.3, and is, therefore, permissible.

It is not permissible under Rules 4.1, 4.2, and 4.3 for a lawyer to ask a witness's permission to view non-public, restricted social media information unless the witness is unrepresented and such request correctly identifies the lawyer and informs the witness of the lawyer's involvement in the disputed or litigated matter.

It is not permissible under Rules 4.1, 4.2, 4.3, 5.3, and 8.4(a) for a lawyer's investigator or other non-lawyer to send a Facebook friend request or ask an unrepresented witness's permission to follow a restricted Twitter feed unless the non-lawyer assistant identifies the assistant, the lawyer, the client, and the cause in litigation.

Under Rule 4.1, a lawyer may not send a Facebook or Twitter request to access restricted information by using a false name or by logging into someone else's account and pretending to be that person.

Under Rules 8.4(a) and 5.3, a lawyer may not direct a client to send a Facebook friend request or request to follow a restricted Twitter feed in order for the lawyer to view the information therein.

If the client has a Facebook or Twitter account that reasonably reveals the client's identity to the witness, and the witness accepts the friend request or request to follow a restricted Twitter feed, no rule prohibits the client from sharing with the lawyer information gained by that means.

Deceit is improper, whether it is accomplished by providing information or by deliberately withholding it. Rule 4.1

QUESTION PRESENTED

What measures may a lawyer take to investigate a witness through the witness's social media accounts, such as Facebook or Twitter, regarding a matter which is, or is likely to be, in litigation?

FACTS

The lawyer discovers that a witness for the opposing party in the client's upcoming trial has Facebook and Twitter accounts. Based on the information provided, the lawyer believes that statements and information available from the witness's Facebook and Twitter accounts may be relevant to the case and helpful to the client's position. Some information is available from the witness's social media pages through a simple web search. Further information is available to anyone who has a Facebook account or who signs up to follow the witness on Twitter. Additional information is available by "friending" the witness on Facebook or by making a request to follow the witness's restricted Twitter account. In both of those latter instances, the information is only accessible after the witness has granted a request.

ANALYSIS

General Principles

The New Hampshire Rules of Professional Conduct do not explicitly address the use of social media such as Facebook and Twitter. Nonetheless, the rules offer clear guidance in most situations where a lawyer might use social media to learn information about a witness, to gather evidence, or to have contact with the witness. The guiding principles for such efforts by counsel are the same as for any other investigation of or contact with a witness.
First and foremost, the lawyer has a duty under Rules 1.1 and 1.3 to represent the client competently and diligently. This duty specifically includes the duties to:

- "Gather sufficient facts" about the client's case from "relevant sources," Rule 1.1(c)(1);
- Take steps to ensure "proper preparation," Rule 1.1(b)(4); and
- Acquire the skills and knowledge needed to represent the client competently. Rule 1.1(b)(1) and (b)(2).

In the case of criminal defense counsel, these obligations, including the obligation to investigate, may have a constitutional as well as an ethical dimension.2 In light of these obligations, counsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.

The duties of competence and diligence are limited, however, by the further duties of truthfulness and fairness when dealing with others. Under Rule 4.1, a lawyer may not "make a false statement of material fact" to the witness. Notably, the ABA Comment to this rule states that "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." Similarly, under Rule 8.4, it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Also, if the witness is represented by counsel, then under Rule 4.3, a lawyer "shall not communicate" with the witness "about the subject of the representation" unless the witness's lawyer has consented or the communication is permitted by a court order or law. Finally, under Rule 4.4, the lawyer shall not take any action, including conducting an investigation, if it is "obvious that the action has the primary purpose to embarrass, delay, or burden a third person."

The lawyer may not avoid these limitations by conducting the investigation through a third person. With respect to investigators and other non-lawyer assistants, the lawyer must "make reasonable efforts to ensure" that the non-lawyer's conduct "is compatible with the professional obligations of the lawyer." Rule 5.3(b). A lawyer may be responsible for a violation of the rules by a non-lawyer assistant where the lawyer has knowledge of the conduct, ratifies the conduct, or has supervisory authority over the person at a time when the conduct could be avoided or mitigated. Rule 5.3(c). Nor should a lawyer counsel a client to engage in fraudulent or criminal conduct. Rule 1.2(d). Finally, of course, a lawyer is barred from violating the rules through another or knowingly inducing the other to violate the rules. Rule 8.4(a).

Application of the General Principles to the Use of Social Media When Investigating a Witness

Is it a violation of the rules for the lawyer to personally view a witness's unrestricted Facebook page or Twitter feed? In the view of the Committee, simply viewing a Facebook user's page or "following" a Twitter user is not a "communication" with that person, as contemplated by Rules 4.2 and 4.3, *if* the pages and accounts are viewable or otherwise open to all members of the same social media site. Although the lawyer-user may be required to join the same social media group as the witness, unrestricted Facebook pages and Twitter feeds are public for all practical purposes. Almost any person may join either Facebook or Twitter for free, subject to the terms-of-use agreement. Furthermore, membership is more common than not, with Facebook reporting that it topped one billion accounts in 2012.4

Other state bars' ethics committees are in agreement that merely viewing an unrestricted Facebook or Twitter account is permissible.5 If, however, a lawyer asks the witness's permission to access the witness's restricted social media information, the request must not only correctly identify the lawyer, but also inform the witness of the lawyer's involvement in the disputed or litigated matter. At least two bar associations have adopted the position that sending a Facebook friend request in-name-only constitutes a misrepresentation by omission, given that the witness might not immediately associate the lawyer's name with his or her purpose and that, were the witness to make that association, the witness would in all likelihood deny the request.6 (This point is discussed in more detail below.)

May the lawyer send a Facebook friend request to the witness or a request to follow a restricted Twitter account, using a false name? The answer here is no. The lawyer may not make a false statement of material fact to a third person. Rule 4.1. Material facts include the lawyer's identity and purpose in contacting the witness. For the same reason, the lawyer may not log into someone else's account and pretend to be that person when communicating with the witness.

May the lawyer's client send a Facebook friend request or request to follow a restricted Twitter feed, and then reveal the information learned to the lawyer? The answer depends on the extent to which the lawyer directs the client who is sending the request. Rule 8.4(a) prohibits a lawyer from accomplishing through another that which would be otherwise barred. Also, while Rule 5.3 is directed at legal assistants rather than clients, to the extent that the client is acting as a non-lawyer assistant to his or her own lawyer, Rule 5.3 requires the lawyer to advise the client to avoid conduct on the lawyer's behalf which would be a violation of the rules.
Subject to these limitations, however, if the client has a Facebook or Twitter account that reasonably reveals the client's identity to the witness, and the witness accepts the friend request or request to follow a restricted Twitter feed, no rule prohibits the client from sharing with the lawyer information gained by that means. In the non-social media context, the American Bar Association has stated that such contact is permitted in similar limitations. See ABA Ethics Opinion 11-461.[7]

May the lawyer's investigator or other non-lawyer agent send a friend request or request to follow a restricted Twitter feed as a means of gathering information about the witness? The non-lawyer assistant is subject to the same restrictions as the lawyer. The lawyer has a duty to make sure the assistant is informed about these restrictions and to take reasonable steps to ensure that the assistant acts in accordance with the restrictions. Thus, if the non-lawyer assistant identifies him- or herself, the lawyer, the client, and the cause in litigation, then the non-lawyer assistant may properly send a social media request to an unrepresented witness.

The witness's own predisposition to accept requests has no bearing on the lawyer's ethical obligations. The Committee agrees with the Philadelphia Bar Association's reasoning: "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." Phil. Bar Assoc., Prof. Guidance Comm., Op. 2009-02.

May the lawyer send a request to the witness to access restricted information, using the lawyer's name and disclosing the lawyer's role? The answer depends on whether the witness is represented. If the witness is represented by a lawyer with regard to the same matter in which the lawyer represents the client, the lawyer may not communicate with the witness except as provided in Rule 4.2. If the witness is not represented, the lawyer may send a request to access the witness's restricted social media profile so long as the request identifies the lawyer by name as a lawyer and also identifies the client and the matter in litigation. This information serves to correct any reasonable misimpression the witness might have regarding the role of the lawyer.

May the lawyer send a request to the witness to access restricted information, when the request uses only the lawyer's name or the name of an agent, and when there is a reasonable possibility that the witness may not recognize the name and may not realize the communication is from counsel involved in litigation? There is a split of authority on this issue, but the Committee concludes that such conduct violates the New Hampshire Rules of Professional Conduct. The lawyer may not omit identifying information from a request to access a witness's restricted social media information because doing so may mislead the witness. If a lawyer sends a social media request in-name-only with knowledge that the witness may not recognize the name, the lawyer has engaged in deceitful conduct in violation of Rule 8.4(c). The Committee further concludes omitting from the request information about the lawyer's involvement in the disputed or litigated matter creates an implication that the person making the request is disinterested. Such an implication is a false statement of material fact in violation of Rule 4.1. As noted above, the ABA Comment to this rule states that "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

Deceit is improper, whether it is accomplished by providing information or by deliberately withholding it. Thus, a lawyer violates the rules when, in an effort to conceal the lawyer's identity and/or role in the matter, the lawyer requests access to a witness's restricted social media profile in-name-only or through an undisclosed agent. The Committee recognizes the counter-argument that a request in-name-only is not overtly deceptive since it uses the lawyer's or agent's real name and since counsel is not making an explicitly false statement. Nonetheless, the Committee disagrees with this counter-argument. By omitting important information, the lawyer hopes to deceive the witness. In fact, the motivation of the request in-name-only is the lawyer's expectation that the witness will not realize who is making the request and will therefore be more likely to accept the request. The New Hampshire Supreme Court has stated that honesty is the most important guiding principle of the bar in this state and that deceitful conduct by lawyers will not be tolerated. *See generally*, RSA311:6; *Feld's Case*, 149 N.H. 19, 24 (2002); *Kalil's Case*, 146 N.H. 466, 468 (2001); *Nardi's Case*, 142 N.H. 602, 606 (1998). The Committee is guided by those principles here.

The Committee notes that there is a conflict of authority on this issue. For example, the Committee on Professional Ethics for the Bar Association of New York City has stated:

> We conclude 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. While there are ethical boundaries to such "friending," in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. [Footnote omitted.]

NY City Bar, Ethic Op. 2010-2. Alternatively, the Philadelphia Bar Association concludes that such conduct would be deceptive. Phil. Bar Assoc., Prof. Guidance Comm., Op. 2009-02. That opinion finds that a social media request in-name-only "omits a highly material fact" -that the request is aimed at obtaining information which may be used to impeach the witness in litigation.8 The Philadelphia opinion further recognizes, as does this Committee, that the witness

would not likely accept the social media request if the witness knew its true origin and context. An opinion from the San Diego County Bar Association reaches the same conclusion. San Diego Cty. Bar Legal Ethics Op. 2011-2. The Committee finds that the San Diego and Philadelphia opinions are consistent with the New Hampshire Rules of Professional Conduct but that the New York City opinion is not. A lawyer has a duty to investigate but also a duty to do so openly and honestly, rather than through subterfuge.

Finally, this situation should be distinguished from the situation where a person, not acting as an agent or at the behest of the lawyer, has obtained information from the witness's social media account. In that instance, the lawyer may receive the information and use it in litigation as any other information. The difference in this latter context is that there was no deception by the lawyer. The witness chose to reveal information to someone who was not acting on behalf of the lawyer. The witness took the risk that the third party might repeat the information to others. Of course, lawyers must be scrupulous and honest, and refrain from expressly directing or impliedly sanctioning someone to act improperly on their behalf. Lawyers are barred from violating the rules "through the acts of another." Rule 8.4(a).

CONCLUSION

As technology changes, it may be necessary to reexamine these conclusions and analyze new situations. However, the basic principles of honesty and fairness in dealing with others will remain the same. When lawyers are faced with new concerns regarding social media and communication with witnesses, they should return to these basic principles and recall the Supreme Court's admonition that honesty is the most important guiding principle of the bar in New Hampshire.

SOURCES/AUTHORITIES

New York City Bar Association, Formal Opinion 2012-2

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New York State Bar Association, Opinion #843 (9/10/2010)

The Philadelphia Bar Association, Professional Guidance Committee, Opinion 2009-02, (March 2009)

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Lackey and Minta, Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging, 28 Touro Law Review 149 (July 2012)

Strutin, Social Media and the Vanishing Points of Ethical and Constitutional Boundaries, 31 Pace Law Review 228 (Winter 2011)

Cook and Tsao, Using Social Media As A Tool In Litigation: An Overview Of Evidentiary And Ethical Considerations, ABA Section of Labor and Employment Law, 6th Annual Labor and Employment Law Conference, October 31 – November 3, 2012

ENDNOTES:

[1] In the remainder of this opinion, the Committee refers to this as a communication "in-name-only."

[2] *See, e.g.*, *Thomas v. Kuhlman*, 255 F. Supp. 2d 99, 107 (E.D.N.Y.2003); *Williams v. Washington*, 59 F.3d 673, 680-81 (7th Cir. 1995); People v. Donovan, 184 A.D.2d 654, 655 (N.Y. App. Div. 1992); see also American Bar Association Criminal Justice Standards, Defense Function §4-4.1.

[3] For the purposes of this opinion, an unrestricted page is a page which may be viewed without the owner's authorization but which may require membership with the same social media service.

[4] "Facebook by the Numbers: 1.06 Billion Monthly Active Users," available online.

[5] San Diego County Bar Legal Ethics Committee, Legal Ethics Opinion 2011-2; NY Bar Ethics Op. #843 (9/10/2010).

[6] San Diego County Bar Legal Ethics Committee, Legal Ethics Opinion 2011-2; Phil. Bar Assoc., Prof. Guidance Comm., Op. 2009-02.

[7] Pursuant to ABA Ethics Opinion 11-461, a lawyer may advise a client regarding the client's right to communicate directly with the other party in the legal matter and assist the client in formulating the substance of any proposed communication, so long as the lawyer's conduct falls short of overreaching. This opinion has engendered significant controversy because, according to some critics, it effectively allowed the lawyer to "script" conversations between the client and a represented opposing party and prepare documents for the client to deliver directly to the represented opponent. For a more complete discussion, see Podgers, On Second Thought: Changes Mulled Re ABA Opinion on Client Communications Issue, ABA Journal (Jan. 1, 2012), available online (last accessed May 22, 2013). The Committee takes no position on this issue and cites the opinion solely to illustrate the point that the client may independently obtain and share information with the lawyer, subject to certain constraints.

[8] In contrast to this opinion, the Philadelphia opinion does not find a violation of Rule 4.3.

NH RULES OF PROFESSIONAL CONDUCT:

1.1(b) and (c) Competence
1.3 Diligence
3.4 Fairness to opposing party and counsel
4.1(a) Truthfulness in statements to others
4.2 Communications with others represented by counsel
4.3 Dealing with the unrepresented person
4.4 Respect for the rights of third persons
5.3 Non-lawyer assistants
8.4(a) Unethical conduct through an agent

SUBJECTS:

Competence and Diligence
Truthfulness
Fairness to Opposing Parties, Counsel, and Third Parties
Contact with Witnesses
Agents of Lawyers; Acting Through Others

- **By the NHBA Ethics Committee**
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