Surreptitious Recording and Research

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February 19, 2019, 5:30 p.m.

Cincinnati Bar Association, 5th Floor

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 466 **April 24, 2014**
Lawyer Reviewing Jurors' Internet Presence

Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

The Committee has been asked whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors' or potential jurors'[1] presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review.

Juror Internet Presence

Jurors may and often will have an Internet presence through electronic social media or websites. General public access to such will vary. For example, many blogs, websites, and other electronic media are readily accessible by anyone who chooses to access them through the Internet. We will refer to these publicly accessible Internet media as "websites."

For the purposes of this opinion, Internet-based social media sites that readily allow account-owner restrictions on access will be referred to as "electronic social media" or "ESM." Examples of commonly used ESM at the time of this opinion include Facebook, MySpace, LinkedIn, and Twitter. Reference to a request to obtain access to

1. Unless there is reason to make a distinction, we will refer throughout this opinion to jurors as including both potential and prospective jurors and jurors who have been empaneled as members of a jury.

another's ESM will be denoted as an "access request," and a person who creates and maintains ESM will be denoted as a "subscriber."

Depending on the privacy settings chosen by the ESM subscriber, some information posted on ESM sites might be available to the general public, making it similar to a website, while other information is available only to a fellow subscriber of a shared ESM service, or in some cases only to those whom the subscriber has granted access. Privacy settings allow the ESM subscriber to establish different degrees of protection for different categories of information, each of which can require specific permission to access. In general, a person who wishes to obtain access to these protected pages must send a request to the ESM subscriber asking for permission to do so. Access depends on the willingness of the subscriber to grant permission.[2]

This opinion addresses three levels of lawyer review of juror Internet presence:

1. passive lawyer review of a juror's website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;

2. active lawyer review where the lawyer requests access to the juror's ESM; and

3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer;

Trial Management and Jury Instructions

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents. Lawyers need to know where the line should be drawn between properly investigating jurors and improperly communicating with them.[3] In today's Internet-saturated world, the line is increasingly blurred.

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2. The capabilities of ESM change frequently. The committee notes that this opinion does not address particular ESM capabilities that exist now or will exist in the future. For purposes of this opinion, key elements like the ability of a subscriber to control access to ESM or to identify third parties who review a subscriber's ESM are considered generically.

3. While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." *See also* Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use "reasonable efforts" to find potential juror's litigation history in Case.net, Missouri's automated case management system); N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have 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"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

For this reason, we strongly encourage judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. A court order, whether in the form of a local rule, a standing order, or a case management order in a particular matter, will, in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel.

Equally important, judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their ESM and websites.[4] If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

Reviewing Juror Internet Presence

If there is no court order governing lawyers reviewing juror Internet presence, we look to the ABA Model Rules of Professional Conduct for relevant strictures and prohibitions. Model Rule 3.5 addresses communications with jurors before, during, and after trial, stating:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
>
> (c) communicate with a juror or prospective juror after discharge of the jury if:
>
> (1) the communication is prohibited by law or court order;
>
> (2) the juror has made known to the lawyer a desire not to communicate; or
>
> (3) the communication involves misrepresentation, coercion, duress or harassment . . .

Under Model Rule 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. *See, e.g.*, *In re Holman*, 286 S.E.2d 148 (S.C. 1982) (communicating with member of jury selected for trial of lawyer's client was "serious crime" warranting disbarment).

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4. Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror's Internet presence.

A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. Model Rule 8.4(a). *See also In re Myers*, 584 S.E.2d 357 (S.C. 2003) (improper for prosecutor to have a lay member of his "jury selection team" phone venire member's home); *cf.* S.C. Ethics Op. 93-27 (1993) (lawyer "cannot avoid the proscription of the rule by using agents to communicate improperly" with prospective jurors).

Passive review of a juror's website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b). In the world outside of the Internet, a lawyer or another, acting on the lawyer's behalf, would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions. The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b).[5]

It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror's electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. This would be the type of ex parte communication prohibited by Model Rule 3.5(b).[6] This would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past.

Some ESM networks have a feature that allows the juror to identify fellow members of the same ESM network who have passively viewed the juror's ESM. The details of how this is accomplished will vary from network to network, but the key feature that is

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5. Or. State Bar Ass'n, Formal Op. 2013-189 ("Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website"); N.Y. Cnty. Lawyers Ass'n, Formal Op. 743 (2011) (lawyer may search juror's "publicly available" webpages and ESM); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may use social media websites to research jurors); Ky. Bar Ass'n, Op. E-434 (2012) ("If the site is 'public,' and accessible to all, then there does not appear to be any ethics issue."). *See also* N.Y. State Bar Ass'n, Advisory Op. 843 (2010) ("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"); Or. State Bar Ass'n, Formal Op. 2005-164 ("Accessing an adversary's public Web [sic] site is no different from reading a magazine or purchasing a book written by that adversary"); N.H. Bar Ass'n, *supra* note 3 (viewing a Facebook user's page or following on Twitter is not communication if pages are open to all members of that social media site); San Diego Cnty. Bar Legal Ethics Op. 2011-2 (opposing party's public Facebook page may be viewed by lawyer).

6. *See* Or. State Bar Ass'n, *supra* note 5, fn. 2, (a "lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so"); N.Y. Cnty. Lawyers Ass'n, *supra* note 5 ("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"); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may not chat, message or send a "friend request" to a juror); Conn. Bar Ass'n, Informal Op. 2011-4 (friend request is a communication); Mo. Bar Ass'n, Informal Op. 2009-0003 (friend request is a communication pursuant to Rule 4.2). *But see* N.H. Bar Ass'n, *supra* note 3 (lawyer may request access to witness's private ESM, but request must "correctly identify the lawyer . . . [and] . . . inform the witness of the lawyer's involvement" in the matter); Phila. Bar Ass'n, Advisory Op. 2009-02 (lawyer may not use deception to secure access to witness's private ESM, but may ask the witness "forthrightly" for access).

relevant to this opinion is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer. This capability may be beyond the control of the reviewer because the notice to the subscriber is generated by the ESM network and is based on the identity profile of the subscriber who is a fellow member of the same ESM network.

Two recent ethics opinions have addressed this issue. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2[7], concluded that a network-generated notice to the juror that the lawyer has reviewed the juror's social media was a communication from the lawyer to a juror, albeit an indirect one generated by the ESM network. Citing the definition of "communication" from Black's Law Dictionary (9th ed.) and other authority, the opinion concluded that the message identifying the ESM viewer was a communication because it entailed "the process of bringing an idea, information or knowledge to another's perception—including the fact that they have been researched." While the ABCNY Committee found that the communication would "constitute a prohibited communication if the attorney was aware that her actions" would send such a notice, the Committee took "no position on whether an inadvertent communication would be a violation of the Rules." The New York County Lawyers' Association Committee on Professional Ethics in Formal Opinion 743 agreed with ABCNY's opinion and went further explaining, "If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."[8]

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.

Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror's information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber-notification feature is not secret. As indicated by Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy

7. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra*, note 3.
8. N.Y. Cnty. Lawyers' Ass'n, *supra* note 5.

features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.

Second, Rule 4.4(a) prohibits lawyers from actions "that have no substantial purpose other than to embarrass, delay, or burden a third person . . ." Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

Discovery of Juror Misconduct

Increasingly, courts are instructing jurors in very explicit terms about the prohibition against using ESM to communicate about their jury service or the pending case and the prohibition against conducting personal research about the matter, including research on the Internet. These warnings come because jurors have discussed trial issues on ESM, solicited access to witnesses and litigants on ESM, not revealed relevant ESM connections during jury selection, and conducted personal research on the trial issues using the Internet.[9]

In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name.[10] The recommended instruction states in part:

> I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

These same jury instructions were provided by both a federal district court and state criminal court judge during a three-year study on juries and social media. Their research found that "jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media."[11] As a result, the authors recommend jury instruction on social media "early and often" and daily in lengthy trials.[12]

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9. For a review of recent cases in which a juror used ESM to discuss trial proceedings and/or used the Internet to conduct private research, read Hon. Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 Duke Law & Technology Review no. 1, 69-78 (2014), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr.

10. Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, USCOURTS.GOV (June 2012), http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

11. *Id.* at 66.

12. *Id.* at 87.

Analyzing the approximately 8% of the jurors who admitted to being "tempted" to communicate about the case using social media, the judges found that the jurors chose not to talk or write about the case because of the specific jury instruction not to do so.

While juror misconduct via social media itself is not the subject of this Opinion, lawyers reviewing juror websites and ESM may become aware of misconduct. Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. But the history is muddled concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of being criminal or fraudulent.

Rule 3.3 was amended in 2002, pursuant to the ABA Ethics 2000 Commission's proposal, to expand on a lawyer's previous obligation to protect a tribunal from criminal or fraudulent conduct by the lawyer's client to also include such conduct by any person.[13]

Model Rule 3.3(b) reads:

> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Comment [12] to Rule 3.3 provides:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Part of Ethics 2000's stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional

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13. Ethics 2000 Commission, *Model Rule 3.3: Candor Toward the Tribunal*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33.html (last visited Apr. 18, 2014).

Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

> This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge"). *Reporter's Explanation of Changes, Model Rule 3.3.*[14]

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code's DR 7-108(G), a lawyer knowing of "improper conduct" by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer's obligation to act arises only when the juror or venireperson engages in conduct that is *fraudulent or criminal.*[15] While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

By passively viewing juror Internet presence, a lawyer may become aware of a juror's conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee's authority, applicable law might treat such juror activity as conduct that triggers a lawyer's duty to take remedial action including, if necessary, reporting the juror's conduct to the court under current Model Rule 3.3(b).[16]

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14. Ethics 2000 Commission, *Model Rule 3.3 Reporter's Explanation of Changes*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33rem.html (last visited Apr. 18, 2014).

15. Compare MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2002) to N.Y. RULES OF PROF'L CONDUCT, R. 3.5(d) (2013) ("a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror....").

16. *See, e.g.*, U.S. v. Juror Number One, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. U.S. v. Rowe, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).

While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a crime or fraud.

Conclusion

In sum, a lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror's ESM is communication within this framework.

The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b).

If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

ETHICAL IMPLICATIONS OF USING SOCIAL MEDIA IN CONNECTION WITH JURY SELECTION

STRAUSS TROY
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ETHICAL IMPLICATIONS OF USING SOCIAL MEDIA IN CONNECTION WITH JURY SELECTION

Application to Social Media.

Social media investigation of jurors can be helpful to:

- confirm the accuracy of jurors' answers during voir dire;
- discover which jurors may be favorable or unfavorable to your case;
- learn personal interests that may help create a bond or connection with the juror;
- monitor jurors' behavior during trial; and
- discover grounds for appeal.

STRAUSS TROY attorneys at law

ETHICAL IMPLICATIONS OF USING SOCIAL MEDIA IN CONNECTION WITH JURY SELECTION

- **Application to Social Media**.
  - By way of example, if a juror's posting shows he or she is a fan of science fiction you might work some references to Star Trek into your trial presentation.

ETHICAL IMPLICATIONS OF USING SOCIAL MEDIA IN CONNECTION WITH JURY SELECTION

Ethical Rule. ABA Model Rule 3.5 provides:

"A lawyer shall not:

- Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- Communicate ex parte with such person during the proceeding unless authorized to do so by law or court order."

ETHICAL IMPLICATIONS OF USING SOCIAL MEDIA IN CONNECTION WITH JURY SELECTION

Ethical Rule.

Courts and bar associations of most jurisdictions have approved use of social medial to investigate jurors. *E.g.*, Bar Assoc. of the City of N.Y., Formal Opinion No. 2012-2

ETHICAL IMPLICATIONS OF USING SOCIAL MEDIA IN CONNECTION WITH JURY SELECTION

Limitations On Use of Social Media.

- Generally, attorneys may "view" social media sites belonging to a juror.
- However, in doing so, the attorney may not contact or communicate with the juror.

ETHICAL IMPLICATIONS OF USING SOCIAL MEDIA IN CONNECTION WITH JURY SELECTION

Limitations On Use of Social Media.

FaceBook

- Depending on the privacy setting, you may need to send a friend request to view that person's page.
- If a juror has his FaceBook setting as "public" it can be viewed without the need to send a friend request.
- But an attorney may not "friend" a juror through FaceBook, if the juror has a privacy setting that requires the request to view that person's page.
- *See* ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 466; Bar Assoc of the City of N.Y., Formal Opinion No. 2012-2.

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ETHICAL IMPLICATIONS OF USING SOCIAL MEDIA IN CONNECTION WITH JURY SELECTION

Limitations On Use of Social Media.

Twitter

- When an individual follows someone's Tweets or subscribes to someone's Tweets, Twitter generates an automated message alerting the sender that she is now being followed by a specific person.
- An attorney may not "follow" a juror on Twitter.
- *See* ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 466; Bar Assoc of the City of N.Y., Formal Opinion No. 2012-2.

ETHICAL IMPLICATIONS OF USING SOCIAL MEDIA IN CONNECTION WITH JURY SELECTION

Limitations On Use of Social Media.

LinkedIn

- LinkedIn does not require an affirmative action by the attorney in order to view a juror's publicly available information.
- However, LinkedIn will send a notification to the juror that someone has looked at their profile an often identifies who that person is.

ETHICAL IMPLICATIONS OF USING SOCIAL MEDIA IN CONNECTION WITH JURY SELECTION

Limitations On Use of Social Media.

LinkedIn

- Arguably this does not constitute a violation since it is LinkedIn and not the attorney making the contact. The best practice however is to use the LinkedIn setting that allows the user to be anonymous when viewing others' profiles.
- ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 466.

ETHICAL IMPLICATIONS OF USING SOCIAL MEDIA IN CONNECTION WITH JURY SELECTION

Limitations On Use of Social Media

Final Points

- This prohibition against contacting jurors also applies to anyone acting on behalf of the attorney.
- Ethical obligation to know how these social media platforms work. To keep abreast of the "benefits and risks associated with relevant technology. ABA Model Rule 1.1

STRAUSS TROY attorneys at law

Cleveland Metro. Bar Ass'n v. Moody

Supreme Court of Ohio

April 10, 2018, Submitted; October 11, 2018, Decided

No. 2017-1738

Reporter
2018-Ohio-4071 *; 2018 Ohio LEXIS 2464 **; 2018 WL 4926864

CLEVELAND METROPOLITAN BAR ASSOCIATION v. MOODY.

Notice: THIS SLIP OPINION IS SUBJECT TO FORMAL REVISION BEFORE IT IS PUBLISHED IN AN ADVANCE SHEET OF THE OHIO OFFICIAL REPORTS.

Subsequent History: Later proceeding at *Cleveland Metro. Bar Ass'n v. Moody, 2019-PDOMOHIO-1, 2019 Ohio LEXIS 2 (Ohio, Jan. 2, 2019)*

Prior History: [**1] ON CERTIFIED REPORT by the Board of Professional Conduct of the Supreme Court, No. 2017-008.

Disposition: Judgment accordingly.

Core Terms

deposition, misconduct, disciplinary, credible, discovery request, suspended, indefinite, practice of law, suspension, discovery, opposing, make a false statement, documents, recorded, board found, misrepresentation, interrogatories, aggravating, knowingly, notice

Case Summary

Overview

HOLDINGS: [1]-The high court accepted the Board of Professional Conduct's recommendation that respondent attorney be indefinitely suspended because the record supported its findings that he failed to act with reasonable diligence and promptness, failed to keep his client reasonably informed about the status of his case, intentionally failed to comply with discovery requests, and violated Ohio R. Prof. Conduct 8.4(c) by knowingly making false statements to opposing counsel and a tribunal and counseling his client to give false deposition testimony.

Outcome
Respondent was indefinitely suspended from the practice of law in Ohio.

LexisNexis® Headnotes

Legal Ethics > Sanctions > Disciplinary Proceedings

HN1[] **Sanctions, Disciplinary Proceedings**

When imposing sanctions for attorney misconduct, the Ohio Supreme Court considers several relevant factors, including the ethical duties that the lawyer violated, the aggravating and mitigating factors listed in Gov.Bar R. V(13), and the sanctions imposed in similar cases.

Legal Ethics > Professional Conduct

Legal Ethics > Sanctions > Suspensions

HN2[] **Legal Ethics, Professional Conduct**

Where an attorney engaged in dishonesty and misrepresentation in violation of Ohio R. Prof. Conduct 8.4(c), at a minimum, his misconduct warrants a term suspension from the practice of law.

Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals

HN3[] **Disciplinary Proceedings, Appeals**

The Ohio Supreme Court ordinarily defers to a panel's credibility determinations in its independent review of professional discipline cases unless the record weighs heavily against those findings.

Evidence > ... > Hearsay > Exemptions > Statements by Party Opponents

HN4[] Exemptions, Statements by Party Opponents

Admissions by a party-opponent are not hearsay and may be considered for the truth of the matter asserted. Evid.R. 801(D)(2).

Legal Ethics > Professional Conduct

HN5[] Legal Ethics, Professional Conduct

One of the fundamental tenets of the professional responsibility of a lawyer is that he should maintain a degree of personal and professional integrity that meets the highest standard. The integrity of the profession can be maintained only if the conduct of the individual attorney is above reproach.

Headnotes/Summary

Headnotes

Attorneys—Misconduct—Failure to act with reasonable diligence—Knowingly making false statements to a tribunal or third person—Intentionally failing to comply with proper discovery requests—Counseling a witness to testify falsely—Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation—Engaging in conduct that is prejudicial to the administration of justice—Indefinite suspension.

Counsel: Dunson Law, L.L.C., and Joseph P. Dunson; and Heather M. Zirke, Bar Counsel, for relator.

Alkire & Nieding, L.L.C., Richard C. Alkire, and Dean Nieding, for respondent.

Judges: O'CONNOR, C.J., and O'DONNELL, KENNEDY, FISCHER, and DEGENARO, JJ., concur. FRENCH and DEWINE, JJ., dissent, and would suspend the respondent from the practice of law for two years.

Opinion

Per Curiam.

[*P1] Respondent, Steven Jerome Moody, of Cleveland, Ohio, Attorney Registration No. 0074731, was admitted to the practice of law in Ohio in 2002.

[*P2] In a February 8, 2017 complaint, relator, Cleveland Metropolitan Bar Association, alleged that while representing a single client, Moody failed to act with reasonable diligence and promptness, **[**2]** failed to keep the client reasonably informed about the status of his legal matter, intentionally failed to comply with proper discovery requests, knowingly made false statements to opposing counsel and a tribunal, and counseled a client to give false deposition testimony. Although relator later amended its complaint to add a second count with additional allegations of misconduct, a panel of the Board of Professional Conduct unanimously dismissed the second count as well as one violation alleged in the original complaint.

[*P3] Based on the hearing testimony and the stipulated exhibits of the parties, the panel found that Moody committed the remaining charged misconduct, and it recommended that he be indefinitely suspended from the practice of law in Ohio. The board adopted the panel's report in its entirety.

[*P4] Moody objects to the board's findings of misconduct and its recommended sanction, arguing that the board failed to properly weigh the evidence and that an indefinite suspension is unwarranted. For the reasons that follow, we overrule Moody's objections, adopt the board's findings of fact and conclusions of law, and indefinitely suspend Moody from the practice of law in Ohio.

Misconduct [3]**

[*P5] In March 2015, Elton Barrios retained Moody to represent him in an employment-discrimination action against Barrios's former employer, PNC, Inc. One month later, Moody filed a complaint in state court. PNC, which was represented by attorney Siobhan M. Sweeney, of Boston, Massachusetts, caused the case to be removed to federal court. *Barrios v. PNC, Inc.*, N.D. Ohio case No. 1:15-cv-01131-CAB.

[*P6] In September 2015, Sweeney served Moody with

interrogatories, a request for production of documents, and a notice to take Barrios's deposition on October 20, 2015. She later suspended the deposition because Moody did not timely respond to her written discovery requests. On October 21, Moody asked Sweeney for more time and received an extension to respond to PNC's discovery requests—though he failed to comply within the extended deadline.

[*P7] Sweeney rescheduled Barrios's deposition for November 6, 2015. She served Moody on October 23, 2015, with a notice of deposition, and on November 2, she reminded him of the deposition. Although Sweeney traveled from Boston to Cleveland for the deposition, neither Moody nor Barrios appeared. Unable to contact Moody, Sweeney adjourned the deposition. Shortly thereafter, **[**4]** Moody called Sweeney to advise her—for the first time—that he had a conflict on the deposition date and wished to reschedule.

[*P8] Based on Moody's repeated failure to comply with discovery requests, Sweeney filed a motion to compel. After a telephone conference with counsel, a magistrate judge granted the motion, ordering that Barrios's responses to PNC's interrogatories be provided no later than November 20, 2015, and that Barrios appear for a deposition on December 21, 2015.

Moody's Communications with Barrios

[*P9] Moody sent PNC's interrogatories to Barrios for the first time on the day of the magistrate judge's telephone conference and asked Barrios to provide his responses later that day. He submitted Barrios's responses to Sweeney by the court-ordered deadline, but they were neither verified nor notarized. Instead, Moody typed Barrios's name on the signature line under Barrios's verification statement and typed his own name on the notary-signature line.

Deposition Preparation

[*P10] Moody did not notify Barrios about his impending deposition until December 12, 2015—a full month after the court had scheduled it and just nine days before it was to occur. He met with Barrios on December 19 to prepare **[**5]** him for the deposition. Barrios surreptitiously recorded their conversation, although the recording is not in the record. Moody admitted that during the meeting, he made the following statements regarding Sweeney's written discovery requests:

• "In this particular case, what I would do is, because we're fighting the bank, right, I would fuck with this person at this stage."

• "She sent me an interrogatory, request for production of documents, I completely ignored her ass for a few months. And I made her file a Motion to Compel, and then I called her and said, oh, yeah, I'll get them to you in two weeks. And then I completely ignored her ass again."

• "So we did a telephone conference with the Magistrate, and I was like, oh, Your Honor, if only I had known, you know. I said, you know, I moved my office * * *, and I didn't know that she was—she sent those things to the wrong address. But I'll get them out. And I said, you know, this wasn't necessary. So, I wanted to make her seem like an ass."

[*P11] With regard to Sweeney and the failed depositions, Moody admitted that he told Barrios: "That's why I did her like I did her. Because I made that bitch fly into town. And they were calling me and **[**6]** shit. I was like, oh, I've been there. And I was in court, too."

[*P12] In addition, concerning Sweeney's approach to Barrios's court-ordered deposition, Moody admitted that he told Barrios:

• "So they're trying to get—you know, trying to play games, because I played a game with her about not giving them to her. So, you know, I told you everything. And obviously, you know, you don't want to discuss that I played a game with her, you know. But that's basically it."

• "Yeah. She isn't going to want no part of your ass. And this might take all day * * *[.] Yeah. Because looks, she's an arrogant bitch, okay?"

• "Yeah. It might be eight hours. Because we gave them a ton of documents. Everything that you gave me, you know, is part of what she asked for, and it was stuff that helped. There's a lot of shit out there, all, right? And we didn't send out any discovery. We don't need it. She might ask you, do you know that your attorney didn't send any discovery, do you know that you were supposed to be here on, whatever the—she had one or two dates. Did your attorney tell you that you were supposed to be present for those depositions? Yes."

[*P13] At the disciplinary hearing, Moody testified that he was only **[**7]** "puffing" in an effort to give Barrios

confidence in his case and his counsel. Moody also claimed that he had made certain exculpatory statements at the end of his December 19 conversation with Barrios that were not recorded. Further, he testified that he had inadvertently failed to timely comply with Sweeney's discovery requests and appear at the November deposition because he had transitioned in April 2015 from a brick-and-mortar office to a virtual office and had been keeping track of all his communications from courts, lawyers, and clients on his cell phone. Barrios, on the other hand, testified that he had recorded their entire conversation and that Moody never disavowed any of the statements that he has admitted he made. After weighing the conflicting evidence, the board found that Moody's claims were not credible.

[*P14] Therefore, the board found that Moody violated *Prof.Cond.R. 1.3* (requiring a lawyer to act with reasonable diligence in representing a client), *1.4(a)(3)* (requiring a lawyer to keep the client reasonably informed about the status of a matter), *3.3(a)(1)* (prohibiting a lawyer from knowingly making a false statement of fact or law to a tribunal), *3.4(b)* (prohibiting a lawyer from counseling **[**8]** or assisting a witness to testify falsely), *3.4(c)* (prohibiting a lawyer from knowingly disobeying an obligation under the rules of a tribunal), *3.4(d)* (prohibiting a lawyer from intentionally failing to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party), *4.1(a)* (prohibiting a lawyer from knowingly making a false statement of material fact or law to a third person), *8.4(c)* (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and *8.4(d)* (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice).

Recommended Sanction

[*P15] *HN1*[↑] When imposing sanctions for attorney misconduct, we consider several relevant factors, including the ethical duties that the lawyer violated, the aggravating and mitigating factors listed in *Gov.Bar R. V(13)*, and the sanctions imposed in similar cases.

[*P16] The board found that just one mitigating factor is present in this case—the absence of a prior disciplinary record. *See Gov.Bar R. V(13)(C)(1)*. As aggravating factors, the board found that Moody acted with a dishonest or selfish motive, engaged in a pattern of misconduct, committed multiple violations of the professional-conduct **[**9]** rules, and refused to acknowledge the wrongful nature of his misconduct. *See Gov.Bar R. V(13)(B)(2)*, *(3)*, *(4)*, and *(7)*. The board also attributed some aggravating effect to Moody's refusal to accept any responsibility or show any remorse for his misconduct, his attempt to shift the blame for some of his misconduct to his client, and the fact that Moody's conduct toward opposing counsel in the underlying litigation constituted gender disparagement. While the board found that Moody's response to the charges in this case lacked credibility and called his character and integrity into question, it stopped short of finding that he submitted false evidence, made false statements, or engaged in other deceptive practices during the disciplinary process. *See Gov.Bar R. V(13)(B)(6)*.

[*P17] Because Moody *HN2*[↑] engaged in dishonesty and misrepresentation in violation of *Prof.Cond.R. 8.4(c)*, the board recognized that, at a minimum, his misconduct warrants a term suspension from the practice of law. *See Disciplinary Counsel v. Fowerbaugh, 74 Ohio St.3d 187, 190, 1995-Ohio 261, 658 N.E.2d 237 (1995)*. In *Disciplinary Counsel v. Stafford, 128 Ohio St.3d 446, 2011-Ohio-1484, 946 N.E.2d 193*, we suspended Vincent Stafford for 18 months with six months stayed on conditions because he did not respond to discovery requests for more than a year in an attempt to "'obfuscate and hinder the truth-seeking process,'" *id. at ¶ 52*, quoting the board's report, and because of **[**10]** his "lack of candor, his disrespect and discourtesy to fellow officers of the court, and his dilatory discovery tactics," *id. at ¶ 83*. The board here, however, determined that Moody's discovery violations were more egregious and flagrant than those of Stafford. Given that Moody had neglected his client's affairs, intentionally frustrated the discovery process, made misrepresentations to the court and opposing counsel, advised his client to lie, disparaged opposing counsel, and forged a defense to the resulting disciplinary matter that was simply not credible, the board determined that an indefinite suspension was necessary to protect the public from future harm.

[*P18] In support of that sanction, the board cited two cases in which we indefinitely suspended attorneys who engaged in multiple dishonest acts in the course of litigation. *See Cleveland Metro. Bar Ass'n v. Gruttadaurio, 136 Ohio St.3d 283, 2013-Ohio-3662, 995 N.E.2d 190*; *Cleveland Metro. Bar Ass'n v. Donchatz, 150 Ohio St.3d 168, 2017-Ohio-2793, 80 N.E.3d 444*.

Moody's Objections

[*P19] Moody objects to the board's findings of misconduct and aggravating and mitigating factors and its recommended sanction. He raises a host of arguments in support of two main contentions: that the record fails to support seven of the nine violations found by the board and that if we do not dismiss the entire complaint, we should not impose **[**11]** any sanction greater than a one-year suspension with six months stayed on conditions.

[*P20] Among Moody's arguments are claims that the hearing panel failed to properly consider and weigh the evidence presented. He contends that the board should have afforded greater weight to his testimony that he inadvertently lost track of Sweeney's discovery requests and deposition notices due to the loss of his physical office location in April 2015. He further testified that he then lied to his client—but not to the court or opposing counsel—about the reason for his failure to comply with the discovery requests in order to demonstrate that he had the upper hand in the litigation. He argues that there is no evidence that he ever made false statements to Sweeney or the magistrate because they did not testify at his disciplinary hearing. Moody further maintains that by advising Barrios once or twice to tell the truth, Moody negated his specific instruction to Barrios that Barrios should answer "yes" if he were asked whether Moody had told him about the first two scheduled depositions—even though Moody *admitted* that he did not so inform him.

[*P21] The essence of Moody's arguments is that the panel erred in finding **[**12]** that his previous admissions and Barrios's testimony about their December 19, 2015 meeting were more credible than Moody's hearing testimony. But our precedent is clear—HN3[↑] "we ordinarily defer to a panel's credibility determinations in our independent review of professional discipline cases unless the record weighs heavily against those findings." *Cincinnati Bar Ass'n v. Statzer, 101 Ohio St.3d 14, 2003-Ohio-6649, 800 N.E.2d 1117, ¶ 8*.

[*P22] Here, Moody admitted that he had received Sweeney's interrogatories, requests for production, and multiple notices of depositions. Yet he told Barrios that he had played games in an effort to delay Sweeney's discovery process, to inconvenience her by making her fly into town for depositions that he had no intention of attending, and to make her look bad in front of the court. He also told Barrios that he had lied to Sweeney and the magistrate about those matters. Those statements are HN4[↑] admissions by a party-opponent; as such they are not hearsay and may be considered for the truth of the matter asserted. *See Evid.R. 801(D)(2)*. Although Moody claimed at the disciplinary hearing that he had disavowed those statements at the end of his conversation with Barrios, Barrios unequivocally testified that Moody made no such retraction—and the hearing panel found Barrios's **[**13]** testimony to be more credible.

[*P23] Having independently reviewed the full record in this case, we have no trouble understanding why the panel found Barrios's testimony to be credible while repeatedly stating that Moody's testimony lacked credibility. Based on Moody's admissions to his client—and the reasons underlying the board's findings that his testimony attempting to retract those admissions was simply not credible—there is ample evidence to support each of the board's findings of misconduct. Moreover, we reject Moody's arguments that the board erroneously attributed aggravating effect to certain facts and failed to attribute mitigating effect to others—because many of those findings are inextricably linked to the panel's credibility determinations.

[*P24] Moody's final objection to the board's report is that his misconduct does not warrant an indefinite suspension. He contends that his misconduct is distinguishable from that in *Gruttadaurio* and *Donchatz* because it occurred over a period of just eight months and affected a single client—while the conduct of Gruttadaurio and Donchatz affected multiple clients and spanned periods of one to seven years.

[*P25] Moody argues that we should consider additional **[**14]** cases in which we imposed term suspensions for misconduct that was arguably more egregious than his. For example, he argues that we suspended Joseph G. Stafford from the practice of law for 12 months based on findings that he had twice engaged in dishonest conduct and abused legal procedures for the ostensible benefit of his clients. *See Disciplinary Counsel v. Stafford, 131 Ohio St.3d 385, 2012-Ohio-909, 965 N.E.2d 971*. Moody also notes that we suspended Leo Johnny Talikka for two years with one year stayed on conditions for stipulated misconduct that included the neglect of three separate client matters, failure to refund the unearned portion of several client retainers, failure to safeguard client funds and maintain required records of entrusted funds, and unspecified acts of dishonesty, fraud, deceit, or misrepresentation in five separate matters, one of which

was prejudicial to the administration of justice. *Disciplinary Counsel v. Talikka, 135 Ohio St.3d 323, 2013-Ohio-1012, 986 N.E.2d 954*.

[*P26] Joseph Stafford's case is distinguishable from the facts of this case because Stafford's actions were not found to be prejudicial to the administration of justice. *Stafford at ¶ 32*. And while Talikka may have committed more rule violations than Moody, we also found that he took on more work than he could handle as he faced a series of significant health **[**15]** problems, accepted full responsibility for his misconduct, made full restitution, and submitted evidence of his good character and reputation. *Talikka at ¶ 20-21*.

[*P27] Despite Moody's arguments to the contrary, his conduct is most comparable to that of *Gruttadaurio* and *Donchatz* given the nature, if not the extent, of the underlying misconduct and the implausible explanations and justifications that each of those attorneys offered for their misconduct in the course of the disciplinary process.

[*P28] Gruttadaurio failed to place client fees into his client trust account, failed to refund unearned fees, failed to perform contracted work, failed to attend the final hearing in a client's case, and lied to relator's investigator about his purported efforts to file a client's appeal. During his first meeting with relator's investigator, Gruttadaurio stated that he had mailed a notice of appeal and related documents to this court, had called this court to check on their status, and had been informed that the documents were "in the system" but not yet on the docket—though in truth the documents were never received by this court. *Gruttadaurio, 136 Ohio St.3d 283, 2013-Ohio-3662, 995 N.E.2d 190, at ¶ 25-28*. Gruttadaurio later attempted to retract that statement by claiming that **[**16]** he had been put on the spot and that "further investigation," *id. at ¶ 34*, of his records made him realize his error—but he had made the same misrepresentations several months earlier in a detailed written response to the grievance.

[*P29] Donchatz filed a satisfaction of judgment falsely stating that a default judgment taken against him had been paid, knowingly made false statements impugning the integrity of the office of disciplinary counsel in a motion filed in his own disciplinary action, and submitted a "stipulated entry and consent judgment," *Donchatz, 150 Ohio St.3d 168, 2017-Ohio-2793, 80 N.E.3d 444, at ¶ 28*, to a court in a client's case without first obtaining the consent of the opposing party. Donchatz also failed to acknowledge the wrongful nature of his conduct and continued to engage in dishonest conduct throughout the disciplinary proceeding. Like Gruttadaurio, he could not keep his story straight. He offered three different explanations—all false—to justify his filing of a false and unauthorized satisfaction of a judgment taken against him. *Id. at ¶ 38*. Donchatz also made numerous false and contradictory statements regarding a fee arrangement, claiming at various times that he had (1) agreed to represent the client pro bono, (2) agreed with **[**17]** the client to seek payment of his fee through a third-party source, (3) wanted to not be left "holding the bag on the legal fees," and (4) instructed the client to seek fee arbitration to convince her that she did not need to pay him for his services. *Id. at ¶ 10, 41-43*.

[*P30] Moody's explanation that he lied in an effort to increase his client's confidence, like the dubious explanations given by Gruttadaurio and Donchatz, has no place in a profession grounded in honesty, integrity, and trustworthiness. Rather than increasing Barrios's confidence in Moody's capabilities, Moody's statements had the opposite effect. Barrios testified that he was confused and "kind of mind-boggled" that Moody asked him to lie under oath to cover up Moody's misconduct or foolishness. Barrios could not sleep for two or three days as he tried to figure out what to do, and he ultimately terminated Moody's representation to avoid being part of his deceit.

[*P31] Regardless of whether Moody's statements to Barrios were true or false, they raise questions about his integrity and his ability to conduct himself in a manner that engenders respect for the law and the profession. *HN5*[↑] "One of the fundamental tenets of the professional **[**18]** responsibility of a lawyer is that he should maintain a degree of personal and professional integrity that meets the highest standard. The integrity of the profession can be maintained only if the conduct of the individual attorney is above reproach." *Cleveland Bar Ass'n v. Stein, 29 Ohio St.2d 77, 81, 278 N.E.2d 670 (1972)*.

[*P32] For these reasons, we overrule each of Moody's objections, accept the board's findings of fact and misconduct, and agree that an indefinite suspension from the practice of law is the appropriate sanction in this case.

Conclusion

[*P33] Accordingly, Steven Jerome Moody is

indefinitely suspended from the practice of law in Ohio. Costs are taxed to Moody.

Judgment accordingly.

O'CONNOR, C.J., and O'DONNELL, KENNEDY, FISCHER, and DEGENARO, JJ., concur.

FRENCH and DEWINE, JJ., dissent, and would suspend the respondent from the practice of law for two years.

End of Document

The chart below sets forth the various wiretapping/electronic surveillance statutes and case decisions, for all 50 states. It does not address the specifics of federal law.

STATE	CONSENT	AUTHORITY	EXPLANATION/ADDITIONAL INFORMATION
Federal	One Party	18 USC § 2511(2)(d)	"It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted to commit any criminal or tortious act in violation of the Constitution or laws of the U.S. or of any State."
Alabama	One Party	Ala. Code § 13A-11-30(1) and § 13A-11-31	Alabama statute defines eavesdropping as to "overhear, record, amplify or transmit any part of the private communication of others without the consent of at least one of the persons engaged in the communication."
Alaska	One Party	Alaska Stat. Ann. § 42.20.300(a); Alaska Stat. Ann. § 42.20.310(a)(1); Palmer v. Alaska, 604 P.2d 1106 (Alaska 1979).	Alaska law prohibits the use of an electronic device to hear or records private conversations without the consent of at least one party to the conversation. Alaska's highest court has held that the eavesdropping statute was intended to prohibit third-party inception of communications only; does not apply to participants in a conversation.
Arizona	One Party	Ariz. Rev. Stat. Ann. § 13-3012(9); § 13-3012(5)(c)	An individual not involved in or present during a communication must have the consent of at least one party to record an electronic or oral communication. Arizona also permits a telephone "subscriber" (the person who orders the phone service and whose name is on the bill) to tape (intercept) calls without being a party to the conversation and without requiring any notification to any parties to the call.
Arkansas	One Party	Ark. Code Ann. § 5-60-120	An individual must have the consent of at least one party to a conversation, whether it is in person or electronic.
California	All Parties	Cal. Penal Code § 632(a)-(d); *Kearney v. Salomon Smith Barney Inc.*, 39 Cal.4th 95 (Cal. 2006); *Kight v. CashCall, Inc.*, 200 Cal. App. 4th 1377 (2011); *Cal. Pub. Util. Code Gen. Order 107-B(II)(A); Air Transp. Ass'n of Am. v. Pub. Utilities Comm'n of State of Cal.*, 833 F.2d 200 (9th Cir. 1987).	California has very specific laws regulating the recording of oral and electronic communications. All parties must give their consent to be recorded. However, The California Supreme Court has ruled that if a caller in a one-party state records a conversation with someone in California, that one-party state caller is subject to the stricter of the laws and must have consent from all callers. Although California is a two-party state, it is also legal to record a conversation if an audible beep is included on the recorder and for the parties to hear.
Colorado	Mixed	Colo. Rev. Stat. Ann. § 18-9-303 (1)	An individual not involved in or present during a communication must have the consent of at least one party to record an electronic or oral communication.

STATE	CONSENT	AUTHORITY	EXPLANATION/ADDITIONAL INFORMATION
Connecticut	Mixed	C.G.S.A. §§ 53a-187, -89; C.G.S.A. § 52-570d	Connecticut is "mixed" because criminally, under Connecticut General Statutes § 53a-187, it's a one-party consent state. It is against the law to record a telephone communication or a communication made by a person other than a sender or receiver, without the consent of either the sender or receiver. For civil cases, however, it is not a one-party consent state. Pursuant to C.G.S.A. § 52-570d, you are not allowed to record an oral private telephone conversation without consent from all parties to the conversation. So, it's impermissible in a civil context, meaning there's civil, not criminal, liability. You can sue the recorder for damages (that is, if there are any damages, such as when someone who puts your phone call on the internet or sends it to your employer). You can also get attorneys' fees from the eavesdropper.
Delaware	All Parties	Del. Code Ann. tit. 11, § 2402(c)(4) Del. Code Ann. tit. 11, § 1335(a)(4); *U.S. v. Vespe*, 389 F. Supp. 1359 (1975).	State privacy laws state that all parties must consent to the recording of oral or electronic conversations. *U.S. v. Vespe* holds that even under the privacy laws an individual has the right to record their own conversations. Section 133S says it is a class G felony to intercept without the consent of all parties thereto a message by telephone or other means of communication, except as authorized by law. Section 2402 provides that it is "authorized by law" for a person communication where the person is a party to the communication or where one of the parties to the communication has given prior consent, unless the communication is intercepted for the purpose of a criminal act.
District of Columbia	One Party	D.C. Code § 23-542(b)(3)	An individual may record or disclose the contents of an electronic or oral communication if they are a party to said communication or it they have received prior consent from one of the parties.
Florida	All Parties	Fla. Stat. Ann. § 934.03(3)(d)	All parties must consent to the recording and or disclosure of the contents of and electronic, oral or wire communication.
Georgia	One Party	Ga. Code Ann. § 16-11-66(a); Ga. Code Ann. § 16-11-62	An individual has the right to record or disclose the contents of an electronic, oral or wire communication that they are a party to or if one of the parties has given prior consent to the recording of said communications.
Hawaii	One Party	Haw. Rev. Stat. § 803-42(3)(A)	An individual has the right to record or disclose the contents of an electronic, oral or wire communication that they are a party to or if one of the parties has given prior consent to the recording of said communications.
Idaho	One Party	Idaho Code Ann. § 18-6702(2)(d)	An individual has the right to record or disclose the contents of an electronic, oral or wire communication that they are a party to or if one of the parties has given prior consent to the recording of said communications.

STATE	CONSENT	AUTHORITY	EXPLANATION/ADDITIONAL INFORMATION
Illinois	All Parties (One-Party for "private electronic communications")	720 I.L.C.S. § 5/14-2(a) (Illinois Eavesdropping Law); *People v. Beardsley*, 503 N.E.2d 346 (Ill. 1986); *People v. Clark*, 6 N.E.3d 154 (Ill. 2014). Section 5/14-2(a)(1)(2) was amended in 2014 to make "eavesdropping" a felony if a person: (1) Uses an eavesdropping device, in a surreptitious manner, for the purpose of overhearing, transmitting, or recording all or any part of any **private conversation** to which he or she is not a party unless he or she does so with the consent of all of the parties to the private conversation; or (2) Uses an eavesdropping device, in a surreptitious manner, for the purpose of transmitting or recording all or any part of any **private conversation** to which he or she is a party unless he or she does so with the consent of all other parties to the private conversation. (3) Intercepts, records, or transcribes, in a surreptitious manner, any **private electronic communication** to which he or she is not a party unless he or she does so with the consent of all parties to the private electronic communication; Section 5/14-1 defines "eavesdropping" (a felony) as using any device capable hearing or recording oral conversation or intercept or transcribe electronic communications whether such conversation or electronic communication is conducted in person, by telephone, or by any other means The use of an eavesdropping device is surreptitious if it is done with stealth, deception, secrecy or concealment. Therefore, it permits recording of conversations in public places, such as courtrooms, that no person could expect to be private.	The law in Illinois is confusing and in flux. For years, § 5/14-2(a) made it a crime to use an "eavesdropping device" to overhear or record a phone call or conversation without the consent of all parties to the conversation, regardless of whether the parties had an expectation of privacy. All parties had to consent to the recording of telephonic, electronic, or in person oral conversation. Illinois courts had ruled that "eavesdropping" only applied to conversations that the party otherwise would not have been able to hear, thereby effectively making it a one-party consent state. However, there still appears to be confusion and debate over the law. The statute had repeatedly and controversially been used to arrest people who have video-taped police. In *People v. Clark*, 6 N.E.3d 154 (Ill. 2014) and *People v. Melongo*, 6 N.E.3d 120 (Ill. 2014), the Supreme Court held that § 5/14-2 made it a crime to knowingly and intentionally use eavesdropping devices to hear or record all or any part of any conversation, unless done with consent of all parties to conversation or authorized by court order, was unconstitutionally overbroad on its face, declaring it unconstitutional. On December 30, 2014, the statute was amended to permit recording of conversations in public places, such as in courtrooms, where no person reasonably would expect it to be private. The new statute draws a distinction between a "***private***" conversation and other public communications. The new statute includes language indicating that in order to commit a criminal offense, a person must be recording "**in a surreptitious manner.**" It addressed a number of circumstances where there were no legitimate privacy interests. The statute provides no guidelines or factors with regard to when an expectation of privacy is reasonable. While the statute leaves open to debate whether a particular "private conversation" falls within the purview of the revised law, some argue that the new statute leaves no doubt that Illinois remains firmly within the minority of "all-party" consent states. The amended statute requires that all parties to an oral communication consent to the use of an eavesdropping device for that use to be lawful. On the other hand, by negative implication, the amended statute also appears to establish a "one-party" consent rule for **private electronic communications**, by prohibiting only someone who is not a party to a conversation from surreptitiously using an eavesdropping device to intercept, record or transcribe such a communication (e.g., telephone, video conference, etc.). A *private electronic communication* is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence . . . transmitted in whole or part by a wire, radio, pager, computer, electromagnetic, photo or optical system, when the sending or receiving party intends the electronic communication to be private under circumstances reasonably justifying that expectation." Therefore, by negative implication, the revised statute appears to permit someone who is a party to a **telephone or a video conference** to electronically record the call without notifying any other party to the call or obtaining their consent. A first offense is a Class 3 felony (maximum 2-5 years and $25,000 fine) and a subsequent offense is a Class 2 felony (maximum 3-7 years and $25,000 fine).

STATE	CONSENT	AUTHORITY	EXPLANATION/ADDITIONAL INFORMATION
Indiana	One Party	Ind. Code Ann. § 35-31.5-2-176	An individual has the right to record or disclose the contents of an electronic or telephonic communication that they are a party to or if one of the parties has given prior consent to the recording of said communications.
Iowa	One Party	Iowa Code Ann. § 808B.2 (2)(c); Iowa Code Ann. § 727.8	An individual has the right to record or disclose the contents of an oral, electronic or telephonic communication that they are a party to or if one of the parties has given prior consent to the recording of said communications.
Kansas	One Party	Kan. Stat. Ann. § 21-6101(1); Kan. Stat. Ann. § 21-6101(4)	Kansas law bars the interception, recording and or disclosure of any oral or telephonic communication by the means of an electronic recording device without the consent of at least one party or if they are a party to said communication.
Kentucky	One Party	Ky. Rev. Stat. Ann. § 526.020; Ky. Rev. Stat. Ann. § 526.010	Kentucky law bars the interception, recording and or disclosure of any oral or telephonic communication by the means of an electronic recording device without the consent of at least one party or if they are a party to said communication.
Louisiana	One Party	La. Rev. Stat. Ann. § 15:1303(c)(4)	The Electric Surveillance Act bars the inception, recording or disclosure of and oral or telephonic communication by the means of an electronic recording device without the consent of at least one party or if they are a party to said communication.
Maine	One Party	Me. Rev. Stat. Ann. tit. 15, § 710	Maine law bars the interception, recording and or disclosure of any oral or telephonic communication by the means of an electronic recording device without the consent of at least one party or if they are a party to said communication.
Maryland	All Parties	Md. Code Ann., Cts. & Jud. Proc. § 10-402 (c)(3)	The Wiretapping and Electronic Surveillance Act holds that it is unlawful to: (1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; (2) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle; or (3) Willfully use, or endeavor to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle. However, it is lawful to intercept a wire, oral, or electronic communication where the person is a party to the communication and where all of the parties to the communication have given prior consent.

STATE	CONSENT	AUTHORITY	EXPLANATION/ADDITIONAL INFORMATION
Massachusetts	All Parties	Mass. Gen. Laws Ann. ch. 272, § 99(B)(4); Mass. Gen. Ann. Laws ch. 272, § 99(C)(1)	The recording, interception, use or disclosure of any conversation, whether in person or via wire or telephone, without the consent of all the parties is prohibited. However, telephone equipment, which is furnished to a phone company subscriber and used in the ordinary course of business, as well as office intercommunication systems used in the ordinary course of business, is excluded from the definition of unlawful interception devices.
Michigan	One Party**	Mich. Comp. Laws Ann. § 750.539(c); *Sullivan v. Gray*, 117 Mich. App. 476, 324 N.W.2d 58 (1982).	The recording, interception, use or disclosure of any conversation, whether in person or electronic or computer-based system, without the consent of all the parties is prohibited. **This looks like an "all party consent" law, but one Michigan court has ruled that a participant in a private conversation may record it without violating the statute because the statutory term "eavesdrop" refers only to overhearing or recording the private conversations of others. The Michigan Court of Appeals interpreted that the eavesdropping statute only applied to third-party inception of a conversation; a participant in a communication does have the right to record the same. Michigan law is often misinterpreted as requiring the consent of all parties to a conversation.
Minnesota	One Party	Minn. Stat. Ann. § 626A.02(d)	An individual has the right to record or disclose the contents of an oral, electronic or telephonic communication that they are a party to or if one of the parties has given prior consent to the recording of said communications.
Mississippi	One Party	Miss. Code. Ann. § 41-29-531(e)	An individual has the right to record or disclose the contents of an oral, telephonic, or other communication that they are a party to or if one of the parties has given prior consent to the recording of said communications.
Missouri	One Party	Mo. Ann. Stat. § 542.402(2)(3)	An individual has the right to record or disclose the contents of an oral or electronic communication that they are a party to or if one of the parties has given prior consent to the recording of said communications.
Montana	All Parties	Mont. Code Ann. § 45-8-213	It is unlawful to record an in person or electronic communication without the consent of all parties except under certain circumstances namely elected or appointed public officials or public employees when the recording occurs in the performance of an official duty; individuals speaking at public meetings; and individuals given warning of or consenting to the recording.

STATE	CONSENT	AUTHORITY	EXPLANATION/ADDITIONAL INFORMATION
Nebraska	One Party	Neb. Rev. Stat. § 86-290(2)(c); Neb. Rev. Stat. § 86-276	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication unless the person is doing so for the purpose of committing a tortious or criminal act. It is also lawful for an individual to record electronic communications that are accessible to the general public.
Nevada	Mixed	Nev. Rev. Stat. § 200.620; Nev. Rev. Stat. § 200.650; *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 969 P.2d 938 (1998).	It is unlawful to surreptitiously record any private in-person communication without the consent of one of the parties to the conversation. The consent of all parties is required to record or disclose the content of a telephonic communication. The Nevada Supreme Court held in *Lane v. Allstate* that an individual must have the consent of all parties in order to lawful record a telephonic communication even if they are a party to said communication.
New Hampshire	All Parties	N.H. Rev. Stat. Ann. § 570-A:2(I-a); *New Hampshire v. Locke*, 761 A.2d 376 (N.H. 1999).	It is unlawful to record or disclose the contents of any electronic or in-person communication without the consent of all parties. The New Hampshire Supreme Court held that an individual efficaciously consented to the recording of a communication when surrounding circumstances demonstrate that they knew said communication was being recorded.
New Jersey	One Party	N.J. Stat. Ann. § 2A:156A-4(d); N.J. Stat. Ann. § 2A:156A-2	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication unless the person is doing so for the purpose of committing a tortious or criminal act. It is also lawful for an individual to record electronic communications that are accessible to the general public.
New Mexico	One Party	N.M. Stat. Ann. § 30-12-1(C)	The reading, interrupting, taking or copying of any message, communication or report is unlawful without the consent of one of the parties to said communication.
New York	One Party	N.Y. Penal Law § 250.00(1); N.Y. Penal Law § 250.05	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication.
North Carolina	One Party	N.C. Gen. Stat. Ann. § 15A-287(a)	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication.
North Dakota	One Party	N.D. Cent. Code § 12.1-15-02	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication unless the person is doing so for the purpose of committing a tortious or criminal act.

STATE	CONSENT	AUTHORITY	EXPLANATION/ADDITIONAL INFORMATION
Ohio	One Party	Ohio Rev. Code Ann. § 2933.52(B)(4); Ohio Rev. Code Ann. § 2933.51	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication unless the person is doing so for the purpose of committing a tortious or criminal act.
Oklahoma	One Party	Okla. Stat. Ann. tit. 13, § 176.4; Okla. Stat. Ann. tit. 13, § 176.2	Pursuant to the Security of Communications Act, it is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication unless the person is doing so for the purpose of committing a tortious or criminal act.
Oregon	Mixed	Or. Rev. Stat. Ann. § 165.540; Or. Rev. Stat. Ann. § 165.535	It is not unlawful for an individual who is a party to or has consent from a party of an electronic communication to record or disclose the contents of said communication. It is unlawful to record an in-person communication without the consent of all parties involved.
Pennsylvania	All Parties	18 Pa. Cons. Stat. § 5702 to § 5704; *Com. v. Smith*, 136 A.3d 170, 171 (Pa. Super. 2016); *Com. v. Spence*, 91 A.3d 44, 44–45 (Pa. 2014).	It is unlawful to record an electronic or in-person communication without the consent of all parties. However, "interception" of or mere listening in to a call using a telephone is not prohibited because the term "electronic, mechanical or other device" does not include a telephone. Using a cell phone's "voice memo" application would be considered a "device" and would be prohibited.
Rhode Island	One Party	R.I. Gen. Laws Ann. § 11-35-21; R.I. Gen. Laws Ann. § 12-5.1-1	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication unless the person is doing so for the purpose of committing a tortious or criminal act. An individual may also disclose the content of any electronic or in-person communication that is common knowledge or public information.
South Carolina	One Party	S.C. Code Ann. § 17-30-30; S.C. Code Ann. § 17-30-15	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication.
South Dakota	One Party	S.D. Codified Laws § 23A-35A-20; S.D. Codified Laws § 23A-35A-1	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication.
Tennessee	One Party	Tenn. Code Ann. § 39-13-601; Tenn. Code Ann. § 39-13-604; Tenn. Code Ann. § 40-6-303	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication unless the person is doing so for the purpose of committing a tortious or criminal act. An individual may also disclose the content of any electronic communication that is readily accessible to the general public.

STATE	CONSENT	AUTHORITY	EXPLANATION/ADDITIONAL INFORMATION
Texas	One Party	Tex. Penal Code Ann. § 16.02; Tex. Code Crim. Proc. Ann. art. 18.20	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication unless the person is doing so for the purpose of committing a tortious or criminal act. An individual may also disclose the content of any electronic communication that is readily accessible to the general public.
Utah	One Party	Utah Code Ann. § 77-23a-4; Utah Code Ann. § 77-23a-3	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication unless the person is doing so for the purpose of committing a tortious or criminal act. An individual may also disclose the content of any electronic communication that is readily accessible to the general public.
Vermont	No Statute or Definitive Case Law	*Vermont v. Geraw*, 795 A.2d 1219 (Vt. 2002); *Vermont v. Brooks*, 601 A.2d 963 (Vt. 1991).	There is no state statute that regulates the interception of telephone conversations. The case law is also lacking in this area and has made a clear indication as to if Vermont is a one-party or all-party consent state. The state's highest court has held that surreptitious electronic monitoring of communications in a person's home is an unlawful invasion of privacy. *Vermont v. Geraw*, 795 A.2d 1219 (Vt. 2002). On the other hand, the state's highest court also has refused to find the overhearing of a conversation in a parking lot unlawful because that conversation was "subject to the eyes and ears of passersby." *Vermont v. Brooks*, 601 A.2d 963 (Vt. 1991).
Virginia	One Party	Va. Code Ann. § 19.2-62	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication.
Washington	All Parties	Wash. Rev. Code Ann. § 9.73.030	It is unlawful for an individual to record and or disclose the content of any electronic of in-person communication without the consent of all parties.
West Virginia	One Party	W. Va. Code Ann. § 62-1D-3	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication unless the person is doing so for the purpose of committing a tortious or criminal act.
Wisconsin	One Party**	Wis. Stat. Ann. § 968.31; Wis. Stat. Ann. § 968.27; **Wis. Stat. Ann. § 885.365(1)	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication unless the person is doing so for the purpose of committing a tortious or criminal act. **Evidence obtained as the result of the recording a communication is "totally inadmissible" in civil cases, except when the party is informed that the conversation is being recorded and that evidence from said recording may be used in a court of law.

STATE	CONSENT	AUTHORITY	EXPLANATION/ADDITIONAL INFORMATION
Wyoming	One Party	Wyo. Stat. Ann. § 7-3-702	It is not unlawful for an individual who is a party to or has consent from a party of an in-person or electronic communication to record and or disclose the content of said communication unless the person is doing so for the purpose of committing a tortious or criminal act.

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LAWS ON RECORDING CONVERSATIONS IN ALL 50 STATES

Individuals, businesses, and the government often have a need to record telephone conversations that relate to their business, customers, or business dealings. The U.S. Congress and most states' legislatures have passed telephone call recording statutes and regulations that may require the person wanting to record the conversation to provide notice and obtain consent before doing so. Most states require one-party consent, which can come from the person recording if present on the call. However, some states require that all parties to a call consent to recording.

Laws governing telephone call recording are typically found within state criminal statutes and codes because most states frame call recording as *eavesdropping*, *wiretapping*, or as a type of *intercepted communication*. State laws may not explicitly mention telephone call recording because of these technical definitions. Accordingly, counsel may need to infer when and under what circumstances a state permits telephone call recording by reviewing prohibited actions.

The big issue when it comes to recording someone is whether the jurisdiction you are in requires that you get the consent of the person or persons being recorded. This begs the question of which jurisdiction governs when you are talking to a person in another state. Some states require the consent of all parties to the conversation, while others require only the consent of one party. It is not always clear whether federal or state law applies, and if state law applies which of the two (or more) relevant state laws controls. A good rule of thumb is that the law of the jurisdiction in which the recording device is located will apply. Some jurisdictions, however, take a different approach when addressing this issue and apply the law of the state in which the person being recorded is located. Therefore, when recording a call with parties in multiple states, it is best to comply with the strictest laws that may apply or get the consent of all parties. It is generally legal to record a conversation where all the parties to it consent.

One-Party Consent

If the consent of one party is required, you can record a conversation if you're a party to the conversation. If you're not a party to the conversation, you can record a conversation or phone call provided one party consents to it after having full knowledge and notice that the conversation will be recorded. Under Federal law, 18 U.S.C. § 2511(2)(d) requires only that one party give consent. In addition to this Federal statute, **thirty-eight (38) states and the District of Columbia** have adopted a "one-party" consent requirement. **Nevada** has a one-party consent law, but Nevada's Supreme Court has interpreted it as an all-party consent law.

All-Party Consent

Eleven (11) states require the consent of everybody involved in a conversation or phone call before the conversation can be recorded. Those states are: California, Delaware, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania and Washington. These laws are sometimes referred to as "two-party" consent laws but, technically, require that all parties to a conversation must give consent before the conversation can be recorded.

Wiretapping vs. Eavesdropping

Electronic "**eavesdropping**" means to overhear, record, amplify, or transmit any part of the private communication of others without the consent of at least one of the persons engaged in the communication. It may involve the placement of a "bug" inside private premises to secretly record conversations, or the use of a "wired" government informant to record conversations that occur within the informant's earshot. At common law, "eavesdroppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet; or are indictable at the sessions, and punishable by fine and finding of sureties for [their] good behavior," 4 Blackstone, *Commentaries on the Laws of England*, 169 (1769).

"**Wiretapping**" involves the use of covert means to intercept, monitor, and record telephone conversations of individuals. It is an unauthorized physical connection with a communication system at a point between the sender and receiver of a message. However, where a message is overheard by a third person during its transmission and there has been no disturbance of the physical integrity of the communication system, it is less clear that an illegal "interception" has taken place. Wiretapping is a form of electronic eavesdropping accomplished by seizing or overhearing communications by means of a concealed recording or listening device connected to the transmission line. In the infamous *Olmstead v. United States* decision, the court held that the Fourth Amendment's search and seizure commands did not apply to government wiretapping accomplished without a trespass onto private property. *Olmstead v. United States*, 277 U.S. 43 (1928). This decision stood for 40 years.

"**Intercepted communication**" generally means the aural acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

Consent

What constitutes "consent" is also an issue of contention when you are considering recording a conversation. In some states, "consent" is given if the parties to the call are clearly notified that the conversation will be recorded, and they engage in the conversation anyway. Their consent is implied. For example, we have all experienced calling a customer service department only to hear a recorded voice warning, "*This call may be recorded for quality assurance or training purposes.*" It is usually a good practice for practitioners to let the witness know they are recording the conversation to accurately recall and commemorate the testimony being given – such as during the taking of a witness' statement.

Exceptions

Nearly all states include an extensive list of exceptions to their consent requirements. Common exceptions found in a majority of states' laws include recordings captured by police, court order, communication service providers, emergency services, etc. Generally, it is permissible to record conversations if all parties to the conversation are aware and consent to the interception of the communication. There are certain limited exceptions to the general prohibition against electronic surveillance. For example, so-called "providers of wire or electronic communication service" (*e.g.,* telephone companies and the like) and law enforcement in the furtherance of criminal investigative activities have certain abilities to eavesdrop.

Interstate/Multi-State Phone Calls

Telephone calls are routinely originated in one state and participated in by residents of another state. In conference call settings, multiple states (and even countries) could be participating in a telephone call which is subject to being recorded by one or more parties to the call. This presents some rather challenging legal scenarios when trying to evaluate whether a call may legally be recorded. A call from Pennsylvania to a person in New York involves the laws of both states. Which state's laws apply and/or whether the law of each state must be adhered to are questions parties to a call are routinely faced with.

In the **New York** Supreme Court case of *Michael Krauss v. Globe International, Inc.*, No. 18008-92 (N.Y. Sup. Ct. Sept. 11, 1995), reporters for *The Globe* recorded a telephone conversation between a prostitute in **Pennsylvania** and Krauss, the former husband of television personality Joan Lunden, who was in **New York**. Pennsylvania law requires two-party consent to record a telephone conversation, while New York law requires only one-party consent. The court noted that in cases where New York law is in conflict with the laws of other states, New York courts usually apply the law of the place of the tort, or more specifically, the place where the injury occurred. The Court held that under such circumstances the New York wiretap law should apply, because any injury that was suffered by Krauss occurred in New York. Therefore, the Court found that Krauss did not have a claim under New York law because the prostitute consented to having the phone conversation recorded.

In *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006), the **California** Supreme Court applied California wiretap law to a company located in **Georgia** that routinely recorded business phone calls with its clients in California. California law requires all party consent to record any telephone calls, while Georgia law requires only one-party consent. Applying California choice-of-law rules, the Court reasoned that the failure to apply California law would "impair California's interest in protecting the degree of privacy afforded to California residents by California law more severely than the application of California law would impair any interests of the State of Georgia."

When a telephone conversation is between parties who are in different states, it also increases the chance that federal law might apply.

Federal Law

In most cases, both state and federal laws may apply. State laws are enforced by your local police department and the state's attorney office. Federal wiretapping laws are enforced by the FBI and U.S. Attorney's office. It is a federal crime to wiretap or to use a machine to capture the communications of others without court approval, unless one of the parties has given their prior consent. It is likewise a federal crime to use or disclose any information acquired by illegal wiretapping or electronic eavesdropping. Violations can result in imprisonment for not more

than five years; fines up to $250,000 (up to $500,000 for organizations); in civil liability for damages, attorney's fees and possibly punitive damages; in disciplinary action against any attorneys involved; and in suppression of any derivative evidence. Congress has created separate, but comparable, protective schemes for electronic mail (e-mail) and against the surreptitious use of telephone call monitoring practices such as pen registers and trap and trace devices.

The *Federal Communications Act of 1934* (47 U.S.C.A. §§ 151, *et seq.*) provides that no person "not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person." 47 U.S.C.A. § 605. In *Nardone v. United States*, 308 U.S. 338 (1939), it was held that this section prohibits divulging such communications in federal criminal prosecutions and prohibits the use of information thus obtained in such prosecutions (the "fruits of the poisonous tree" doctrine).

Evidence obtained by wiretapping in violation of § 605, is rendered inadmissible in a state court solely because its admission in evidence would also constitute a violation of 47 U.S.C.A. § 605. *Lee v. State of Fla.*, 392 U.S. 378 (1968). The mere interception of a telephone communication by an unauthorized person does not in and of itself constitute a violation of § 605. Only where the interception is followed by the divulging of the communication, as by introducing it into evidence, would there be a violation of § 605.

The *Federal Wiretap Act*, found at 18 U.S.C. § 2520, protects individual privacy in communications with other people by imposing civil and criminal liability for intentionally intercepting communications using a device, unless that interception falls within one of the exceptions in the statute. Although the Federal Wiretap Act originally covered only wire and oral conversations (*e.g.,* using a device to listen in on telephone conversations), it was amended in 1986 to cover electronic communications as well (*e.g.,* emails or other messages sent via the Internet).

The *Electronic Communications Privacy Act of 1986* (ECPA) is found at 8 U.S.C. § 2510 et seq. It prohibits the intentional actual or attempted interception, use, disclosure, or "procure[ment] [of] any other person to intercept or endeavor to intercept any wire, oral, or electronic communication." The ECPA allows employers to listen to "job-related" conversations. It protects the privacy of wire, oral, and electronic communications including telephone conversations (18 U.S.C. §§ 2510 to 2522). The ECPA gives employers almost total freedom to listen to any phone conversation, since it can be argued that it takes a few minutes to decide if a call is personal or job-related. However, this exception applies only to the employer, not the employee. This law only permits telephone call recording if at least one-party consents. However, call recording is unlawful if the party consents with the intent to use the recording to commit a criminal or tortious act.

Exceptions to the Federal Wiretap Act's one-party consent requirement include call recordings captured by:

- Law enforcement;
- Communication service providers, if the recording is necessary to deliver service, or protect property or rights;
- Federal Communications Commission (FCC) personnel for enforcement purposes;
- Surveillance activities under the Foreign Intelligence Surveillance Act (50 U.S.C. §§ 1801 to1813);
- Individuals, if they record telephone calls to identify the source of harmful radio or other electronic interference with lawful telephone calls or electronic equipment; or
- Court order.

ORC Ann. 2933.52

Current with Legislation passed by the 132nd General Assembly and filed with the Secretary of State through file 107 (HB 405).

Page's Ohio Revised Code Annotated > Title 29: Crimes — Procedure (Chs. 2901 — 2981) > Chapter 2933: Peace Warrants; Search Warrants (§§ 2933.01 — 2933.831) > Wiretapping, Electronic Surveillance (§§ 2933.51 — 2933.66)

§ 2933.52 Interception of wire, oral or electronic communications.

(A) No person purposely shall do any of the following:

(1) Intercept, attempt to intercept, or procure another person to intercept or attempt to intercept a wire, oral, or electronic communication;

(2) Use, attempt to use, or procure another person to use or attempt to use an interception device to intercept a wire, oral, or electronic communication, if either of the following applies:

(a) The interception device is affixed to, or otherwise transmits a signal through, a wire, cable, satellite, microwave, or other similar method of connection used in wire communications;

(b) The interception device transmits communications by radio, or interferes with the transmission of communications by radio.

(3) Use, or attempt to use, the contents of a wire, oral, or electronic communication, knowing or having reason to know that the contents were obtained through the interception of a wire, oral, or electronic communication in violation of *sections 2933.51* to *2933.66 of the Revised Code*.

(B) This section does not apply to any of the following:

(1) The interception, disclosure, or use of the contents, or evidence derived from the contents, of an oral, wire, or electronic communication that is obtained through the use of an interception warrant issued pursuant to *sections 2933.53* to *2933.56 of the Revised Code*, that is obtained pursuant to an oral approval for an interception granted pursuant to *section 2933.57 of the Revised Code*, or that is obtained pursuant to an order that is issued or an interception that is made in accordance with section 802 of the "Omnibus Crime Control and Safe Streets Act of 1968," *82 Stat. 237*, 254, *18 U.S.C. 2510* to *2520* (1968), as amended, the "Electronic Communications Privacy Act of 1986," *100 Stat. 1848*-1857, *18 U.S.C. 2510*-*2521* (1986), as amended, or the "Foreign Intelligence Surveillance Act," *92 Stat. 1783*, *50 U.S.C. 1801*.11 (1978), as amended;

(2) An operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication to intercept, disclose, or use that communication in the normal course of employment while engaged in an activity that is necessary to the rendition of service or to the protection of the rights or property of the provider of that service, except that a provider of wire or electronic communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks;

(3)A law enforcement officer who intercepts a wire, oral, or electronic communication, if the officer is a party to the communication or if one of the parties to the communication has given prior consent to the interception by the officer;

(4)A person who is not a law enforcement officer and who intercepts a wire, oral, or electronic communication, if the person is a party to the communication or if one of the parties to the

communication has given the person prior consent to the interception, and if the communication is not intercepted for the purpose of committing a criminal offense or tortious act in violation of the laws or Constitution of the United States or this state or for the purpose of committing any other injurious act;

(5) An officer, employee, or agent of a communications common carrier providing information, facilities, or technical assistance to an investigative officer who is authorized to intercept a wire, oral, or electronic communication pursuant to *sections 2933.51* to *2933.66 of the Revised Code*;

(6) The use of a pen register in accordance with federal or state law;

(7) The use of a trap and trace device in accordance with federal or state law;

(8)A police, fire, or emergency communications system to intercept wire communications coming into and going out of the communications system of a police department, fire department, or emergency center, if both of the following apply:

(a) The telephone, instrument, equipment, or facility is limited to the exclusive use of the communication system for administrative purposes;

(b) At least one telephone, instrument, equipment, or facility that is not subject to interception is made available for public use at each police department, fire department, or emergency center.

(9) The interception or accessing of an electronic communication made through an electronic communication system that is configured so that the electronic communication is readily accessible to the general public.

(10) The interception of a radio communication that is transmitted by any of the following:

(a)A station for the use of the general public;

(b)A governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including a police or fire system, that is readily accessible to the general public;

(c)A station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services;

(d)A marine or aeronautical communications system.

(11) The interception of a radio communication that relates to a ship, aircraft, vehicle, or person in distress.

(12) The interception of a wire or electronic communication the transmission of which is causing harmful interference to a lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of that interference.

(13) Other users of the same frequency to intercept a radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of that system, if the communication is not scrambled or encrypted.

(C) Whoever violates this section is guilty of interception of wire, oral, or electronic communications, a felony of the fourth degree.

History

141 v S 222 (Eff 3-25-87); 142 v H 231 (Eff 10-5-87); *146 v S 2* (Eff 7-1-96); *146 v H 181*, § 3. Eff 7-1-96.

Annotations

Notes

Publisher's Note:

The amendments made by SB 2 (146 v —) and HB 181 (146 v —) have been combined. Please see provisions of RC § 1.52.

Notes to Decisions

Generally

Where defendant admitted to several persons that he was involved in a murder and that he had property belonging to the victim for sale, those conversations that were taped by police after they became aware of defendant's involvement did not have to be suppressed, as they were not obtained in violation of R.C. 2933.52(B)(3). State v. Schaar, 2003-Ohio-4774, 2003 Ohio App. LEXIS 4304 (Ohio Ct. App., Stark County 2003).

Ohio wiretap law outlaws the use and disclosure of the contents of intercepted communications when a person acts knowing or having reason to know that the information was obtained illegally. The protection of privacy requires strict controls on repetition of the contents of illegally intercepted communications: Nix v. O'Malley, 160 F.3d 343, 1998 FED App. 0337P, 1998 U.S. App. LEXIS 28599 (6th Cir. Ohio), modified, 160 F.3d 343, 1998 FED App. 0337P, 1998 U.S. App. LEXIS 37797 (6th Cir. Ohio 1998).

Admission proper

Recordings made in violation of *Cal. Penal Code § 632* were admissible because the detective's conduct violated neither this section nor federal law. *State v. Knoefel, 2015-Ohio-5207, 2015 Ohio App. LEXIS 5043 (Ohio Ct. App., Lake County 2015)*.

Trial court did not commit plain error in failing to exclude a recorded telephone conversation into evidence on the basis that it was intercepted in violation of the statute because it could not be discerned how the categorization of the victim as a government agent would result in a violation; consequently, had a detective's notes pertaining to the conversation been supplied with the State's response to discovery, the evidence of the telephone call would not necessarily have been suppressed. *State v. Payne, 2013-Ohio-5230, 2013 Ohio App. LEXIS 5440 (Ohio Ct. App., Summit County 2013)*.

Trial court did not err in overruling defendant's motion to suppress a telephone recording between defendant and a rape victim because a police detective testified that the detective had obtained the victim's consent, and the detective stated the detective's name on the recording before the victim placed the call to defendant. Moreover, nothing in the record indicated that the victim was coerced into recording defendant, and the victim testified in the victim's deposition that no coercion occurred. *State v. Brumbach, 2011-Ohio-6635, 2011 Ohio App. LEXIS 5499 (Ohio Ct. App., Hamilton County 2011)*.

Defendant's recorded telephone conversations with the mother of his victim were properly admitted in his criminal trial involving sexual offenses against the victim, as the mother was not prohibited from recording her conversations without a warrant because she was a party to them and was not acting as a state agent pursuant to *R.C. 2933.52(B)(3)* and (4). *State v. Hauptstueck, 2011-Ohio-3502, 2011 Ohio App. LEXIS 2972 (Ohio Ct. App., Montgomery County 2011)*.

Applicability

User adequately pled a manufacturer violated *18 U.S.C.S. § 2511(1)(a)* and *Ohio Rev. Code Ann. § 2933.52(A)(1)* because (1) the user said the manufacturer contemporaneously intercepted the user's electronic communications, and (2) the manufacturer's contrary affidavit could not be considered on a motion to dismiss and did not foreclose the possibility of a contemporaneous interception. *Luis v. Zang, 833 F.3d 619, 2016 FED App. 0196P, 2016 U.S. App. LEXIS 15003 (6th Cir. Ohio 2016)*.

User adequately pled a manufacturer violated *Ohio Rev. Code Ann. § 2933.52(A)(3)* because the user alleged the manufacturer (1) stored and disclosed the user's electronic communications to a third party, (2) intercepted the communications in violation of the Ohio Wiretap Act, and (3) expected the manufacturer's device would be so used. *Luis v. Zang, 833 F.3d 619, 2016 FED App. 0196P, 2016 U.S. App. LEXIS 15003 (6th Cir. Ohio 2016)*.

Defendant's motion to suppress tape recorded statements defendant made to his passenger and in a cell phone call to his mother while inside a police cruiser prior to his arrest was properly denied as defendant did not have a reasonable expectation of privacy when making the statements; thus, *R.C. 2933.51* and *2933.52*, relating to wiretapping, did not apply. *State v. Ingram, 2010-Ohio-3546, 2010 Ohio App. LEXIS 3014 (Ohio Ct. App., Medina County 2010)*.

Burden of proof

The party seeking to suppress evidence allegedly obtained in violation of R.C. 2933.52(A)(1) bears the burden of proof on that issue: State v. Childs, 2000-Ohio-425, 88 Ohio St. 3d 558, 728 N.E.2d 379, 2000 Ohio LEXIS 1325 (Ohio 2000).

Cellular telephone communications

Court did not commit plain error by admitting into evidence several text messages that she and her accomplice exchanged around the time of the victim's murder because defendant pointed to no law that prohibited her accomplice, a party to the communications with defendant, from divulging the content of their communications. State v. Raber, 2010-Ohio-4066, 189 Ohio App. 3d 396, 938 N.E.2d 1060, 2010 Ohio App. LEXIS 3456 (Ohio Ct. App., Wayne County 2010).

The trial court did not err in finding that listening to cellular telephone communications on public airways did not constitute a violation of R.C. 2933.52 or related provisions: State v. Larabee, 1994 Ohio App. LEXIS 5312 (Ohio Ct. App., Fairfield County Nov. 3, 1994).

Consent

Admission of a taped telephone conversation between defendant and a victim of his sexual conduct was proper where the police had obtained the consent of the victim prior to the time that the call was made, such that there was no violation of defendant's rights under U.S. Const. amend. IV or R.C. 2933.52(B). State v. Bell, 2009-Ohio-2335, 2009 Ohio App. LEXIS 2112 (Ohio Ct. App., Clermont County 2009).

It was not plain error, under Crim.R. 52(B), to admit a surveillance recording of defendant's conversation with a confidential informant, in defendant's trial on drug charges, because, while the informant's conversation was not with the person the informant thought the informant would be talking to when the informant consented to the recording of the conversation, R.C. 2933.52(B)(3), allowing a law enforcement officer to intercept a conversation with the consent of one of the parties, was still satisfied because the informant impliedly consented to the recording, as (1) defendant was the supplier for the person from whom the informant thought the informant would be buying drugs, so defendant simply eliminated an unnecessary intermediate step by dealing directly with the informant, and (2) the informant, knowing officers had wired the informant, voluntarily left the person the informant thought the informant would be buying drugs from and went with defendant. State v. Givens, 2008-Ohio-1202, 2008 Ohio App. LEXIS 1048 (Ohio Ct. App., Washington County 2008).

Defendant's entry of a guilty plea pursuant to a negotiated plea agreement, wherein the State dismissed other charges, waived all appealable issues with respect to defendant's claim that suppression of taped phone conversations should have been granted because the taping was in violation of the wiretapping statute; the police had obtained permission from the other party to the phone call, such that it was within the exception under R.C. 2933.52(B)(3). State v. Perez-Diaz, 2008-Ohio-2722, 2008 Ohio App. LEXIS 2283 (Ohio Ct. App., Clark County 2008).

It was not plain error, under CrimR 52(B), to admit a surveillance recording of defendant's conversation with a confidential informant, in defendant's trial on drug charges, because, while the informant's conversation was not with the person the informant thought the informant would be talking to when the informant consented to the recording of the conversation, R.C. 2933.52(B)(3), allowing a law enforcement officer to intercept a conversation with the consent of one of the parties, was still satisfied because the informant impliedly consented to the recording, as (1) defendant was the supplier for the person from whom the informant thought the informant would be buying drugs, so defendant simply eliminated an unnecessary intermediate step by dealing directly with the informant, and (2) the informant, knowing officers had wired the informant, voluntarily left the person the informant thought the informant would be buying drugs from and went with defendant. State v. Givens, 2008-Ohio-1202, 2008 Ohio App. LEXIS 1048 (Ohio Ct. App., Washington County 2008).

Suppression of evidence obtained as the result of information gathered from telephone calls made by a prison inmate to defendant was properly denied because the inmate, if not defendant, implicitly consented to the interception of his outgoing telephone calls, as provided in *R.C. 2933.52(B)(3)*, because he made those calls after having been advised that they were subject to monitoring and recording. *State v. Dickey, 2007-Ohio-1180, 2007 Ohio App. LEXIS 1092 (Ohio Ct. App., Darke County 2007)*.

Trial court did not base its decision upon vicarious consent but upon the victim's actual, voluntary consent. Because the testimony provided at the suppression hearing established that the victim consented to the phone call and that such consent was not coerced, the controlled call did not violate *R.C. 2933.52* as it was predicated upon the consent exception of *R.C. 2933.53(B)(3)*. *State v. Stalnaker, 2005-Ohio-7042, 2005 Ohio App. LEXIS 6356 (Ohio Ct. App., Lake County 2005)*.

Neither the federal constitution nor state law requires the suppression of evidence obtained by the warrantless recording of a telephone conversation between a consenting police informant and a nonconsenting defendant (*United States v. White, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453, 1971 U.S. LEXIS 132 (U.S. 1971)*.

Cordless telephone communications

The provisions of *R.C. 2933.52(A)*, prohibiting the purposeful interception of wire or oral communications through the use of an interception device, apply to cordless telephone communications that are intentionally intercepted and recorded: *State v. Bidinost, 1994-Ohio-465, 71 Ohio St. 3d 449, 644 N.E.2d 318, 1994 Ohio LEXIS 2946 (Ohio 1994)*.

Evidence not derived from illegal tap

While police officer violated *R.C. 2933.52(A)(3)* when he listened to a recording of a conversation held between defendant and the other individual while sitting in the back of the police cruiser waiting for the K-9 unit, the evidence found in defendant's car was not derived from the contents of the illegal tap as the officer testified that he was suspicious that defendant and the individual had been pill shopping before placing them in his cruiser and that information he received while they were in the cruiser, to the effect that they had tried to purchase Sudafed at other pharmacies, only bolstered the officer's suspicions; thus, defendant's motion to suppress evidence obtained as a result of the drug sniff was properly denied. *State v. French, 2009-Ohio-2342, 2009 Ohio App. LEXIS 1983 (Ohio Ct. App., Summit County 2009)*.

Exceptions

Activation of the emergency button key in defendant's vehicle to OnStar placed the call within the exception of *R.C. 2933.52(B)(2)*; thus, the trial court properly denied defendant's motion to suppress evidence obtained during a stop of defendant's vehicle by law enforcement officers, who responded to the OnStar dispatcher's request that emergency assistance be provided to defendant's vehicle. The exception in § 2933.52(B)(2) still applied even though defendant did not enter into a contract for OnStar services as the occupants of the vehicle initiated the contact and failed to respond to the OnStar employee, who overheard a conversation about an illegal drug transaction in the course of responding to the emergency call. *State v. Wilson, 2008-Ohio-2863, 2008 Ohio App. LEXIS 2397 (Ohio Ct. App., Fairfield County 2008)*.

Jail recordings

Since defendant was provided express notice that her telephone conversations would be monitored and recorded, she could not have had a reasonable expectation that her communications with her husband from jail would be free

from interception and thus, there was no violation of R.C. 2933.52(A)(1), of Ohio's wiretap statute, or 18 U.S.C.S. 2511. There was a notice posted in the area of the jail where the prisoners used telephones informing them that their calls would be monitored and the telephones themselves also contained a recording that calls would be monitored and recorded. State v. Voss, 2008-Ohio-3889, 2008 Ohio App. LEXIS 3302 (Ohio Ct. App., Warren County 2008).

Party to communication

As the Ohio Turnpike Commission and related parties were part of a conference call about a program manager, they did not violate R.C. 2933.52(B) when they recorded the conversation. Georgalis v. Ohio Tpk. Comm'n, 2010-Ohio-4898, 2010 Ohio App. LEXIS 4149 (Ohio Ct. App., Cuyahoga County 2010).

Spouses

Court properly denied a motion to suppress statements that defendant made to his wife that were secretly recorded in the police interview room because defendant had been advised that he was under arrest before his wife was allowed to enter the room, and thus he was in police custody at the time of his conversation. An objective person had no reasonable expectation of privacy under the circumstances. State v. Clemons, 2011-Ohio-1177, 2011 Ohio App. LEXIS 1015 (Ohio Ct. App., Belmont County 2011).

There was no error in finding for the wife on her civil claim that her husband had illegally recorded her telephone conversations; the husband conceded that he secretly recorded certain telephone conversations of the wife. The husband's suspicions of his wife's extramarital activities did not serve as a defense to illegal wiretapping and the fact that his suspicions were well-founded did not negate his guilt. Hodges v. Hodges, 2008-Ohio-601, 175 Ohio App. 3d 121, 885 N.E.2d 307, 2008 Ohio App. LEXIS 519 (Ohio Ct. App., Lucas County 2008).

Suspicions concerning a spouse's infidelity do not serve as a defense to illegal wiretapping: Hodges v. Hodges, 2008-Ohio-601, 175 Ohio App. 3d 121, 885 N.E.2d 307, 2008 Ohio App. LEXIS 519 (Ohio Ct. App., Lucas County 2008).

Where a spouse suspicious of infidelity violated R.C. 2933.52 by intercepting his spouse's calls thereby learning of crimes by a third party and then contacted the police, evidence derived from the subsequent police investigation was not subject to suppression: State v. Davies, 145 Ohio App. 3d 630, 763 N.E.2d 1222, 2001 Ohio App. LEXIS 4023 (Ohio Ct. App., Summit County 2001).

Where a husband tapped the telephone line within his own home and taped the conversations between his wife and her lover, such taped conversations are admissible in evidence by the husband to impeach his wife's testimony in a divorce action brought by her; and neither the Ohio Constitution, the Ohio statutes, the United States Constitution as it relates to the right of privacy, nor the Omnibus Crime Control Bill of 1968, prevents the admission of said tapes: Beaber v. Beaber, 41 Ohio Misc. 95, 70 Ohio Op. 2d 213, 322 N.E.2d 910, 1974 Ohio Misc. LEXIS 169 (Ohio C.P. 1974).

Suppression

—Denied

Defendant's motion to suppress was properly denied because the State complied with Evid.R. 901 when it introduced phone calls between the victim and defendant, which the detective had arranged, and the duplicate was admissible to the same extent as the original. Also, the controlled calls did not violate defendant's Fourth

Amendment rights because the victim gave his prior consent to have the calls intercepted by the detective. *State v. Haynes, 2013-Ohio-2401, 2013 Ohio App. LEXIS 2339 (Ohio Ct. App., Ashtabula County 2013)*.

Defendants were not entitled to suppression with respect to recordings of their oral conversations, which were transmitted electronically to the police by a cooperating confidential informant pursuant to *R.C. 2933.52(B)(3)*, as the warrants were not shown to have been facially invalid for failure to identify a party who consented to the recorded conversation, and there was no other basis shown that warranted suppression. *State v. Wallace, 2012-Ohio-6270, 986 N.E.2d 498, 2012 Ohio App. LEXIS 5443 (Ohio Ct. App., Mahoning County 2012)*.

Tapes made by defendant

Where there was no evidence showing that the police department played any role in the creation of the audio tapes, and the tapes were found in the defendant's desk along with voice-activated telephone recording equipment, these facts created a strong inference that the defendant was responsible for making the tapes; thus, all of the tapes in which he was a party to the conversation were admissible pursuant to *R.C. 2933.52(B)*: *State v. Childs, 1998 Ohio App. LEXIS 4204 (Ohio Ct. App., Montgomery County Sept. 11, 1998)*, aff'd, *2000-Ohio-298, 88 Ohio St. 3d 194, 724 N.E.2d 781, 2000 Ohio LEXIS 478 (Ohio 2000)*.

Tapes made by plaintiff

Where a landlord made crude, sexual remarks to a tenant and offered to pay her for sex, where the tenant went to the police but was told that they could do nothing, where the tenant recorded her next conversation with the landlord and was able to capture additional crude comments, where the tenant filed suit sexual harassment, housing discrimination, and unlawful coercion or intimidation under *R.C. 4112.02(H)*, and where the landlord filed a counterclaim based upon the tenant's alleged violation of *R.C. 2933.52*, the trial court properly granted summary judgment in favor of the tenant on the wiretap claim because the evidence indicated that the tenant recorded the conversation with the landlord in an effort to substantiate her claim that he made offensive comments; when she chose that option, she had already consulted with the police and had been told that they would so nothing because it was a "he said/she said" situation. Under the circumstances, there was no evidence that the tenant acted in violation of the statute by recording the landlord; to the contrary, the tenant used the recording merely to develop proof for a cause of action to vindicate her rights. *McDonald v. Burton, 2011-Ohio-6178, 2011 Ohio App. LEXIS 5067 (Ohio Ct. App., Montgomery County 2011)*.

Opinion Notes

Attorney General Opinions

If a classified employee of a court of common pleas secretly tape records a meeting involving other employees, the tape may be used as a basis for discipline of an employee whose misconduct is documented on the secret recording unless the tape is excluded from use as evidence pursuant to *R.C. 2933.62*, 2933.63 on the grounds that the recording violates the provisions of *R.C. 2933.52*; additionally, use or disclosure by the court of a recording known to have been made in violation of *R.C. 2933.52* may subject the court to criminal and civil liability: *1994 Ohio Op. Att'y Gen. No. 097 (1994)*.

A court of common pleas, acting as an employer, may implement a workplace policy that prohibits classified employees of the court from tape recording meetings that involve other employees or clients of the court without first obtaining the express consent of the court administrator; provided, however, that consent of the court administrator should be precluded in any situation where the recording would violate the provisions of *R.C. 2933.52*: *1994 Ohio Op. Att'y Gen. No. 097 (1994)*.

When the court administrator knows that a court employee is tape recording a meeting involving other employees and clients of the court, and such recording is otherwise lawful pursuant to *R.C. 2933.52*, the court administrator is neither required to give notice, nor precluded from giving notice, to other participants in the meeting: *1994 Ohio Op. Att'y Gen. No. 097 (1994)*.

Research References & Practice Aids

Cross-References to Related Sections

Law enforcement officer defined, RC § *2901.01*.

Property defined, RC § *2901.01*.

Ohio Constitution

Search warrants, *Ohio Const. art I, § 14*.

Ohio Rules

Search and seizure, CrimR 41.

Comparative Legislation

Wiretap authorization:

18 USCS § 2516(2)

CA— Cal Pen Code § *630* et seq.

FL— Fla. Stat. § *934.01* et seq.

IL—725 Ill. Comp. Stat. § *5/108A-1*

NY—NY CLS CPL § 700.05 et seq.

PA—18 P.S. § 5701 et seq.

Practice Manuals and Treatises

Anderson's Ohio Search Warrant Manual § 8.10 Issuance of the Warrant or Wiretap Order and Execution

Practice Guides

Anderson's Ohio Criminal Practice and Procedure § 49.112 When an Interception Warrant is Not Required

Anderson's Ohio Manual of Criminal Complaints and Indictments § 2933.52 Interception of wire, oral or electronic communication

Hierarchy Notes:

ORC Ann. Title 29, Ch. 2933

End of Document

Oracle Am., Inc. v. Google Inc.

United States District Court for the Northern District of California

March 25, 2016, Decided; March 25, 2016, Filed

No. C 10-03561 WHA

Reporter
172 F. Supp. 3d 1100 *; 2016 U.S. Dist. LEXIS 39675 **

ORACLE AMERICA, INC., Plaintiff, v. GOOGLE INC., Defendant.

Prior History: *Oracle Am., Inc. v. Google Inc., 750 F.3d 1339, 2014 U.S. App. LEXIS 8744 (Fed. Cir., 2014)*

Core Terms

jurors, user, searches, venire, media, friends, profile, lawyers, privacy, ban, prospective juror, connections, admonition, logged, voir dire, postings, sites, empaneled, default, tweets, teams, notification, consultants, conducting, favorite, includes, monitor, inform

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Judges: WILLIAM **[**4]** ALSUP, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM ALSUP

Opinion

[*1101] ORDER RE INTERNET AND SOCIAL MEDIA SEARCHES OF JURORS

Trial judges have such respect for juries — reverential respect would not be too strong to say — that it must pain them to contemplate that, in addition to the sacrifice jurors make for our country, they must suffer trial lawyers and jury consultants scouring over their Facebook and other profiles to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information.

In this high-profile copyright action, both sides requested that the Court require the venire to complete a two-page jury questionnaire. One side then wanted a full extra day to digest the answers, and the other side wanted two full extra days, all before beginning voir dire. Wondering about the delay allocated to reviewing two pages, the judge eventually realized that counsel wanted the names and residences from the questionnaire so that, during the delay, their teams could scrub Facebook, Twitter, LinkedIn, and other Internet sites to extract personal data on the venire. Upon inquiry, counsel admitted this. The questionnaire idea cratered, and the discussion moved to whether **[**5]** Internet investigation by counsel about the venire should be allowed at all. That led to a series of memoranda by counsel on the subject and now to this order.

An ordinary Google search on the venire would fetch hits, including links to many Facebook profiles, which, in turn, would at least display profile information classified as "public." Counsel could uncover even more personal information by logging onto their own Facebook accounts and researching the specific venire persons. In this way, counsel could mine not only the "public" data but the details classified as "for friends only" or "friends of friends," depending on the fortuity of friend listings. The same is true, more or less, for other social media sites.

The Court, of course, realizes that social media and Internet searches on the venire **[*1102]** would turn up information useful to the lawyers in exercising their three peremptory challenges, and, might even, in a very rare case, turn up information concealed during voir dire that could lead to a for-cause removal. While the trial is underway, ongoing searches might conceivably reveal commentary about the case to or from a juror.

Nevertheless, in this case there are good reasons to **[**6]** restrict, if not forbid, such searches by counsel, their jury consultants, investigators, and clients.

The first reason is anchored in the danger that upon learning of counsel's own searches directed at them, our jurors would stray from the Court's admonition to refrain from conducting Internet searches on the lawyers and the case. This is a high-profile lawsuit, as stated, and dates back to 2010. Nearly one million hits (including tens of thousands of news results) appear in a Google search for "Oracle v. Google." These include strong opinions on both sides and at least the usual amount of inaccurate information. In this very case, we earlier learned that both sides hired online commentators who have promoted their respective litigation viewpoints on blogs and other web sites. Numerous of the top results for searches on counsel for either party (or for the undersigned judge) include discussions of this controversy and its national policy

implications. As a result, we have an unusually strong need to prevent any member of our jury from yielding to the impulse to conduct Internet searches on our lawyers or our case or its history.

Our jury will, of course, be admonished to refrain from **[**7]** any Internet research about the lawsuit, the parties, the lawyers, or the judge — an admonition that will be regularly repeated. *See* Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case* (June 2012). Indeed, the entire venire will be told to refrain from any such research soon after it reaches the courtroom and well before the final jury is even selected.

Google is willing to accept an outright ban on Internet research about the venire and our jury, provided the ban applies equally to both sides. Oracle, however, will not. Oracle initially took a broad position on the scope of Internet research it intended to conduct, but it has since purported to scale back its plan. On numerous occasions, Oracle has supplied confusing answers to the Court's inquiries about its plan, and its responses make little sense in light of how the Court understands the most prominent social media sites to operate. For purposes of this order, it is unnecessary to pin Oracle down in its intentions, but it will be necessary for Oracle to pin down its specific search intentions **[**8]** by the time jury selection begins, as outlined below.

To return to the first concern, the apparent unfairness in allowing the lawyers to do to the venire what the venire cannot do to the lawyers will likely have a corrosive effect on fidelity to the no-research admonition. Once our venire learns of the lawyers' Internet searches (as the venire would via the instruction Oracle requests), a very serious risk will be presented that they will feel justified in doing to the lawyers (and to the case itself) what the lawyers are doing to them, namely, conducting Internet searches — despite the no-research admonition. The one-sidedness of Oracle's approach will be hard to accept and therein lies the danger. Given the massive volume of Internet commentary on the lawyers and the case, this presents a significant risk.

A second danger posed by allowing counsel to conduct research about the venire **[*1103]** and the jury is that it will facilitate improper personal appeals to particular jurors via jury arguments and witness examinations patterned after preferences of jurors found through such Internet searches. For example, if a search found that a juror's favorite book is *To Kill A Mockingbird*, it wouldn't **[**9]** be hard for counsel to construct a copyright jury argument (or a line of expert questions) based on an analogy to that work and to play upon the recent death of Harper Lee, all in an effort to ingratiate himself or herself into the heartstrings of that juror. The same could be done with a favorite quote or with any number of other juror attitudes on free trade, innovation, politics, or history. Jury arguments may, of course, employ analogies and quotations, but it would be out of bounds to play up to a juror through such a calculated personal appeal, all the moreso since the judge, having no access to the dossiers, couldn't see what was really in play. *See* *United States v. Nobari, 574 F.3d 1065, 1077 (9th Cir. 2009)*.

A third reason is to protect the privacy of the venire. They are not celebrities or public figures. The jury is not a fantasy team composed by consultants, but good citizens commuting from all over our district, willing to serve our country, and willing to bear the burden of deciding a commercial dispute the parties themselves cannot resolve. Their privacy matters. Their privacy should yield only as necessary to reveal bias or a reluctance to follow the Court's instructions. It is a weak answer that venire persons, through their **[**10]** social media privacy settings, have chosen to expose their profiles to scrutiny, for navigating privacy settings and fully understanding default settings is more a matter of blind faith than conscious choice. (Otherwise, there would be no need for websites explaining the intricacies of privacy settings.)

For all these reasons, the Court has considered exercising its discretion to impose an outright ban preventing counsel and the parties from conducting social media and Internet searches on venire persons as well as on the final empaneled jury. Such a ban would be within the sound exercise of discretion to protect the integrity of our process and to curb unnecessary intrusions into juror privacy. A main problem in doing so, however, is that the lawyers would then be precluded from learning information readily available to the press and every member of the public in the gallery. That is, with an outright ban, everyone in the gallery could have more information about the venire persons and the

empaneled jurors than the lawyers themselves. Of course, the Court cannot control those in the gallery, but it can control the trial teams. And, lawyer surveillance is what leads to the problems **[**11]** above, so such a ban on the trial teams would be logical. Still, the Court respects the excellent trial lawyers in this case and their burden in this trial and is reluctant to order them. Rather, the Court calls upon them to voluntarily consent to a ban against Internet research on the venire or our jury until the trial is over. If they will so agree, we will so advise the venire at the start of jury selection and this will surely have a positive effect on fidelity to the no-research admonition. If all counsel so agree, counsel will be given an enlargement of time to conduct extra voir dire themselves.

In the absence of complete agreement on a ban, the following procedure will be used. At the outset of jury selection, each side shall inform the venire of the specific extent to which it (including jury consultants, clients, and other agents) will use Internet searches to investigate and to monitor jurors, including specifically searches on Facebook, LinkedIn, Twitter, and so on, including the extent to which **[*1104]** they will log onto their own social media accounts to conduct searches and the extent to which they will perform ongoing searches while the trial is underway. Counsel shall not explain **[**12]** away their searches on the ground that the other side will do it, so they have to do it too. Nor may counsel intimate to the venire that the Court has allowed such searches and thereby leave the false impression that the judge approves of the intrusion. Counsel may simply explain that they feel obliged to their clients to consider all information available to the public about candidates to serve as jurors. Otherwise, counsel must stick to disclosing the full extent to which they will conduct searches on jurors. By this disclosure, the venire will be informed that the trial teams will soon learn their names and places of residence and will soon discover and review their social media profiles and postings, depending on the social media privacy settings in place. The venire persons will then be given a few minutes to use their mobile devices to adjust their privacy settings, if they wish. The venire persons will also be given the normal admonition that they cannot do any research about the case, the parties, or the lawyers and that they cannot speak to anyone about the case, including by making any social media postings about it. Only the names and places of residence of those called **[**13]** forward to the box shall be provided to counsel (so the identities of venire persons still in the gallery will remain private).

In this case, there is a further special point that both sides may wish to address with the venire. The very name of the defendant — Google — brings to mind Internet searches. On their own, prospective jurors are likely to wonder whether Google will be mining the histories of Internet searches by the venire persons to determine their interests in politics, careers, hobbies, dating, shopping, travel, or other intimate facts. Although Google has assured the Court that it has no intention to review such search histories, our venire will not know this (unless told) and may speculate. It would, therefore, be prudent to explain to our venire that neither party will resort to examining search histories on any search engine.

Thereafter, until the trial is over, each side will be permitted to view online whatever it told the venire it would review — but nothing more. If, as we proceed forward, either side detects any apparent misconduct by a juror, counsel must immediately report it to the Court and the other side regardless of whether the juror appears favorable to **[**14]** their side or not. Each side must preserve an exact record of every search and all information viewed so that if a motion is later made alleging misconduct by a juror, we will all be able to see when the objecting side first learned of the problem.

During voir dire, each prospective juror that has been called forward will be asked if he or she can still follow the usual prohibitions on research and public statements about the case despite the one-sidedness (that is, despite the fact that one or both trial teams will be trying to monitor each juror's social media postings). If the prospective juror cannot do so, he or she will be excused on that basis.

With regard to the problem of personal appeals, this order rules now that no personal appeals to any juror may be made. This prohibition bars witness examinations or jury arguments (or opening statements) exploiting information learned about a juror via searches, such as, without limitation, favorite books, texts, verses, songs, or analogies to likes or dislikes expressed on the Internet. This prohibition, of course, applies whether or not the name of the particular juror is called out.

In addition to the Court's own thorough voir dire, **[**15]** each side shall have twenty minutes **[*1105]** of venire examination directed to bias or other for-cause challenges, subject to enlargement for good cause (but this may not be used for "conditioning the jury" or "extracting promises" or drawing out argumentative material from jurors to argue the case).

The Court would much prefer to fully protect the privacy of all venire persons from Internet searches and only reluctantly allows the foregoing.

* * *

This is an emerging and developing concern. To that end, this order will now step back and offer a snapshot of how some of today's prominent social media sites protect (or don't protect) personal information, which information may be useful for other judges, lawyers, and academics in working through this concern:

> • With regard to Facebook, typical profiles contain the following information: lists of personal connections (*i.e.*, "friends"), pictures, videos, check-ins at real-world locations, scheduled events, posts dating back to the creation of the user's profile (including commentary on news stories and discussions with other "friends"), relationship status, work experience, educational background, current city, home town, contact information, and certain **[**16]** personal interests such as favorite quotes, membership in certain groups, hobbies, political preferences, religious views, sexual orientation, and preferred media. Access to segments of this information can be regulated by the account holder according to various privacy settings. The highest level of privacy keeps information accessible only to the user. This is rarely used, inasmuch as a key purpose of Facebook is to share information with other people using the platform. The next level of privacy allows a user to reveal information only to his or her "friends" (or to a more limited list). The next level allows access to "friends of friends," which includes not only the user's friends *but all of the friends of the user's friends*, which can vastly multiply access. (For example, if someone has three hundred friends and each of them has three hundred different friends, access would expand to 90,000 viewers.) The most expansive setting is "public," meaning at least everyone with a Facebook account. Certain "public" information, including a user's primary picture, list of likes, hometown, current city, education and work history, and favorite quote, is even available to Internet users **[**17]** without Facebook accounts or who have not logged onto their accounts. Generally, a Facebook user's post history (*i.e.*, the stream of text, articles, discussions, pictures, and videos the user shares) is *not* available to searchers without a Facebook account. By default today, most information is accessible only to friends, although a default setting of "friends of friends" has been employed by Facebook in the past. This means that someone may log onto Facebook and automatically access *all* Facebook information (including post history) on a juror classified as "public," as "friends of friends" (if there is a "friend" in common) or as "friends only" (if the investigator happens to be a Facebook "friend" of the juror). "Public" information (excluding post history) is accessible as well via ordinary Google searches without ever logging onto Facebook. Finally, Facebook does not notify its users when their profiles have been visited.
>
> • With regard to Twitter, a typical user's profile includes that user's **[*1106]** "tweet" history, which includes all posts made since the user created the account, the list of other Twitter accounts that user "follows" and the list of other users that "follow" that user's **[**18]** account. When one Twitter user "follows" another Twitter user, the latter's posts appear in the former's default real-time feed of tweets. Access to this information is regulated by a choice between two privacy settings. The default privacy setting keeps all of a user's tweets public, in which case anyone may view those tweets, *even without ever logging onto a Twitter account.* Additionally, anyone who is logged onto Twitter can view the list of a user's "followers" and the accounts that user "follows" if the user's tweets are made public. Alternatively, a user may elect to keep tweets "protected," in which case the above information is available only to other Twitter users whom the user has affirmatively approved to view that information. Twitter does not notify its users when their profiles have been visited.
>
> • With regard to LinkedIn, a typical user's profile

includes a picture, the user's employment and education history, contact information, a list of skills, publications, awards and interests, among other line items that might appear on a résumé. The profile also includes information such as a list of the "connections" the user has established on the site. (Two users "connect" **[**19]** once one user sends a request to connect and the other accepts the request, which opens up additional personal data and avenues of communication.) A user's profile also displays a list of groups established on the site that the user has joined. Users can post content, such as links to news articles or original writing. For each item on a user's profile (except for the list of "connections"), the user may elect to publish the item to his or her "public profile," making it visible to everyone, including individuals who are not even logged onto LinkedIn, or to make it visible only to the user's "connections." A user may further select whether to reveal his list of personal connections to other users. Unlike Facebook and Twitter, LinkedIn's default setting is to display a notification informing a user each time his or her profile is visited by another LinkedIn user and identifying that visitor by name. A visitor may change that setting so that a visitee receives no notification, or so the notification only displays the visitor's place of employment without any further identifying information.$i

With regard to the case law, most of it discusses the problems of jurors using of social media **[**20]** and conducting Internet searches, thereby exposing jurors to commentary about the case. *E.g.*, *United States v. Fen Li, No. 14-3924-CR, 630 Fed. Appx. 29, 2015 U.S. App. LEXIS 19656, 2015 WL 7005595, at *3 (2d Cir. 2015)*; *United States v. Fumo, 655 F.3d 288 (3d. Cir. 2011)*; *Dimas-Martinez v. State, 2011 Ark. 515, 385 S.W.3d 238 (Ark. 2011)*. Several other decisions address whether a party waives arguments seeking to set aside a verdict based on a juror's apparent bias if that apparent bias could have been discovered through an Internet search of that juror before the verdict (where counsel were allowed and able to conduct such searches). *E.g.*, *Johnson v. McCullough, 306 S.W.3d 551, 559 (Mo. 2010)*; *Burden v. CSX Transp., Inc., No. 08-04, 2011 U.S. Dist. LEXIS 94809, 2011 WL 3793664, at *9 (S.D. Ill. Aug. 24, 2011)* (Chief Judge David R. Herndon).

There are precious few decisions addressing our immediate problem, namely, whether counsel should be allowed to conduct **[*1107]** Internet and social media research about prospective and empaneled jurors.

The American Bar Association issued an opinion that, within limits, it is ethical for counsel to conduct Internet searches on prospective jurors. Specifically, in Formal Opinion No. 466, the ABA considered the extent to which an attorney may conduct Internet searches of jurors and prospective jurors without running afoul of ABA Model Rule 3.5(b), which prohibits ex parte communication with jurors. That opinion determined that "passive review" of a juror's website or social media that is available without making an "access request" and of which the juror is unaware is permissible **[**21]** within ABA Model Rule 3.5(b). The ABA likened such review to "driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions." Access requests, such as friend requests on Facebook, "following" users on Twitter, or seeking to "connect" on LinkedIn, whether on one's own or through a jury consultant or other agent, constitute forbidden ex parte communications within the rule. That such searches are not unethical does not translate into an inalienable right to conduct them.

Although the ABA determined that a range of activities is *permitted* without violating a professional duty, it cautioned that judges may limit the scope of the searches that counsel could perform regarding the juror's social media "[i]f a judge believes it to be necessary, under the circumstances of a particular matter . . . ."

California has not promulgated a rule regarding the ethical scope of Internet research on jurors or prospective jurors, nor has the California State Bar issued an opinion on that subject. The California State Bar website provides a link to the ABA opinion discussed above as well as links **[**22]** to opinions from the Association of the Bar of the City of New York and the Oregon State Bar. Formal Opinion No. 2012-2, issued by the ABCNY, largely mirrors the ABA opinion, except that the ABCNY would prohibit any Internet research that notified the juror such research occurred (such as using LinkedIn in a manner that sent an automatic notification informing the user that another user had visited his or her profile). Formal Opinion No. 2013-189, issued by the Oregon State Bar provides,

unlike the ABA or the ABCNY, that a lawyer may affirmatively request access to private aspects of a juror's social media profiles, provided the lawyer accurately represents his or her role in a case when asked by the juror. Neither the New York City opinion nor the Oregon opinion addressed the judge's discretion in prohibiting such searches or access requests.

In *United States v. Norwood, No. 12-CR-20287, 2014 U.S. Dist. LEXIS 62308, 2014 WL 1796644 (E.D. Mich. May 6, 2014)* (Judge Mark A. Goldsmith), the defendants opposed a plan to empanel an anonymous jury (which would protect the jury from intimidation in a case involving a violent criminal enterprise). Defendants argued that their counsel needed access to the jurors' identifying information to monitor their social media accounts during the trial to ensure **[**23]** compliance with the no-discussion admonition. Judge Goldsmith rejected the defendants' argument because the proposed monitoring would "unnecessarily chill the willingness of jurors summoned from [the] community to serve as participants in our democratic system of justice." *2012 U.S. Dist. LEXIS 110165, [WL] at *4* (quoting *United States v. Kilpatrick, No. 10-20403, 2012 U.S. Dist. LEXIS 110165, 2012 WL 3237147, at *1 (E.D. Mich. Aug. 7, 2012)* (Judge Nancy G. Edmunds)). A jury questionnaire had also specifically asked prospective jurors whether they could abide by the judge's admonitions regarding Internet and social media. **[*1108]** Thus, the defendants' interest in monitoring the jurors' social media postings could not overcome the interest in protecting the jurors from intimidation and violence, which interest was served by empaneling an anonymous jury.

In *Carino v. Muenzen, No. A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, 2010 WL 3448071, at *10 (N.J. Super. App. Div. Aug. 30, 2010)*, a trial court in New Jersey prohibited the plaintiff's counsel from using the Internet to investigate the jurors because they had failed to notify opposing counsel that they would be conducting such searches, although the trial court cited no basis for requiring such notification. The New Jersey Appellate Division determined that the trial court abused its discretion by imposing such a prohibition "in the name of 'fairness' or maintaining a 'level playing field.'" **[**24]** *Ibid.*

Oracle cites *Sluss v. Commonwealth, 381 S.W.3d 215, 226-227 (Ky. 2012)*, for the contention that counsel's lack of access to social media "effectively precluded" full voir dire, but that decision did not address a prohibition on social media and Internet searches. Rather, it addressed two jurors' false statements made during oral voir dire regarding their respective relationships to the victim's mother. A review of the jurors' respective Facebook profiles later revealed that both jurors were Facebook "friends" with the victim's mother. One of the jurors in question unequivocally denied having a Facebook account (which later proved false). Thus, the case was remanded for a hearing regarding the jurors' honesty and whether the true facts warranted for-cause removal.

Finally, in *Steiner v. Superior Court, 220 Cal. App. 4th 1479, 1493, 164 Cal. Rptr. 3d 155 (2013)*, as modified on denial of rehearing (Nov. 26, 2013), the California Court of Appeal recognized that although certain tools are available to ensure that jurors do not conduct research about the attorneys or the case, a judge lacks the authority "to impose, as a prophylactic measure, an order requiring" defense counsel to remove pages from their website to ensure they could not be viewed by the jurors, which "constituted an unlawful prior restraint on [counsel's] **[**25]** constitutional right to free speech."

* * *

Both sides shall inform the Court By **March 31 at noon**, whether they will consent to a ban against Internet research on the venire or the empaneled jury until the trial is over.

IT IS SO ORDERED.

Dated: March 25, 2016.

/s/ William Alsup

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

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The Supreme Court of Ohio

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OPINION 2012-1
Issued June 8, 2012

Surreptitious (Secret) Recording by Lawyers

SYLLABUS: A surreptitious, or secret, recording of a conversation by an Ohio lawyer is not a per se violation of Prof.Cond.R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) if the recording does not violate the law of the jurisdiction in which the recording takes place. The acts associated with a lawyer's surreptitious recording, however, may constitute misconduct under Prof.Cond.R. 8.4(c) or other Rules of Professional Conduct. In general, Ohio lawyers should not record conversations with clients or prospective clients without their consent. Advisory Opinion 97-3 is withdrawn.

QUESTION PRESENTED: May an Ohio lawyer engage in the surreptitious recording of a conversation if the recording is permitted by the law of the jurisdiction where the recording occurs?

APPLICABLE RULE: Rule 8.4(c) of the Ohio Rules of Professional Conduct

OPINION: Before the Board is a request to articulate its current view on surreptitious, or secret, recording of conversations by lawyers. The Board last addressed surreptitious recording 15 years ago in Advisory Opinion 97-3. In that opinion, which was issued under the now-superseded Code of Professional Responsibility (Code), the Board advised that in "routine circumstances" surreptitious recording by lawyers in legal representations is unethical. *See* Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 97-3 (June 13, 1997). The Board based its conclusion on DR 1-102(A)(4), the Code provision that subjected lawyers to discipline for engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation." *Id.* at 3.

In Opinion 97-3, the Board also recognized three widespread exceptions to its characterization of surreptitious recording. First, the Board found that prosecutors and law enforcement lawyers acting pursuant to statutory, judicial, or constitutional authority could engage in surreptitious recording. Second, the Board indicated that criminal defense lawyers were permitted to use surreptitious recordings to further their clients' constitutional rights to zealous representation. Finally, the Board identified an "extraordinary circumstances" exception for situations such as when lawyers must defend themselves or their clients against wrongdoing. With all three exceptions, the Board concluded that the lawyer had the burden of demonstrating that the surreptitious recording did not amount to conduct involving dishonesty, fraud, deceit, or misrepresentation.

Opinion 97-3 was based in part on the American Bar Association's (ABA) stance on surreptitious recording at that time. In 1974, the ABA opined that "no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation." ABA Commt. on Ethics and Prof'l Responsibility, Formal Op. 337 (Aug. 10, 1974). The only exception noted by the ABA was one for prosecutors and law enforcement lawyers. Interestingly, the ABA's opinion was issued one day after Richard Nixon resigned from the presidency as a result of the Watergate wiretapping scandal.

In 2001, the ABA readdressed surreptitious recording by lawyers in Formal Opinion 01-422. In that opinion, the ABA reversed its position and withdrew Formal Opinion 337. The ABA now concludes that "[w]here nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules [of Professional Conduct] merely by recording a conversation without the consent of the other parties to the conversation." ABA Commt. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (June 24, 2001), at 7.

In Ohio, recording of wire, oral, and electronic communications is legal if the person instituting the recording is a party to the communication or one of the parties to the communication has given prior consent. R.C. 2933.52. Ohio joins the majority of states and the federal government in this "one-party consent" approach. *See* Bast, *Surreptitious Recording by Attorneys: Is It Ethical?*, 39 St. Mary's L.J. 661, 681 (2008). In a minority of states, recording conversations is illegal except when all of the parties to the conversation give permission for the recording. *Id.* These states are known as "all-party consent" states. *Id.*

Turning from the legality of surreptitious recording to the question of whether such recording is ethical, 13 states take the position that surreptitious recording by lawyers is not per se misconduct. *Id.* at 711. In ten states, surreptitious recording is both illegal and unethical for lawyers. *Id.* Additionally, in nine states surreptitious recording is unethical, but allowed in certain circumstances. *Id.* at 703, 711. Four states evaluate surreptitious recording on a case-by-case basis, and 13 states have not expressed an opinion on the issue. *Id.* at 711.[1] In sum, 26 states permit surreptitious recording by lawyers in at least some situations. *Id.* at 703.[2]

The Supreme Court of Ohio (Court) has addressed surreptitious recording in only one lawyer discipline case. In *Ohio State Bar Assn. v. Stern*, 103 Ohio St.3d 491, 2004-Ohio-5464, a lawyer secretly videotaped a meeting with investigators from the Office of Disciplinary Counsel. The lawyer also lied to the investigators about videotaping their meeting. The sole charge of misconduct against the lawyer was that the recording and accompanying lie constituted conduct involving dishonesty, fraud, deceit, or misrepresentation. The Court recognized Opinion 97-3, but dismissed the charge of misconduct, finding that the bar association had not proven that the videotaping involved dishonesty, fraud, deceit, or misrepresentation. *Id.* at ¶ 17, 38. The Court indicated that its dismissal was based upon the unique facts of the case including the effects that a major head injury had on the lawyer's conduct and the ulterior motives of the grievants. *Id.* at ¶ 24-39. Three justices dissented, stating that the lawyer should have received a public reprimand for lying to the investigators. *Id.* at ¶ 40-42. Neither the majority nor the dissent found surreptitious recording to be per se misconduct.

In addition to *Stern*, the Board reviewed disciplinary cases from other states involving surreptitious recording. Of a number of reported cases considered by the Board, only one held that a lawyer's surreptitious recording did "not rise to the level of dishonesty, fraud, deceit, or misrepresentation." *Attorney M. v. The Mississippi Bar*, 621 So.2d 220, 224 (Miss. 1992). In *Attorney M.*, the Supreme Court of Mississippi reviewed the conduct of a lawyer representing the plaintiff in a medical malpractice action. Two physicians had treated the

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[1] In two states, recording of telephone conversations is not per se unethical, but recording of face-to-face conversations is either illegal or has not been addressed. *Id.* at 714.

[2] Ohio is not included in these totals. Although based on the Bast law review article from 2008, the Board's independent research revealed that the Bast totals appear to remain accurate.

plaintiff. The lawyer recorded two telephone conversations with one of the physicians without consent. Because the lawyer was taking the physician's statement during the calls, the physician testified that he assumed the conversations were being taped, and there was no evidence that the lawyer intended to use the tapes for an improper purpose, the court dismissed the allegation of conduct involving dishonesty, fraud, deceit, or misrepresentation. *Id.* at 225.

In the other cases considered, surreptitious recording was found to be misconduct. However, all of the cases finding a disciplinary violation either rely on the ABA's 1974 opinion or involve extenuating facts such as the lawyer lying about the recording, the subject of the recording being a client or judge, or a motive for the recording that benefits the lawyer's own interests. *See Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) (recording of adverse party's employees conducted through false representations); *Matter of Wetzel*, 143 Ariz. 35, 691 P.2d 1063 (1985) (lawyer recorded disciplinary counsel and opposing counsel for the purpose of future impeachment); *People v. Smith*, 778 P.2d 685 (Colo. 1989) (lawyer recorded a judge and used the statement out of context in a judicial grievance); *Commt. on Prof'l Ethics and Conduct of the Iowa State Bar v. Mollman*, 488 N.W.2d 168 (Iowa 1992) (lawyer recorded client without consent to secure leniency in the lawyer's own criminal case); *Commt. on Prof'l Ethics and Conduct of the Iowa State Bar v. Plumb*, 546 N.W.2d 215 (Iowa 1996) (recording of judge in chambers); *In re Crossen*, 880 N.E.2d 352 (Mass. 2008) and *In re Curry*, 880 N.E.2d 388 (Mass. 2008) (creating and recording fake job interview with former law clerk in attempt to have judge disqualified); *The Mississippi Bar v. Attorney ST*, 621 So.2d 229 (Miss. 1993) (lawyer lied about the recording); *Matter of an Anonymous Member of South Carolina Bar*, 304 S.C. 342, 404 S.E.2d 513 (1991) (relies on former ABA opinion), *modified by In the Matter of the Attorney General's Petition*, 308 S.C. 114, 417 S.E.2d 526 (1992) (recognizing exception for law enforcement investigations); *In re PRB Docket No. 2007-046*, 989 A.2d 523 (Vt. 2009) (misleading statements about whether conversation was being recorded).[3] In these out-of-state disciplinary cases, the approach is similar to *Attorney M.* in that misconduct is determined based on additional facts connected to the recording. Only the Supreme Court of South Carolina in *Matter of an Anonymous Member of South Carolina Bar* found that surreptitious recording is inherently unethical.

[3] *See also Wilbourn III v. Wilbourn*, 2010-CA-00014-COA (Miss. Ct. App. 2012) (surreptitious recording by trustee of co-trustee found improper when purpose of recording was to have co-trustee declared incompetent and removed).

Taking into account the current ABA position on surreptitious recording, R.C. 2933.52, other states' ethics opinions and disciplinary cases involving surreptitious recording, and the *Stern* decision, the Board believes it is time to deviate from the position taken in Opinion 97-3. On February 1, 2007, the Court rescinded the Code and adopted the Ohio Rules of Professional Conduct. Unlike the Code, the Ohio Rules are based in large part on the ABA's Model Rules of Professional Conduct. Accordingly, the Board finds that the ABA's interpretations of its Model Rules carry at least some weight in the application of the Ohio Rules. After careful study of ABA Formal Opinion 01-422, the Board concludes that it is a well-reasoned approach that provides better guidance for Ohio lawyers than Opinion 97-3 has done.

Like the Code, the Ohio Rules do not explicitly prohibit surreptitious recordings of conversations by lawyers. In Opinion 97-3, the Board found that surreptitious recording is misconduct in "routine circumstances" because it involves dishonesty, fraud, deceit, or misrepresentation as prohibited under DR 1-102(A)(4). Prof.Cond.R. 8.4(c) has replaced DR 1-102(A)(4), and Rule 8.4(c) also states that it is misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Surreptitious, or secret, recording by a party to a conversation is legal in Ohio unless it is conducted for an improper purpose. R.C. 2933.52.[4] Such recordings are used in "widespread practice by law enforcement, private investigators, and journalists, and the courts universally accept evidence acquired by such techniques." ABA Formal Opinion 01-422 at 4. Additionally, public expectations of privacy have changed given advances in technology and the increased availability of recording equipment. *Id.* The public has an almost ubiquitous ability to record others through the use of smart phones, tablets, and other portable devices. Further, so many exceptions have been recognized to justify surreptitious recording that it seems patently unfair to maintain that it is misconduct per se when a lawyer does it. In Opinion 97-3, the Board identified sweeping exceptions for law enforcement lawyers, prosecutors, criminal defense lawyers, and in "extraordinary circumstances." Other jurisdictions have found exceptions for recordings in situations involving threats or obscene calls, of witnesses to avoid perjury, for a lawyer's self-preservation, when authorized by law or court order, and for housing discrimination and trademark infringement investigators. *Id.* A rule

[4] The recording cannot be for the "purpose of committing a criminal offense or tortuous act in violation of the laws or Constitution of the United States or [Ohio] or for the purpose of committing any other injurious act." R.C. 2933.52(B)(4).

with a significant number of variables simply does not provide appropriate guidance for Ohio lawyers. For all of these reasons, the Board finds that the general rule should be that legal surreptitious recording by Ohio lawyers is not a per se violation of Prof.Cond.R. 8.4(c).

Although the Board is fashioning a new standard for surreptitious recording by Ohio lawyers, the Board is not in any way indicating that a lawyer cannot be disciplined for conduct involving such recordings. As demonstrated by the out-of-state disciplinary cases cited above, the acts associated with a lawyer's surreptitious recording may rise to the level of misconduct, including a violation of Prof.Cond.R. 8.4(c). Examples include lying about the recording, using deceitful tactics to become a party to a conversation, and using the recording to commit a crime or fraud.[5] Under Prof.Cond.R. 4.4, lawyers also cannot employ surreptitious recording if it has "no substantial purpose other than to embarrass, harass, delay, or burden a third person" or is a means of obtaining evidence that violates the legal rights of a third person. "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others." Ohio Rules of Prof'l Conduct, Preamble, ¶ [5].

In the alternative, as revealed in *Stern*, the facts and circumstances may cause the Court to find that a seemingly-deceitful surreptitious recording was justifiable and not misconduct. The mere act of surreptitiously or secretly recording a conversation should not be the impetus for a charge of misconduct. Instead, the totality of the circumstances surrounding the recording must be evaluated to determine whether a lawyer has engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Prof.Cond.R. 8.4(c). As eloquently stated by the Supreme Court of Iowa in 1996, "[i]t is not the use of recording devices, but the employment of artifice or pretense, that truly poses a threat to the trust which is the bedrock of our professional relationships." *Plumb*, *supra*, at 217.

This opinion assumes that a lawyer's surreptitious recording does not violate the law of the jurisdiction where the recording takes place. If an Ohio lawyer chooses to record a conversation in another jurisdiction, the lawyer is advised to verify that the recording is legal. Once a surreptitious recording becomes an illegal act, the recording may violate Prof.Cond.R. 4.4 (obtaining

[5] However, Prof.Cond.R. 8.4(c) "does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law." Prof.Cond.R. 8.4, comment [2A].

evidence in violation of a person's legal rights), 8.4(b) (illegal act reflecting adversely on honesty or trustworthiness), 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), or 8.4(h) (conduct adversely reflecting on fitness to practice). In addition, under Prof.Cond.R. 8.5(b), a lawyer may be subject to the disciplinary rules of another jurisdiction for conduct occurring in that jurisdiction. Thus, Ohio lawyers are further advised to confirm that a recording that occurs in another jurisdiction is permissible under that jurisdiction's rules of professional conduct.

On a final note, the Board finds that it must separately address surreptitious recordings by lawyers of their conversations with clients and prospective clients. In Formal Opinion 01-422, the ABA stated as follows: "[a]lthough the Committee is divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client concerning the subject matter of the representation without the client's knowledge, such conduct is, at the least, inadvisable." ABA Formal Opinion 01-422 at 8. The Board agrees with the ABA's general admonition against surreptitious recording of client conversations. A lawyer's duties of loyalty and confidentiality are central to the lawyer-client relationship, and recording client conversations without consent is not consistent with these overarching obligations. *See* Preamble, ¶ [4], Prof.Cond.R. 1.6, and Prof.Cond.R. 1.7, comment [1]. While there may occasionally be extraordinary occasions in which a surreptitious recording of a client conversation would be justified, such as when a lawyer believes a client plans to commit a crime resulting in death or substantial bodily harm, a lawyer generally should not record client conversations without the client's consent.

If a person is a prospective client as defined in Prof.Cond.R. 1.18(a), a lawyer's conversation with that person should also generally not be recorded without consent. As stated in Prof.Cond.R. 1.8(b), lawyers have a duty not to use or disclose information revealed during a consultation with a prospective client. These expectations of trust and confidentiality are similar to those found in the lawyer-client relationship, and inconsistent with the routine, nonconsensual recording of prospective client conversations. A person must truly be a prospective client for the general admonition to apply, however, and a unilateral communication to a lawyer without a reasonable expectation that the lawyer is willing to consider a lawyer-client relationship does not make the person initiating the communication a prospective client. Prof.Cond.R. 1.18, Comment [2].

CONCLUSION: A surreptitious, or secret, recording of a conversation by an Ohio lawyer is not a per se violation of Prof.Cond.R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) if the recording does not violate the law of the jurisdiction in which the recording took place. Because surreptitious recording is regularly used by law enforcement and other professions, society as a whole has a diminished expectation of privacy given advances in technology, the breadth of exceptions to the previous prohibition on surreptitious recording provides little guidance for lawyers, and the Ohio Rules of Professional Conduct are based on the Model Rules of Professional Conduct, the Board adopts the approach taken in ABA Formal Opinion 01-422. Although surreptitious recording is not inherently unethical, the acts associated with a lawyer's surreptitious recording may constitute a violation of Prof.Cond.R. 8.4(c) or other Rules of Professional Conduct. Examples of misconduct may include lying about the recording, using deceitful tactics to become a party to a conversation, and using the recording to commit a crime or fraud. As a basic rule, Ohio lawyers should not record conversations with clients without their consent. A lawyer's duties of loyalty and confidentiality are central to the lawyer-client relationship, and recording client conversations without consent is ordinarily not consistent with these overarching obligations. Similar duties exist in regard to prospective clients, and Ohio lawyers should also refrain from nonconsensual recordings of conversations with persons who are prospective clients as defined in Prof.Cond.R. 1.8(a).

Advisory Opinion 97-3 is withdrawn.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.

The Supreme Court of Ohio
Board of Commissioners on Grievances & Discipline

Opinion 2012-1
Issued June 8, 2012

Surreptitious (Secret) Recording by Lawyers

SYLLABUS

- **A surreptitious, or secret, recording of a conversation by an Ohio lawyer is not a per se violation of Prof.Cond.R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) if the recording does not violate the law of the jurisdiction in which the recording takes place.**

- **The acts associated with a lawyer's surreptitious recording, however, may constitute misconduct under Prof.Cond.R. 8.4(c) or other Rules of Professional Conduct.**

- **In general, Ohio lawyers should not record conversations with clients or prospective clients without their consent. Advisory Opinion 97-3 is withdrawn.**

ABA Comment on Ethics and Professional Responsibility
Formal Opinion 2001-442
June 24, 2001

- "Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules [of Professional Conduct] merely by recording a conversation without the consent of the other parties to the conversation."

Board of Commissioners on Grievances & Discipline
Opinion 2012-1

Surreptitious (Secret) Recording by Lawyers

- In Ohio, recording of wire, oral, and electronic communications is legal if the person instituting the recording is a party to the communication or one of the parties to the communication has given prior consent. RC 2933.52. Ohio joins the majority of states and the federal government in this "one-party consent" approach.

Board of Commissioners on Grievances & Discipline

Opinion 2012-1

Surreptitious (Secret) Recording by Lawyers

- Surreptitious, or secret, recording by a party to a conversation is legal in Ohio unless it is conducted for an improper purpose. RC 2933.52(B)(4).

R.C. 2933.52 Interception of wire, oral or electronic communications

- R.C. 2933.52(B)(4) Prohibition against interception does not apply if:
  - A person who is not a law enforcement officer intercepts a wire, oral, or electronic communication,
    - if the person is a party to the communication, or
    - if one of the parties to the communication has given the person prior consent to the interception, and
  - the communication is not intercepted for purpose of committing a criminal offense or tortious act in violation the laws or Constitution of the United States or this state or
  - for the purpose of committing any other injurious act.

Board of Commissioners on Grievances & Discipline
Opinion 2012-1

Surreptitious (Secret) Recording by Lawyers

- Such recordings are used in "widespread practice by law enforcement, private investigators, and journalists, and the courts universally accept evidence acquired by such techniques." ABA Formal Opinion 01-422 at 4.

- Additionally, **public expectations of privacy have changed** given advances in technology and the increased availability of recording equipment. *Id.* **The public has an almost ubiquitous ability to record others through the use of smart phones, tablets, and other portable devices.**

Board of Commissioners on Grievances & Discipline
Opinion 2012-1

Surreptitious (Secret) Recording by Lawyers

- The acts associated with a lawyer's surreptitious recording may rise to the level of misconduct, including a violation of Prof.Cond.R. 8.4(c).

- Examples include:
  - lying about the recording,
  - using deceitful tactics to become a party to a conversation, or
  - using the recording to commit a crime or fraud.

Board of Commissioners on Grievances & Discipline
Opinion 2012-1

Surreptitious (Secret) Recording by Lawyers

- "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others." Ohio Rules of Prof'l Conduct, Preamble, ¶ [5].

  Under Prof.Cond.R. 4.4, lawyers also cannot employ surreptitious recording if it has
  - "no substantial purpose other than to embarrass, harass, delay, or burden a third person" or
  - is a means of obtaining evidence that violates the legal rights of a third person.

Board of Commissioners on Grievances & Discipline
Opinion 2012-1

Surreptitious (Secret) Recording by Lawyers

- If an Ohio lawyer chooses to record a conversation in another jurisdiction, the lawyer is advised to verify that the recording is legal.

- In addition, under Prof.Cond.R. 8.5(b), a lawyer may be subject to the disciplinary rules of another jurisdiction for conduct occurring in that jurisdiction.

Board of Commissioners on Grievances & Discipline
Opinion 2012-1

Surreptitious (Secret) Recording by Lawyers

- Once a surreptitious recording becomes an illegal act, the recording may violate
  - Prof. Cond. R. 4.4 (obtaining evidence in violation of a person's legal rights),
  - Prof. Cond. R. 8.4(b) (illegal act reflecting adversely on honesty or trustworthiness),
  - Prof. Cond. R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), or
  - Prof. Cond. R. 8.4(h) (conduct adversely reflecting on fitness to practice).

Surreptitious Recordings by Lawyers of Conversations with Clients and Prospective Clients

ABA Formal Opinion 2001-442

- "Although the Committee is divided as to whether the Model Rules forbid a lawyer from **recording a conversation with a client** concerning the subject matter of the representation **without the client's knowledge**, such conduct is, at the least, inadvisable."
  - ABA Formal Opinion 01-422 at 8.

Board of Commissioners on Grievances & Discipline
Opinion 2012-1

Surreptitious (Secret) Recording by Lawyers

- A lawyer's duties of loyalty and confidentiality are central to the lawyer-client relationship, and recording client conversations without consent is not consistent with these overarching obligations. *See* Preamble, ¶ [4], Prof.Cond.R. 1.6, and Prof.Cond.R. 1.7, comment [1].

Board of Commissioners on Grievances & Discipline
Opinion 2012-1

Surreptitious (Secret) Recording by Lawyers

- While there may occasionally be **extraordinary occasions** in which a surreptitious recording of a client conversation would be justified, such as when a lawyer believes a client plans to commit a crime resulting in death or substantial bodily harm, **a lawyer generally should not record client conversations without the client's consent**.

Positive
As of: October 1, 2018 1:23 PM Z

United States v. Harris

United States Court of Appeals for the Sixth Circuit

December 7, 2017, Argued; February 5, 2018, Decided; February 5, 2018, Filed

File Name: 18a0025p.06

No. 17-3087

Reporter
881 F.3d 945 *; 2018 U.S. App. LEXIS 2793 **; 2018 FED App. 0025P (6th Cir.) ***; 2018 WL 706513

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TALMAN HARRIS, Defendant-Appellant.

Subsequent History: On remand at, Motion for new trial denied by *United States v. Harris, 2018 U.S. Dist. LEXIS 138064 (N.D. Ohio, Aug. 15, 2018)*

Prior History: [**1] Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 1:15-cr-00335-2—Benita Y. Pearson, District Judge.

United States v. Esposito, 2016 U.S. Dist. LEXIS 11573 (N.D. Ohio, Jan. 7, 2016)

Core Terms

district court, Juror, exhibits, extraneous, records, impeach, investigate, fiduciary duty, profile, prior inconsistent statement, obstruction of justice, abuse of discretion, prejudicial, stockbroker, admissible, witness's, customer, counts, instruction of a jury, colorable claim, new trial, convictions, introduce, abused, argues

Case Summary

Overview

HOLDINGS: [1]-The court abused its discretion by not allowing defendant to introduce a prior inconsistent statement for impeachment purposes, because the court abused its discretion by determining that *Fed. R. Evid. 608* applied and by not allowing defendant to present the prior inconsistent statement pursuant to *Fed. R. Evid. 613*, and the court's failure to allow introduction of the prior inconsistent statement was not harmless error; [2]-The court abused its discretion by failing to hold an Remmer evidentiary hearing or by denying defense counsel's request to question the juror and his friend, because defendant presented a colorable claim of extraneous influence on a juror.

Outcome
Judgment vacated and case remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > ... > Testimony > Credibility of Witnesses > Impeachment

HN1[] **Abuse of Discretion, Evidence**

The appellate court reviews the district court's ruling under *Fed. R. Evid. 608(b)* for abuse of discretion, which occurs when the court relies on clearly erroneous findings of fact, improperly applies the law, or employs an erroneous legal standard.

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Inconsistent Statements

HN2[] **Impeachment, Prior Inconsistent**

Statements

Fed. R. Evid. 613(b) provides that an impeaching party may produce extrinsic evidence of a witness's prior inconsistent statement if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. It applies when two statements, one made at trial and one made previously, are irreconcilably at odds. Inconsistency is defined broadly.

Evidence > Types of Evidence > Documentary Evidence > Summaries

HN3[] **Documentary Evidence, Summaries**

Fed. R. Evid. 1006 includes five distinct requirements in order for a summary exhibit to be deemed admissible.

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

HN4[] **Clearly Erroneous Review, Findings of Fact**

In reviewing a trial court's evidentiary determinations, the appellate court reviews for clear error the trial court's factual determinations that underpin its legal conclusions.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Trials > Jury Instructions

HN5[] **Standards of Review, Abuse of Discretion**

The appellate court reviews the district court's jury instruction for abuse of discretion and examines the jury charge as a whole to determine whether it fairly and adequately submits the issues and the law to the jury.

Business & Corporate Law > Agency Relationships > Fiduciaries > Formation

Business & Corporate Law > Agency Relationships > Types

HN6[] **Fiduciaries, Formation**

Particular factual circumstances may serve to create a fiduciary duty between a broker and his customer, even though there is no general fiduciary duty inherent in an ordinary broker/customer relationship.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations

HN7[] **Standards of Review, Abuse of Discretion**

The appellate court reviews the district court's denial of a Remmer hearing for abuse of discretion.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations

HN8[] **Fundamental Rights, Criminal Process**

In order to safeguard a criminal defendant's right to a panel of impartial jurors under the *Sixth Amendment*, when a defendant presents a colorable claim of extraneous influence, the court has a duty to investigate and to determine whether there may have been a violation of the constitutional guarantee. Any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. In such cases, a district court must conduct a Remmer hearing in order to afford the defendant an opportunity to establish bias. When there is a credible allegation of extraneous influences, the court must investigate sufficiently to assure itself that constitutional rights of the criminal defendant have not been violated.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations

HN9[] **Juries & Jurors, Jury Deliberations**

While the appellate court affords broad discretion to the district court in determining the type of investigation necessary to determine juror bias, the district court must provide the defendant a meaningful opportunity to prove the same.

Counsel: ARGUED: Philip S. Kushner, KUSHNER, HAMED & GROSTIC, CO., LPA, Cleveland, Ohio, for Appellant.

Daniel R. Ranke, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

ON BRIEF: Philip S. Kushner, Christian J. Grostic, KUSHNER, HAMED & GROSTIC, CO., LPA, Cleveland, Ohio, for Appellant.

Daniel R. Ranke, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

Judges: Before: SILER, WHITE, and THAPAR, Circuit Judges.

Opinion by: SILER

Opinion

[*947] [*1]** SILER, Circuit Judge. Talman Harris appeals his criminal convictions and sentences, arguing that the district court erred by: (1) barring Harris from impeaching a government **[***2]** witness; (2) admitting government summary evidence; (3) giving an inaccurate jury instruction with regard to a stockbroker's fiduciary duties; and (4) failing to investigate potential extraneous influence on a juror.

Because the district court abused its discretion by not allowing Harris to introduce a prior inconsistent statement for impeachment purposes, we reverse Harris's conviction for obstruction of justice and remand for a new trial **[**2]** on that count. The district court did not, however, err in **[*948]** admitting the summary exhibits and in rendering the fiduciary-duty jury instruction, so we affirm the district court's rulings on Harris's second and third assignments of error. Finally, because Harris presented a colorable claim of extraneous influence on a juror, we conclude that the district court abused its discretion by failing to hold an evidentiary hearing pursuant to *Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954)*, or by denying defense counsel's request to question the juror and his friend. Thus, we vacate the judgment of the district court and remand for a *Remmer* hearing.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2016, a jury convicted Harris of one count of conspiracy to commit securities fraud or wire fraud, in violation of *18 U.S.C. §§ 1343*, *1348*, *1349*, one count of obstruction of justice, in violation of *18 U.S.C. § 1503*, and three counts of wire fraud, in violation of *18 U.S.C. § 1343*. The district court sentenced Harris to 63 months' imprisonment, a five-year term of supervised release, a $500 special assessment, and $843,423.91 in restitution.

Harris was a registered stockbroker with various securities firms in New York from 2007 to 2014. He and his co-conspirators, including government witness Guy Durand, **[**3]** participated in a scheme whereby they agreed to recommend shares of Zirk de Maison's companies to clients in exchange for undisclosed commissions.[1] The Financial Industry Regulatory Authority ("FINRA") began an investigation of the conspirators' activities and questioned Harris and Durand on wire transfers from certain organizations controlled by de Maison. Harris and Durand decided to tell investigators that the deposits resulted from selling expensive watches, and they **[***3]** sent letters to FINRA summarizing this fictitious explanation. FINRA responded with a letter asking, "Did an individual by the name of Zirk Engelbrecht have any connection whatsoever with any of the above-noted wire transfers that you received?" Harris and Durand replied that they did not deal with Zirk Engelbrecht. After Harris was arrested, he purportedly called and texted Durand on multiple occasions, instructing him to stick with their

[1] Zirk de Maison, also known as Zirk Engelbrecht, was Harris's co-conspirator who testified for the government.

story: "Remember, we sold watches." Durand later admitted to officers that the watch story was entirely false.

DISCUSSION

I. Impeachment of Government Witness

Harris first challenges his obstruction of justice conviction based on the district court's denial of his request to impeach **[**4]** Durand with a prior inconsistent statement.

The government presented co-conspirator Durand as a witness against Harris at trial in support of the obstruction of justice charge. Durand testified that he viewed Harris's statement, "Remember, we sold watches," as an "invit[ation]" to make a false statement to the FBI. Harris's counsel then attempted to impeach Durand with a recorded statement that Durand made to Harris's private investigator, Ron Dwyer. Harris's counsel posited that Dwyer asked Durand, "Was Talman basically saying if anybody comes around, just tell the truth and leave it at that?" Durand responded, "It was more of that nature, you know." Durand told Harris's counsel that he did not recall making this statement, **[*949]** and Harris's counsel then requested to play Durand's recorded statement on counsel's cell phone. The district court denied Harris's request to impeach, finding that the recording was unauthenticated extrinsic evidence that counsel was attempting to use as character evidence.

Harris now contends that the district court improperly analyzed his proffered evidence under *Federal Rule of Evidence 608(b)*, when he sought to introduce the evidence to contradict the witness's testimony, not to attack the **[**5]** witness's character for truthfulness. *HN1*[↑] We review the district court's ruling for abuse of discretion, "which occurs when the court 'relies on clearly erroneous findings of fact, improperly applies the law, or employs an erroneous legal standard.'" *Griffin v. Finkbeiner, 689 F.3d 584, 592 (6th Cir. 2012)* (quoting *Barner v. Pilkington N. Am., Inc., 399 F.3d 745, 748 (6th Cir. 2005)*).

[*4]** *Rule 608(b)* states that "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." "By limiting the application of the Rule to proof of a witness' character for truthfulness," however, "the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to *Rules 402* and *403*." *Fed. R. Evid. 608* (application note).

HN2[↑] *Rule 613(b)* provides that an impeaching party may produce "[e]xtrinsic evidence of a witness's prior inconsistent statement . . . if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires." It applies when two statements, "one made at trial and one made previously, are irreconcilably at odds." *United States v. Fonville, 422 F. App'x 473, 481 (6th Cir. 2011)* (quoting *United States v. Winchenbach, 197 F.3d 548, 558 (1st Cir. 1999)*). "[I]nconsistency is defined broadly." **[**6]** *United States v. LaVictor, 848 F.3d 428, 451 (6th Cir. 2017)*.

Here, counsel sought to impeach Durand with a prior inconsistent statement that was "irreconcilably at odds" with his testimony. *Winchenbach, 197 F.3d at 558*. Durand testified at trial that Harris asked him to be dishonest with law enforcement. In the recorded statement that Harris's counsel proffered and attempted to use for impeachment, Durand essentially told Dwyer that Harris had instructed him to "tell the truth and leave it at that." Harris did not, as the district court found, seek to introduce character evidence.

Consequently, the district court abused its discretion by determining that *Rule 608* applied and by not allowing Harris to present the prior inconsistent statement pursuant to *Rule 613*. Harris's counsel met the requirements of *Rule 901(a)* by informing the district court of the substance of the evidence, *see United States v. Wilson, 630 F. App'x 422, 428 (6th Cir. 2015)*, and the issue of whether Harris instructed Durand to lie to law enforcement was clearly a noncollateral issue, *see United States v. Markarian, 967 F.2d 1098, 1102 (6th Cir. 1992)*. Pursuant to *Rule 613(b)*, the district court should have afforded Harris the opportunity to produce his proffered evidence.

[*5]** The government argues that "any error would be harmless in light of the overwhelming evidence against Harris." Evidence against Harris on this specific charge does not appear to have been substantial, **[**7]** however. Durand was the only government witness on the obstruction of justice charge, and his testimony was **[*950]** largely uncorroborated. Notably, the government did not introduce the actual text messages Harris purportedly sent to Durand to corroborate Durand's testimony because Durand had apparently deleted them from his phone.

We cannot say "with fair assurance" that the judgment on Harris's obstruction charge "was not substantially swayed by the error." *United States v. Haywood, 280 F.3d 715, 724 (6th Cir. 2002)* (quoting *Kotteakos v. United States, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)*). Consequently, the district court's failure to allow introduction of Durand's prior inconsistent statement was not harmless error. We reverse Harris's conviction for obstruction of justice and remand for a new trial on this count.

II. Summary Exhibits

Next, Harris appeals the district court's admission of certain summary exhibits presented by the government.

Prior to trial, Harris filed a motion *in limine* to preclude the government's introduction of summary charts because the government had not provided Harris's counsel with the underlying records in a timely manner, as required by *Federal Rule of Evidence 1006*. The district court denied this motion, finding that the government had produced the summary evidence and underlying data reasonably early. At the **[**8]** final pretrial conference, Harris renewed his objection to the government's use of summary evidence, specifically exhibit 610, arguing that the exhibit was based on other summaries, exhibits 303, 320, and 346, which did not qualify as business records under *Federal Rules of Evidence 803(6)* and *902(11)*. The court again overruled his objection and allowed the government to present exhibits 303, 320, 346, and 610. We review the district court's ruling for abuse of discretion. *See Griffin, 689 F.3d at 592*.

Federal Rule of Evidence 1006 provides:

> The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently **[***6]** examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

We have interpreted *HN3*[↑] *Rule 1006* to include five distinct requirements in order for a summary exhibit to be deemed admissible. *See United States v. Bray, 139 F.3d 1104, 1109-10 (6th Cir. 1998)* (the "*Bray* factors"). Only the second *Bray* factor is at issue here:[2] the proponent of the summary exhibits must make the underlying documents "available for examination or copying, or both, by other parties at [a] reasonable time and place." **[**9]** *Id. at 1109*. Harris contends that exhibits 303, 320, and 346 are summaries, for which the government was required to submit the underlying trade records.[3]

[*951] As stated by Harris and testified to by Special Agent McGovern at trial, exhibit 610 was a "combination of prior exhibits," including exhibits 303, 320, and 346. Exhibits 303 and 346 were "trade blotters," or compilations of trade records created by clearing firms. Finally, exhibit 320 was a summary of a trade blotter created by Agent McGovern.

The district court did not abuse its discretion in admitting exhibits 303 and 346 because they were created by clearing firms as part of their regular business practice and were admissible under the business-records exception. *Fed. R. Evid. 803(6)*; *see*

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[2] Although Harris asserts that the exhibits "may have failed to satisfy the other requirements [of *Rule 1006*], too: were the underlying records too voluminous to conveniently examine in court? Were they admissible? And was the summary accurate and non-prejudicial? It is impossible to say, because the government did not produce the underlying records," he does not specifically address these factors.

[3] The government argues that this is the first time Harris has made this specific argument. Thus, the government contends that we should review the district court's denial for plain error. *See United States v. Calvetti, 836 F.3d 654, 664 (6th Cir. 2016)*. Harris responds that he made this argument below, and it appears that Harris's counsel did argue this point before the district court. Thus, we will apply the abuse of discretion standard, as previously set forth.

United States v. Laster, 258 F.3d 525, 529 (6th Cir. 2001). Thus, the government was not required to provide all of the underlying trade records because these trade blotters were reliable and were not summary evidence. *See* *Cobbins v. Tenn. Dep't of Transp.*, 566 F.3d 582, 588 (6th Cir. 2009).

With regard to exhibits 320 and 610, the district court did not abuse its discretion in finding that these exhibits were valid summary evidence under *Rule 1006*. The district court determined that the government had produced all underlying bank records and clearing firm **[***7]** records months before trial and had informed defense **[**10]** counsel that certain Bloomberg market data was publically available. This finding does not appear to be clearly erroneous based upon the record. *See* *United States v. Salgado*, 250 F.3d 438, 451 (6th Cir. 2001) (***HN4***[↑] "In reviewing a trial court's evidentiary determinations, this court reviews . . . for clear error the [trial] court's factual determinations that underpin its legal conclusions."). Thus, the district court did not unreasonably apply the law in determining that exhibits 320 and 610 met the second *Bray* criterion. *139 F.3d at 1109*. Furthermore, as established herein, the underlying trade blotters were admissible as evidence under the business records exception. *Id. at 1109-10*. The district court did not abuse its discretion in admitting exhibits 303, 320, 346, and 610, and we affirm its ruling on that issue.

III. Fiduciary Duty Jury Instruction

Third, Harris argues that he is entitled to a new trial on all counts because the district court erred in instructing the jury that a stockbroker owes his clients certain fiduciary duties.

Pre-trial, the government filed a motion seeking to preclude Harris from arguing that he had no duty to disclose to customers that he was receiving kickbacks from stock issuers. Harris opposed the motion, arguing that he had no such fiduciary **[**11]** duty as a matter of law. The district court granted the government's motion. Following presentation of the evidence at trial, over Harris's objection, the district court gave the jury the following instruction with regard to Harris's fiduciary duty to his customers:

> I instruct you that a fiduciary owes a duty to his customer to disclose all material facts concerning the transaction entrusted to him. Matters entrusted to a stockbroker include those transactions in which the stockbroker makes recommendations to a customer regarding buying or selling stock. The concealment by a fiduciary of material information which he or she is under a duty to disclose to another, under circumstances where the non-disclosure can or does result in harm to the other is a breach of the fiduciary duty and can be a violation of federal laws, if the government has proven beyond a reasonable doubt the **[*952]** other elements of those offenses, as I explained them to you.

HN5[↑] We review the district court's jury instruction for abuse of discretion and examine "the jury charge as a whole to determine whether it fairly and adequately submits the issues and the law to **[***8]** the jury." *United States v. Newcomb*, 6 F.3d 1129, 1132 (6th Cir. 1993) (citing *United States v. Williams*, 952 F.2d 1504, 1512 (6th Cir. 1991)).

Harris argues that the district court **[**12]** instructed the jury that a stockbroker has a fiduciary obligation to disclose his compensation any time the broker recommends a stock. He is incorrect. The district court's instructions made clear that the jury had to find a fiduciary relationship existed before it could convict Harris on the government's failure-to-disclose theory. ***HN6***[↑] "[P]articular factual circumstances may serve to create a fiduciary duty between a broker and his customer," even though "there is no general fiduciary duty inherent in an ordinary broker/customer relationship." *United States v. Skelly*, 442 F.3d 94, 98 (2d Cir. 2006) (citation omitted).

In light of established Second Circuit case law relied upon by both of the parties, the instruction rendered by the district court was not an abuse of discretion. It "fairly and adequately" explained the law to the jury, *Newcomb*, 6 F.3d at 1132, and was not "confusing, misleading or prejudicial," *United States v. Myers*, 854 F.3d 341, 354 (6th Cir. 2017) (citation omitted). Thus, we affirm the district court's use of this particular jury instruction.

IV. Extraneous Influence on a Juror

Finally, Harris argues that the district court abused its discretion by failing to conduct a *Remmer* hearing after he presented evidence that a juror may have been improperly influenced during trial.

On September 6, 2016, Harris **[**13]** received a notification from LinkedIn that other LinkedIn members had recently viewed his LinkedIn profile. Harris opened this email the next day, after the jury had returned its verdict. Shortly thereafter, Harris discovered that one of the persons who viewed his profile was Christian Goleno, a student at Youngstown State University, located in the city where Harris's trial was conducted. The record is inconclusive regarding the exact date Goleno viewed Harris's profile, but the September 12, 2016 LinkedIn profile-viewssummary page indicates that it was sometime between August 28 and September 12, 2016. Harris's trial began on August 24, and the jury was discharged on September 7, 2016.

[*9]** Harris then discovered that Goleno's Facebook profile featured pictures of her and a juror from Harris's trial, Juror Number 12 ("Juror 12"), and Juror 12's profile featured pictures of Goleno. The voir dire transcript confirmed that Goleno was Juror 12's live-in girlfriend. Goleno and Harris had no personal connection, and Harris's trial had received little publicity. Thus, Harris concluded that Juror 12 must have discussed the trial with his girlfriend. Harris surmised that Goleno had probably searched **[**14]** his name on Google because his LinkedIn profile was on the first page of search results. Information regarding FINRA's investigation of Harris, which led to his permanent bar from FINRA, was also on the first page of Google results. The government was precluded from presenting evidence of this investigation during Harris's trial.

Harris filed a motion for a *Remmer* hearing in order to determine whether Juror 12 was improperly exposed to prejudicial extraneous information about Harris during trial. *See* Remmer, 347 U.S. at 230. The government argued **[*953]** in response that Harris had not made a "colorable claim of extraneous influence." *See* United States v. Davis, 177 F.3d 552, 557 (6th Cir. 1999). In Harris's reply, he requested that the court at least allow him to interview Juror 12 and Goleno. The district court denied Harris's motion, declining to either hold a *Remmer* hearing or allow Harris to investigate further. It concluded that it was "more likely" that Goleno "never had an actual communication with Juror Number 12."[4] HN7[↑] We review the district court's denial of a **[***10]** *Remmer* hearing for abuse of discretion. United States v. Lanier, 870 F.3d 546, 549 (6th Cir. 2017).

HN8[↑] In order to safeguard a criminal defendant's right to a panel of impartial jurors under the *Sixth Amendment*, when a defendant presents a "colorable claim of extraneous influence," the court "has a duty to investigate and to determine whether there may have been a violation of the constitutional guarantee." United States v. Perry, 438 F.3d 642, 651 (6th Cir. 2006) (internal citation omitted); United States v. Owens, 426 F.3d 800, 805 (6th Cir. 2005); *see* Remmer, 347 U.S. at 229 ("[A]ny private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for

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[4] Specifically, the district court stated:

> While Defendant's exhibits may very well establish that Ms. Goleno viewed Defendant's LinkedIn profile and knew Juror Number 12, he offers little else other than speculation. **[**15]** Defendant speculates that Ms. Goleno learned of prejudicial information and communicated the prejudicial information to Juror Number 12. In sum, Defendant has done nothing more than raise a possibility of bias—a bar he must surpass for the Court to grant his motion and conduct a *Remmer* hearing. Furthermore, there is a well established presumption that the jurors, including Juror Number 12, followed the Court's instruction not to discuss the case with anyone and not to conduct any outside research while the trial was being conducted. *See* United States v. Guzman, 450 F.3d 627, 629 (6th Cir. 2006). Not only did Juror Number 12 repeatedly receive this instruction, along with the other jurors, he responded in the negative each time this Court inquired about whether any juror had any improper contacts or attempted contacts that should be brought to the Court's attention. The inquiry was made each time the jury entered the courtroom after a prolonged absence from the courthouse.
>
> Assuming the connection drawn between Juror Number 12 and Ms. Goleno is accurate, a more likely explanation is that Ms. Goleno learned that Juror Number 12 had been seated as a juror. She then, as "this age of the internet" allows: visited the Court's public website; found **[**16]** the trial in progress; decided to inquire further by visiting LinkedIn; and never had an actual communication with Juror Number 12. Nothing about this is improper or surprising in this age of technology. Not only is this scenario far more likely than that offered by Defendant, it discourages the notion that Juror Number 12 had improper communications with Ms. Goleno.

obvious reasons, deemed presumptively prejudicial."). In such cases, a district court must conduct a *Remmer* hearing in order to afford the defendant an opportunity to establish bias. *See* United States v. Rigsby, 45 F.3d 120, 124-25 (6th Cir. 1995) ("When there is a credible allegation of extraneous influences, the court must investigate sufficiently to assure itself that constitutional rights of the criminal **[**17]** defendant have not been violated.").

Here, Harris presented credible evidence that Goleno found his LinkedIn profile, likely from searching for him on Google. The first page of Google results also included prejudicial information that the government was precluded from introducing at trial. Although the district court admonished the jury not to discuss the case with others, under the circumstances here, it is quite possible that Juror 12 told Goleno about the trial, leading her to Google Harris and to potentially communicate **[*954]** her findings to her live-in boyfriend, Juror 12.

Although Harris did not establish that Juror 12 was exposed to unauthorized communication, Harris did present a colorable claim of extraneous influence, which necessitated investigation. The district court had "considerable discretion" in determining how to investigate, United States v. Taylor, 814 F.3d 340, 348 (6th Cir. 2016), but its decision to neither hold a *Remmer* hearing nor allow Harris to investigate was an abuse of discretion. *See* United States v. Herndon, 156 F.3d 629, 637 (6th Cir. 1998) (**HN9**[↑] "While this court affords broad discretion to the district court in determining the type of investigation necessary to determine juror bias, the **[***11]** district court must provide the defendant a meaningful opportunity to prove the same."). **[**18]** Thus, the district court abused its discretion by failing to conduct an evidentiary hearing on the allegations of extraneous influence on Juror 12.

We vacate the judgment of the district court and remand for a hearing pursuant to Remmer, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146. If the district court finds that Harris was prejudiced by jury misconduct, then Harris will be entitled to a new trial on all counts. If not, then his conspiracy and fraud convictions will stand. United States v. Corrado, 227 F.3d 528, 532 (6th Cir. 2000); *see* Owens, 426 F.3d at 805 (stating that this court routinely remands when a district judge fails to conduct a *Remmer* hearing in spite of a colorable claim of extraneous influence).

In sum, we **REVERSE** Harris's conviction on Count 5, obstruction of justice, and **REMAND** for either a retrial on Count 5 or resentencing on the remaining counts, at the government's option. We **VACATE** the judgment of the district court denying Harris's request to investigate the allegations of extraneous influence on Juror 12 or to hold a *Remmer* hearing and **REMAND** for a *Remmer* hearing. We **AFFIRM** Harris's convictions on Counts 1, 2, 3, and 4, except that if, following a *Remmer* hearing, the district court finds that Harris was prejudiced by juror misconduct, Harris will be entitled to a new trial on all counts. **[**19]**

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Is It Ethical to Tape a Client?

By Joseph P. Briggett, Esquire

Lawyers taping conversations with their clients received national attention recently after Michael Cohen, the erstwhile personal attorney for President Trump, reportedly recorded at least one of his conversations with his client. The president tweeted in response, "What kind of a lawyer would tape a client? So sad!" Setting aside the controversies of the story, it highlights the fact that undisclosed recording of client conversations could result in a client who feels betrayed.

Some attorneys and law firms regularly record telephone discussions with clients, opposing counsel, and other third parties. There is certainly support for the notion that such a policy is both legal and ethical. Most states, as well as federal law, permit one-party-consent recording. Some states' ethics authorities have concluded that the practice is permissible specifically for lawyers, within certain parameters. But determining when it is legal—and when it is ethical—for an attorney to record a phone conversation is a difficult question that probably needs to be evaluated on a call-by-call basis.

In so-called "two-party" states, the question is simple because it is illegal to record a conversation without the consent of the other party. Obviously, lawyers should never record a conversation without consent in these states. However, the question gets blurry for lawyers in one-party states, where it is legal to record telephone conversations as long as one of the parties to the conversation is the person doing the recording. But is this ethical?

People associate recording conversations with deceit, entrapment, and other unethical behavior. But there are legitimate reasons lawyers would

want to record their conversations with a client, opposing counsel, or other parties involved in a case. Generally, maintaining such recordings can aid memory and assist in maintaining an accurate record. Having a recording could also protect the lawyer and his or her client from false accusations.

This is particularly true for litigators, who spend a great deal of their time communicating on the phone with opposing counsel about discovery, motions, and settlement. From time to time, lawyers may have differing recollections or interpretations about what was said in a telephone discussion—or even whether a phone conversation occurred at all. For those reasons, it may be useful to have a record of the conversations.

Recording is even easier with the advent of internet telephone technologies. Using these systems, lawyers can implement "ad hoc" recording on an internet-integrated telephone system, which allows the user to push a button and record the conversation on the fly whenever necessary. These systems can also be configured to automatically record every conversation from the user's telephone station. The recordings of the calls are then saved in an integrated document management system along with metadata, such as the originating number and call duration. Transcriptions of each call can also be automatically generated and saved in a searchable system.

The technology for recording has improved, but definitive guidance from state authorities on the ethics of recording has been somewhat rare. In Texas, the Professional Ethics Committee for the State Bar Association determined that, with certain limitations, lawyers may record phone conversations with third parties, including clients, without first disclosing to the other party that the conversation is being recorded (Opinion No. 575, November 2006). The committee reversed its prior position in which it had opined that such recording was strictly prohibited. In fact, it was a double-reversal because in 1953 the committee had initially opined that the practice was permissible.

There are varying degrees of permissiveness among the states, but a dearth of guidance seems to prevail. The American Bar Association (ABA) has gone only so far as to say "a lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules." In states such as Louisiana, there is no definitive guidance on this issue from the state bar association, attorney general or supreme court. More generally, Louisiana Attorney General Opinion no. 91-531 opined that the practice of recording phone calls is permissible without addressing the practice of doing so between lawyers or between a lawyer and his or her client. It remains an open question in Louisiana and many other states as to the circumstances in which a lawyer can record telephone calls.

In these states that lack definitive guidance, it would be advisable to proceed with some discretion. Even though a lawyer can easily record a telephone conversation, he or she may be reluctant to use that capability for a number of reasons. First, there is the question of whether to disclose that the call is being recorded. The lawyer might conclude that he or she has not affirmatively misrepresented any fact by exercising the right (in one-party states) to record a conversation without advising the other party to the conversation. But the recorded party might consider it dishonesty by omission. And the alternative—announcing the fact that the conversation is being recorded—has the potential to chill open and candid communication.

Would not telling someone a call is being recorded constitute an ethical violation? The most likely answer is no. Rule 4.1(a) of the ABA Model Rules of Professional Conduct, which prohibits "[making] a false statement of material fact or law to a third person." Theoretically, one could argue that recording a call without disclosing that fact could amount to a false statement of fact or law in violation of that rule.

When read in conjunction with Rule 4.1(b), however, it is reasonable to infer that the rule does not impose a general duty on lawyers to disclose material facts. It simply prohibits making false statements. Rule 4.1(b) imposes an affirmative duty on a lawyer to disclose a material fact only "when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." By reverse implication, there is no affirmative duty to disclose material facts in other circumstances. The comments to the rule bear out this interpretation. So this practice would probably not amount to a violation of Rule 4.1, unless a lawyer told someone he or she was not recording the conversation and then proceeded to record it anyway. Things could also get thorny if the party being unknowingly recorded made a statement that suggested he or she believed the conversation was off the record. In such an instance, the lawyer doing the recording might have an ethical duty to correct such a misapprehension.

Continued on the next page.

Is it Ethical to Tape a Client? *continued from page 27.*

Having an audio recording may give the lawyer a more reliable defense in these situations. But by the same token, publicity regarding the unauthorized release of taped conversations between attorney and client, even when the release is justified, has the potential to erode public trust in the confidentiality of the attorney-client relationship.

For litigators, there are also strategic reasons to be reluctant to record such conversations, regardless of whether it is ethical and whether contemporaneous disclosure is required. If such a recording of the conversation were to become relevant evidence in relation to any pending action, it might have to be produced in discovery according to the applicable rules and orders of the court. Such a recording could be protected by the attorney-client privilege or work-product doctrine. But if the content of the conversation became discoverable and turned out to be damaging to the recording lawyer's client, it might appear to be a foolish misstep in hindsight.

An important principle that applies to any recording maintained by an attorney in the course of representing a client is shown in Model Rule 1.6 regarding confidentiality of information. A lawyer generally cannot reveal taped conversations with a client without the client's consent. The lawyer is prohibited from revealing any client information except in accordance with the exceptions set out in Rule 1.6. One of those exceptions is the crime or fraud exception. It allows a lawyer to disclose client confidences to prevent crime or fraud when the client has used the lawyer's services in furtherance of a crime or fraud. Likewise, an attorney can reveal confidential client information to defend him or herself from accusations of wrongdoing if the lawyer has been accused of involvement in criminal activity with the client.

These rules address a tension in the attorney-client relationship. The relationship of confidence between a lawyer and client is a critical component of the legal process. But in these extreme situations, a lawyer is authorized to reveal confidential communications to protect him or herself or others. Having an audio recording may give the lawyer a more reliable defense in these situations. But by the same token, publicity regarding the unauthorized release of taped conversations between attorney and client, even when the release is justified, has the potential to erode public trust in the confidentiality of the attorney-client relationship.

The Texas Committee on Professional Ethics provides an instructive list of ethical parameters that a lawyer should consider when recording phone conversations. Recordings are generally permissible as long as (1) recordings of conversations involving a client are made to further a legitimate purpose of the lawyer or the client, (2) confidential client information contained in any recording is appropriately protected by the lawyer in accordance with Rule 1.05, (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded, and (4) the recording is not contrary to a representation made by the lawyer to any person.

One thing to keep in mind with regard to parameter three is that many court-organized conference call services for telephonic court appearances, such as CourtCall, specifically prohibit recording the subject court proceedings. Furthermore, that parameter references "any jurisdiction applicable to the telephone conversation," which signals that attorneys should tread very carefully when recording a telephone conversation with participants from other states or countries.

In states where there is an absence of definitive guidance on this issue, attorneys must use their professional judgment as to whether they may record telephone calls with clients, opposing counsel, and third parties, and further, whether they must advise the other party that the call is being recorded. While internet telephone technologies offer the convenient ability to automatically record and store every phone conversation that goes through a lawyer's phone, a blanket policy would be imprudent. Some degree of discretion is required to determine whether each particular call may be recorded. By the same token, attorneys and clients alike should be mindful that any time they pick up the phone, their words may be recorded.

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TO (SECRETLY) TAPE OR NOT TO TAPE

IS RECORDING OTHERS LEGAL, AND IS IT ETHICAL?

By David L. Hudson Jr.

Ethics

"What kind of a lawyer would tape a client?" tweeted President Donald J. Trump upon learning his former counsel Michael Cohen had taped a 2016 conversation between the two of them that dealt with many subjects, including payments to a former *Playboy* model who alleged a past sexual liaison with the president.

In a different tweet, Trump wondered, "Even more inconceivable that a lawyer would tape a client—totally unheard of & perhaps illegal."

A lawyer taping a client may be illegal in some circumstances, but it certainly is not unheard of. In fact, lawyers have surreptitiously tape-recorded conversations with witnesses, potential party opponents and clients.

Whether a secret recording is illegal and unethical depends on where it takes place and why.

The first question to address is whether state wiretapping laws have been violated and whether the attorney secretly recorded the conversation in a state with a one-party consent or two-party consent law. In many states, a person can secretly record a conversation as long as one party knows of it, and that one party can be the recorder. These are called "one-party consent" states. Other states are two-party or "all-party consent" states. In these jurisdictions, all parties to the conversation must know a recording is taking place.

State laws vary quite dramatically in this area, explains Hartford, Wisconsin-based attorney Gary L. Wickert.

"Currently, 38 states and the District of Columbia have adopted a 'one-party' consent requirement. Nevada has a one-party consent law, but Nevada's Supreme Court has interpreted it as an all-party consent law," Wickert notes. "Eleven states require the consent of everybody involved in a conversation or phone call before the conversation can be recorded. Those states are California, Delaware, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania and Washington." (Vermont currently has no statute.)

But even if secretly recording another person is legal—as it would be in a one-party state—attorneys must also consider whether such recordings are ethical. ABA Model Rule of Professional Conduct 8.4(c) states that it is professional misconduct for an attorney to engage in conduct "involving dishonesty, fraud, deceit or misrepresentation." Furthermore, a paramount duty undergirding professional responsibility is that attorneys must follow a duty of loyalty to their clients.

"In all-party consent states, it would generally be unlawful as well as unethical for an attorney to secretly tape a client," says Carol Bast, a professor of legal studies at the University of Central Florida. "However, even some all-party consent states make an exception that permits secret taping to gather evidence of criminal activity."

A TALE OF TWO OPINIONS

In 1974, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 337. The committee concluded that "no lawyer should record any conversation, whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation." The only exception was for the U.S. attorney general or state or local prosecutors who "might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements."

However, in 2001, the ABA changed its position. Formal Opinion 01-422 reflected that the issue often depends on state wiretapping laws.

The opinion noted that in those states that prohibit recordings without the consent of all parties, a lawyer could be subject to liability for secretly recording a client. "A lawyer who records a conversation in the practice of law in violation of such a state statute likely has violated Model Rule 8.4(b) or 8.4(c) or both," the opinion reads.

Thus, Opinion 01-422 cautioned that "a lawyer contemplating nonconsensual recording of a conversation should, therefore, take care to ensure that he is informed of the relevant law of the jurisdiction in which the recording occurs."

And even if a surreptitious recording does not violate state law, it may still be unethical. In those instances, the committee was divided on whether such recordings violated the Model Rules.

But where a client was concerned, the committee was "unanimous, however, in concluding that it is almost always advisable for a lawyer to inform a client that a conversation is being or may be recorded before recording such a conversation."

However, the committee did not go so far as to say that all secret recordings of clients were unethical. Instead, the opinion says it is not unethical for lawyers to secretly tape clients in two situations. The first is when "the lawyer has no reason to believe the client might object," and the second is when "exceptional circumstances" exist.

SHUTTERSTOCK

"Exceptional circumstances might arise if the client, by his own acts, has forfeited the right of loyalty or confidentiality," Opinion 01-422 reads.

"For example, there is no ethical obligation to keep confidential plans or threats by a client to commit a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. Nor is there an ethical obligation to keep confidential information necessary to establish a defense by the lawyer to charges based upon conduct in which the client is involved."

EXCEPTIONAL CIRCUMSTANCES

Legal experts generally agree with the approach taken by the ABA in its 2001 formal ethics opinion. "The committee's conclusion is that for an attorney to secretly tape a client is inadvisable," says Bast, whose 2008 article "Surreptitious Recording by Attorneys: Is It Ethical?"was published in the *St. Mary's Law Journal*. "However, the committee did recognize exceptional circumstances in which it might be permissible for an attorney to secretly tape a client. These exceptional circumstances include a conversation in which a client discloses a plan to commit a serious crime."

But experts note that the exceptional circumstances requirement can set up a chicken-and-egg scenario, leaving room to question whether the decision to record was ethical or not.

"It may be difficult to predict in advance of taping that the conversation will involve an exceptional circumstance," Bast notes.

The key question, according to professor Stephen Galoob, who teaches professional responsibility at the University of Tulsa College of Law, is whether the attorney's secret recording violates the fundamental duty of loyalty owed to a client.

"There are at least two ways that an attorney's recording her client could violate the duty of loyalty," Galoob says. "First, the recording might increase the risk that the client's confidences will be betrayed. The idea here is that the duty of loyalty not only governs a lawyer's actual behavior but also the possible results of that behavior. If a lawyer creates an unnecessary risk on behalf of the client, then the duty of loyalty is violated even if that risk never materializes. In the fiduciary context, the irresponsible risking is the wrong."

Galoob explains that when a lawyer records a client, it increases the chances of inadvertent disclosure or "intentional disclosure, in Cohen's case" of a client's confidences.

For example, Galoob says Cohen well may have violated a duty of loyalty to Trump: "Even if Cohen didn't plan to betray Trump at the time he recorded the conversations, I think there's a sufficient basis for saying that he violated the duty of loyalty based on the risks that he created that such conversations would be disclosed in the future." ■

Successfully Navigating the Ethical Minefield of Social Media in the Legal Profession

By David J. Oberly

Why It Matters

Social media platforms such as Facebook, Twitter, and LinkedIn have fundamentally transformed the way in which people communicate and share information. In addition, the rising use of social media is also changing the face of the practice of law. Given the ubiquitous nature of social media today, it should not come as a surprise that social media evidence has arrived on the scene as a major player in litigation, where in many instances a single social media post, by itself, possesses the power to make or break a case. In addition, legal professionals now rely heavily on social media as an integral facet of attorneys' and law firms' marketing and business development campaigns.

Importantly, the increasing prevalence of social media in the day-to-day operations of the legal profession has ushered in a host of new ethical obligations on the part of attorneys. If not addressed properly, these unique, oftentimes complex ethical issues can land the unsuspecting legal professional in hot water for running afoul of the Rules of Professional Conduct. With the appropriate amount of attention and care, however, attorneys can successfully navigate the ethical minefield of social media to steer clear of any ethical lapses while harnessing the power of social media as a key practice and business development tool for their legal practices.

Duty of Competence

Rule 1.1 of the Ohio Rules of Professional Conduct provides that "a lawyer shall provide competent representation to a client." To satisfy Ohio's version of Rule 1.1, the attorney must maintain "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation" and "keep abreast of changes in the law and its practice." Moreover, just recently the scope of ABA Model Rule 1.1 was expanded to require not just competence in an attorney's areas of practice, but also with respect to "the benefits and risks associated with relevant technology."

Taken together, and with the profound significance that social media has on all aspects of the practice of law today, competence in the digital age now requires attorneys to maintain an understanding of social media both in terms of how it impacts their cases and the practice of law as a whole. Consequently, incompetence in the area of social media will not only place counsel at a severe disadvantage in attempting to successfully litigate his or her case load, but will also cause the attorney to violate his or her ethical obligations as well. As such, attorneys must maintain a working knowledge of the basics of all social media platforms and the legal issues that commonly arise at the intersection of social media in the practice of law, including the various privacy settings of the major social platforms and how posts and other data are managed and obtained from those sites. Moreover, attorneys who lack the necessary technical competence in the area of social media must confer with qualified individuals who maintain such expertise.

Investigation & Discovery of Social Media Evidence

Many ethical problems stem from the manner in which attorneys utilize social media to view the profiles of opposing parties, witnesses, and other individuals. Courts across the country are in unison that viewing publicly available portions of a user's social media accounts is clearly permissible, making everything that is publicly available online fair game. However, attorneys frequently run into significant trouble when attempting to view private social media profiles.

In particular, attorneys must tread extremely carefully when seeking to "friend" individuals in order to gain access to the private portions of their social media accounts. In this regard, while no Ohio court has addressed the issue, other jurisdictions have held that it is a violation of Rule 4.2 to contact or "friend" an individual represented by counsel. Other jurisdictions have also held that it is a violation of Rules 4.1 and 8.4(C) to enlist a third party to make a friend request as a pretext to gain access to a represented individual's private account. While attorneys may contact unrepresented individuals directly through social media, some jurisdictions require attorneys to disclose the reasons for "friending" an unrepresented individual or the intended purpose of the sought-after social media information so as to avoid the appearance that the attorney is an uninterested party. Similarly, attorneys are barred from using any pretextual basis for accessing an unrepresented individual's social media profile that would otherwise be shielded from view to the general public.

Clients' Use of Social Media and the Duty to Preserve Evidence

In addition to utilizing social media for obtaining evidence, attorneys' ethical duty to preserve evidence and the related issue of spoliation of evidence are also matters of critical importance in today's highly digital social media age. Ohio Professional Rule 3.4 requires attorneys to oversee the preservation of relevant evidence and bars attorneys from obstructing another party's access to evidence. In addition, Rule 3.4 bars attorneys from modifying or destroying evidence or assisting clients in doing so.

Without question, this ethical obligation extends to electronically stored information and evidence from social media sites. Accordingly, attorneys must take reasonable measures to preserve and produce any relevant evidence that is contained on a client's social media platforms. In doing so, attorneys must not only clearly notify their clients of their preservation obligations but must also take an active role themselves throughout the course of litigation to ensure that all social media posts are preserved and accessible in the event they are sought during litigation. With that said, attorneys are generally permitted to advise clients to control their privacy settings to prevent any posts from being publicly available, so long as those posts are not altered or deleted in any fashion.

Use of Social Media as a Legal Marketing and Business Development Tool

Social media has rapidly developed into an integral tool for attorneys in the area of legal marketing and advertising. As with any method of legal marketing, lawyers must proceed with caution to avoid any ethical lapses when utilizing social media as a marketing and business development tool.

Importantly, any social media profile utilized by an attorney that articulates information about his or her legal practice must comply with the array of different ethical rules that bar attorneys from making false or misleading communications about the attorney or the attorney's services. Pursuant to Professional Conduct Rule 7.1, attorneys are prohibited from "making or *using*" a false, misleading, or unverifiable communication about his or her services. This rule strictly prohibits an attorney from misrepresenting his or her skills or experience on the attorney's social media sites or accounts. Moreover, this rule also creates additional ethical problems for attorneys in the area of client endorsements where the endorsements suggest skills or experience that the attorney does not possess. Accordingly, attorneys must regularly monitor client reviews to ensure they are accurate representations of the legal professional's skills and experience.

Rule 1.6's duty of confidentiality is another area of significant concern that arises in the context of digital legal marketing and business development. Rule 1.6 provides that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." Under this Rule, attorneys have an ethical obligation to prevent the inadvertent or unauthorized disclosure of access of client information when using social media. Because social media is heavily geared towards making routine, causal comments about a user's day-to-day activities—including work-oriented endeavors—attorneys must proceed with extreme caution when discussing any of the attorney's cases or other work matters on social media in order to avoid posting any information that would violate the attorney's confidentiality obligations, as even cursory, off-hand comments are sufficient in many circumstances to constitute a violation of Rule 1.6.

Similarly, attorneys must also exercise caution to avoid providing legal advice while communicating or interacting with others on social media, as doing so could inadvertently lead to the creation of an unwanted attorney/client relationship with another social media user, as well as all of the responsibilities and significant liability that arise with such relationships. For example, an attorney may unwittingly create an attorney-client relationship if an individual "reasonably relies" on what that person believes to be the attorney's legal advice that he or she has supplied through social media. In addition, participation in question-and-answer sessions on social media platforms such as Twitter may potentially create a prospective attorney-client relationship under Rule 1.18—which provides that a person who discusses with a lawyer the possibility of forming an attorney-client relationship with respect to a matter is a prospective client—especially if the attorney expressly requests or invites the submission of inquiries concerning a potential legal matter.

To guard against the risk of forming unwanted attorney-client relationships, legal professionals should make clear that any social media interaction does

not form an attorney-client relationship. Importantly, attorneys should also limit their communications on social media to the discussion of generalized legal information (general legal principles and considerations) and must avoid crossing over the line to supplying specific advice and recommendations tailored to the unique facts of an individual's specific circumstances, as doing so will ordinarily form the basis for an attorney-client relationship. In addition, sticking solely to discussing legal information will also allow attorneys to avoid violating Rule 5.5's bar on the unauthorized practice of law, which arises when an attorney provides legal advice to other social media users who reside in jurisdictions in which the legal professional is not licensed to practice.

The Final Word

Social media has quickly evolved into an essential tool for practicing law, and now operates as a mainstay in the day-to-day practices of many attorneys. While social media presents many significant opportunities for legal professionals to enhance their practices, these opportunities go hand-in-hand with an array of critical ethical obligations that legal professionals must adhere to in today's highly digital age. Accordingly, attorneys must exercise great caution when harnessing social media in the course of their legal practices to avoid the minefield of potential ethical pitfalls that lie waiting for the unsuspecting and inattentive legal professional. When utilized properly and with an eye towards adherence to one's ethical obligations, social media can be leveraged as an extremely powerful tool in the practice of law while at the same time steering clear of any potential ethical problems that may arise in connection with the use of today's technology.

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Ethical Quandary?

The CBA is proud to offer ethical guidance to Greater Cincinnati attorneys through our Ethics Committee's hotline.

December

Michael J. Bronson (513) 977-8654
Samuel M. Duran (513) 357-9378

The members of the CBA Ethics & Professional Responsibility Committee listed above are available to help you interpret your obligations under the Ohio Rules of Professional Conduct. Questions posed should be framed hypothetically and should relate to your own prospective conduct. The committee also accepts requests for written opinions.

The Washington Post

The Fix

Michael Cohen secretly recorded Trump. Does that make him a bad lawyer?

By Deanna Paul
July 26, 2018

Michael Cohen would tape conversations with clients in lieu of taking notes, his own lawyer, Lanny Davis, told The Washington Post. The September 2016 recording of Cohen and his then-client Donald Trump attests to this practice, Davis said.

But that recording — made during the presidential campaign — has also raised questions about the code of legal ethics, among other things.

The president lashed out about the tape and Cohen on Wednesday.

> What kind of a lawyer would tape a client? So sad! Is this a first, never heard of it before? Why was the tape so abruptly terminated (cut) while I was presumably saying positive things? I hear there are other clients and many reporters that are taped - can this be so? Too bad!
>
> — Donald J. Trump (@realDonaldTrump) July 25, 2018

So can lawyers do this?

Was it legal for Cohen to record his conversations with Trump?

Yes.

Cohen and Trump were both in New York when the recording was created on Cohen's cellphone, Davis confirmed to The Post.

In New York, a one-party consent state, it is legal to record another person without his or her knowledge, so long as the individual is also in a one-party consent state.

Was it ethical?

This answer is less clear cut.

The rules of professional responsibility and legal ethics hinge on whether a lawyer acted deceptively or dishonestly, two fairly ambiguous descriptors.

“The traditional view was that any secret tape recording was deceitful,” said Bruce Green, professor at Fordham University School of Law. Over time, though, social expectations shifted. As people became more accustomed to being recorded, the American Bar Association backed away from that position.

The ABA, whose standards are often models for state laws, wrote an opinion — published in 2001 — that said secret tape recordings of third parties were not ordinarily deceptive. However, the ABA ethics committee was divided on whether it violated legal ethics to secretly record a client.

“The general weighted opinion is that an attorney must have a justifiable reason, assuming he’s in a state that allows it,” said Green, adding that there’s rarely a good reason to record a client.

The answer is furthered muddled in New York, where Cohen was practicing law in 2016. The state has more than 20 bar associations that are not in 100 percent agreement with one another. Some, like the New York City Bar Association, say that “undisclosed taping as a routine practice is ethically impermissible” and absent an exception, lawyers may not do it. Yet other New York associations are accepting of the same practice.

“Recording clients is definitely unusual and almost always a really bad idea,” said Rebecca Roiphe, professor at New York Law School. “But it’s not necessarily a clear ethical violation, depending on the circumstances.”

What circumstances would justify recording a client? Does ‘general practice’ qualify?

Ellen Yaroshefsky, executive director of the Monroe H. Freedman Institute for the Study of Legal Ethics and a member of the New York City Bar Association’s Ethics Committee, suggested a few scenarios:

If a lawyer believed the client was engaging in illegal conduct; suspected the client was attempting to use the lawyer to commit a crime or as a scapegoat; or intended to include the client’s words in a complaint or legal filing.

According to Davis, Cohen had a longtime habit of using his telephone as an alternative to note-taking.

“It was such a familiar practice, he often forgot to tell the person he was talking to that he had the phone on because he never intended to ever make use of it and there was no deceptive intent,” Davis said.

To his point, many recordings were seized by the federal government in April during a search warrant.

One might argue that recording clients, as a general practice, is bad lawyering, but, according to Roiphe, it seems less likely to run into ethical problems. “It’s not as deceptive and more probable to be known by the client,” since it's not a one-time thing, done for a particular meeting.

Could Cohen be disbarred for the recordings?

On Tuesday, Trump attorney Rudolph W. Giuliani told Fox News that Cohen was a “pariah” to the legal profession and had released only an excerpt of the tape. Then he predicted Cohen would be disbarred.

But experts agreed, unanimously, that that was an unlikely outcome, though the future could uncover other ethical or criminal violations.

Although failing to tell a client about a recording device certainly doesn’t engender trust, which is the hallmark of attorney-client relationships, in New York, no rule says a lawyer must.

READ MORE

‘What kind of lawyer would tape a client?’: Trump lashes out at Michael Cohen after release of recording

Four important points that arise from the Trump-Cohen recording

On new Cohen tape, Trump seemed to insist on ‘cash’ payment. Here’s what that might mean.

LEGAL ETHICS

Was Cohen's secret Trump tape an ethics violation? ABA opinion authors split on client taping

BY DEBRA CASSENS WEISS (HTTP://WWW.ABAJOURNAL.COM/AUTHORS/4/)

POSTED AUGUST 1, 2018, 7:30 AM CDT

New York law didn't prevent lawyer Michael Cohen from recording a September 2016 discussion

Benedix/Shutterstock.com.

(http://www.abajournal.com/news/article/after_michael_cohen_releases_mcdougal_tape_dispute_arises_over_what_trump_s) with his client, then-presidential candidate Donald Trump. But did Cohen violate ethics requirements when he recorded the discussion about a hush-money payment?

The answer to that is less clear-cut, the Washington Post (https://www.washingtonpost.com/news/the-fix/wp/2018/07/25/michael-cohen-secretly-recorded-trump-does-that-make-him-a-bad-lawyer/?utm_term=.2dc015724f90) reports.

The recording was legal because Cohen and Trump were in New York, a one-party consent state. That means only one person needs to be aware of the recording—and that person can be the one making the tape.

But ethics opinions are divided on whether secretly recording a client is an ethics violation, including opinions by various bar associations within New York state, according to the Post. Even the ABA committee that issues ethics opinions has reversed course on the broader issue of secret recordings by lawyers, and has split on the issue of secret recordings when the person recorded is a client.

The ABA Standing Committee on Ethics and Professional Responsibility initially concluded in a 1974 ethics opinion that the ethical ban on dishonesty, fraud, deceit or misrepresentation generally prevented lawyers from recording any conversation without the prior knowledge of all parties to the conversation.

However, the standing committee withdrew that opinion in 2001 when it issued Formal Opinion 01-422 (http://www.abajournal.com/images/main_images/01-422.pdf). The new opinion said lawyers who record conversations without the knowledge of other parties don't necessarily violate the ABA Model Rules of Professional Conduct.

But lawyers may not record conversations in jurisdictions that make it illegal, the opinion says. They can't falsely deny that a conversation is being recorded. And there are ethical issues that arise when a lawyer records a client, who is owed a duty of loyalty, according to the opinion. The committee pointed out those issues, but split on whether recording a client is permissible.

The opinion said the committee was unanimous, however, "in concluding that it is almost always advisable for a lawyer to inform a client that a conversation is being or may be recorded, before recording such a conversation."

"Clients must assume, absent agreement to the contrary, that a lawyer will memorialize the client's communication in some fashion," the opinion said. "But a tape recording that captures the client's exact words, no matter how ill-considered, slanderous or profane, differs from a lawyer's notes or dictated memorandum of the conversation. If the recording were to fall into unfriendly hands, whether by inadvertent disclosure or by operation of law, the damage or embarrassment to the client would likely be far greater than if the same thing were to happen to a lawyer's notes or memorandum of a client conversation. …

"The relationship of trust and confidence that clients need to have with their lawyers, and that is contemplated by the Model Rules, likely would be undermined by a client's discovery that, without his knowledge, confidential communications with his lawyer have been recorded by the lawyer."

The Post spoke with law professors for their take on the ethics issue. Rebecca Roiphe, a professor at New York Law School, told the newspaper that recording clients “is definitely unusual and almost always a really bad idea.” But depending on the circumstances “it’s not necessarily a clear ethical violation,” she added.

Transcript of Michael Cohen, Esq.'s Secret Recording of President Donald Trump

TRUMP: [In background] Good. Let me know what's happening, okay? Oh, oh. Maybe because of this it would be better if you didn't go, you know? Maybe because of this. For that one, you know – I think what you should do is get rid of this. Because it's so false what they're saying, it's such bullshit. Um. [PAUSE] I think, I think this goes away quickly. I think what — I think it's probably better to do the Charleston thing, just this time. Uh, yeah. In two weeks, it's fine. I think right now it's, it's better. You know? Okay, hun. You take care of yourself. Thanks, [Unintelligible]. Yup, I'm proud of you. So long. Bye.

[Into phone] What's happening?

COHEN: Great poll, by the way.

TRUMP: Yeah?

COHEN: Seen it. Great poll.

TRUMP: Making progress.

COHEN: Big time.

TRUMP: And, your guy is a good guy. He's a good —

COHEN: Who, Pastor Scott?

TRUMP: Can't believe this. No, Pastor Scott. What's, what's happening —

COHEN: No —

TRUMP: Can we use him anymore?

COHEN: Oh, yeah, a hundred — no, you're talking about Mark Burns. He's, we've told him to [UNINTELLIGIBLE].

TRUMP: I don't need that — Mark Burns, are we using him?

COHEN: No, no.

FEMALE: Richard [UNINTELLIGIBLE]. I'm sorry, Richard [UNINTELLIGIBLE] just called. He — just when you have a chance, he had an idea for you.

TRUMP: Okay, great.

COHEN: Um, so, we got served from the New York Times. I told you this — we were …

TRUMP: To what?

COHEN: … To unseal the divorce papers with Ivana. Um, we're fighting it. Um, [Trump attorney Marc] Kasowitz is going to —

TRUMP: They should never be able to get that done.

COHEN: Never. Never. Kasowitz doesn't think they'll ever be able to. They don't have a —

TRUMP: Get me a Coke, please!

COHEN: They don't have a legitimate purpose, so —

TRUMP: And you have a woman that doesn't want 'em unsealed.

COHEN: Correct.

TRUMP: Who you've been handling.

COHEN: Yes. And —

TRUMP: And it's been going on for a while.

COHEN: About two, three weeks now.

TRUMP: All you've got to do is delay for —

COHEN: Even after that, it's not going to ever be opened. There's no, there's no purpose for it. Um, told you about Charleston. Um, I need to open up a company for the transfer of all of that info regarding our friend, David, you know, so that — I'm going to do that right away. I've actually come up and I've spoken —

TRUMP: Give it to me and [UNINTELLIGIBLE].

COHEN: And, I've spoken to Allen Weisselberg about how to set the whole thing up with ...

TRUMP: So, what do we got to pay for this? One-fifty?

COHEN: … funding. Yes. Um, and it's all the stuff.

TRUMP: Yeah, I was thinking about that.

COHEN: All the stuff. Because — here, you never know where that company — you never know what he's —

TRUMP: Maybe he gets hit by a truck.

COHEN: Correct. So, I'm all over that. And, I spoke to Allen about it, when it comes time for the financing, which will be —

TRUMP: Wait a sec, what financing?

COHEN: Well, I'll have to pay him something.

TRUMP: [UNINTELLIGIBLE] pay with cash ...

COHEN: No, no, no, no, no. I got it.

TRUMP: ... check.

[Tape cuts off abruptly. Separate recording begins.]

MALE: Hey Don, how are you?

DATE: _____

BAILEY & GALYEN
ATTORNEYS AT LAW

Name _____ DOB: _____ Sex: M ___ F ___
Last Name First Middle Maiden

Place of birth _____
City County State Country

Social Security Number: _____ Drivers License Number: _____ State _____

Address: _____ Apt. # _____

City: _____ County: _____ State: _____ Zip: _____

Home Phone: (_____) _____ Work Phone: (_____) _____

E-Mail Address: _____ Cell Phone: (_____) _____

☐ I authorize emails concerning my case. ☐ I authorize emails of general interest from Bailey & Galyen.
☐ I authorize a follow up call regarding my consultation. If yes, please list a contact number. (_____) _____

Place of Employment: _____ Job Title: _____

Address of Employment: _____ City _____ St _____ Zip _____ Annual Salary _____

Spouse's Name: _____ (Maiden name) _____ DOB: _____

Address(if different from yours): _____ City: _____ State: _____ ZIP: _____

Employer: _____ Work Phone: _____

PERSON FINANCIALLY RESPONSIBLE: Name _____ DOB: _____

Address: _____ City: _____ State: _____ Zip: _____ Phone: _____

Social Security Number: _____ Drivers License Number: _____ State _____

EMERGENCY CONTACT INFORMATION: Name _____

Address: _____ City: _____ State: _____ Zip: _____

Home Phone: (_____) _____ Work Phone: (_____) _____

What legal action(s) were you involved in previously, if any? _____

Have you or family member been involved in any type of accident in the last two years? Yes _____ No _____
Have you or a family member ever suffered any serious injuries after taking a prescription or non-prescription drug? Yes _____ No _____
Do you currently have a will? Yes _____ No _____
Have you been denied Social Security benefits? Yes _____ No _____
Have you been denied Veterans benefits? Yes _____ No _____
Do you have need of legal assistance for any immigration matter? Yes _____ No _____

Purpose of visit today: _____

HOW WERE YOU REFERRED TO US? (Circle one) Office Sign I'm a Previous Client Bar Association B&G Letter TV Ad Radio
Billboard Website WebChat Phonebook: name of book _____
Friend: Name of Friend _____ Other: _____
Bailey & Galyen Employee: Name _____ An Attorney: Name of attorney _____

FOR OFFICE USE ONLY:

INTERVIEWING ATTY _____

FEE QUOTED _____ COST QUOTED _____

DOWN PAYMENT QUOTED _____

CONFLICT CHECK PNC _____ INI _____
CONFLICT CHECK OP _____ INI _____
PNC CONTACT ENTERED IN ATO _____ INI _____
OP CONTACT ENTERED IN ATO _____ INI _____

REVISED 6-19-14

SAMPLE

NEW CLIENT SCREENING CHECKLIST

SUBJECT MATTER

- ✓ What is the legal matter for which the client needs representation?
- ✓ Are there any imminent deadlines or time limitations?
- ✓ Is the case too large, time consuming or expensive for my practice to handle?
- ✓ Is the case one that is pending or that must be filed in another jurisdiction?
- ✓ If so, am I familiar with the local statute of limitations, other filing deadlines, substantive issues and procedural rules?
- ✓ Is the matter within my primary area(s) of practice?
- ✓ If not, how much time would be required to become competent in that area?
- ✓ If the case is outside my area of practice or in another jurisdiction, do I know an attorney to whom I could associate or refer the case?
- ✓ If I refer the case, do I seek a referral fee and remain liable to the client as if I were the receiving attorney's partner?
- ✓ If so, do I trust that the attorney is competent and will not expose me to a malpractice claim or ethical grievance?
- ✓ Am I willing to learn and comply with the disclosure and consent requirements imposed by the applicable ethics rules?
- ✓ Does the matter have merit?
- ✓ Does the client have evidence to corroborate his/her story?

CLIENT ISSUES

- ✓ What are the client's expectations (with both the outcome and the time involved)?
- ✓ Are they reasonable?
- ✓ If not, is this client able to adjust his/her expectations to make them reasonable?
- ✓ What is the client's motive (justice, revenge, vendetta, to be compensated)?

- ✓ Is the motive likely to cause the client to be unable to accept settlement or an unfavorable outcome?
- ✓ Has the client shown himself/herself to be dishonest or to lack integrity?
- ✓ Is the client evasive or reluctant in connection with a commitment to abide by a fee agreement?
- ✓ Has the client indicated that he/she will be difficult to control as a witness?

PRIOR ATTORNEY-CLIENT RELATIONSHIPS

- ✓ Has the client retained prior attorneys in the same matter?
- ✓ If so, why did the previous attorney-client relationships terminate?
- ✓ Has the client made claims or grievance complaints against any prior attorneys?
- ✓ Do any prior attorneys claim that legal fees/costs are owed?
- ✓ Has the client refused to pay legitimate invoices for legal fees?

PROTECTING YOURSELF

- ✓ If I have accepted the client, have I sent the client an engagement letter for the client to sign and return setting forth the scope of the retention and the fee agreement?
- ✓ If I have referred the client to another attorney without a referral fee, have I sent the client a non-engagement letter?
- ✓ If I have referred the client to another attorney and have received or expect to receive a referral fee, have I sent the client a letter disclosing what is required by the applicable ethics rules and have I obtained the client's consent in the form required by the applicable ethics rules?
- ✓ If I have declined to represent the client, have I sent a non-engagement letter clearly and unequivocally informing the client that I am not representing him/her, that I express no opinion about the matter, that the matter may be affected by a statute of limitations and that he/she should seek other representation?

SOL:

GENERAL LITIGATION
INTAKE SHEET

INITIAL CLIENT STATEMENT

HAVE YOU SPOKEN TO ANOTHER ATTORNEY ABOUT THIS CASE?_____

IF SO, PLEASE GIVE NAME OF ATTORNEY: _____

DO YOU HAVE A SIGNED RELEASE BY THAT ATTORNEY? _____

WHO WERE YOU REFERRED BY: (INDIVIDUAL, YELLOW PAGE AD, ETC.)

_____

PERSONAL INFORMATION:

NAME: _____

Address: _____

Telephone Number: (home) _____

Age: ___ Date of Birth: _____ Social Security No: _____

EMPLOYER: _____

Address: _____

Telephone Number: (work)_____

Occupation: _____ Worked there how long?_____

Immediate Supervisor: _____

SPOUSE'S NAME: _____

Address: _____

Telephone Number: (home) _____

Spouse's Employer: _____

Employer's Address: _____

Telephone Number: (work)_____ Occupation: _____

Age: __ Date of Birth: ____ Social Security No: _____

CHILDREN:

Name(s)/Age(s): _____

_____

_____

How many children are living with you now? _____

EMERGENCY CONTACT:

Name: _____

Relationship: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone Number: _____

EDUCATION:

High School/G.E.D.: _____ Year of Graduation: _____

Technical School: _____

College/University: _____Years & Degree: _____

EMPLOYMENT HISTORY:

Employer: _____ Position: _____

Duties: _____

_____

Employer: _____ Position: _____

Duties: _____

Employer: _____ Position: _____

Duties: _____

Employer: _____ Position: _____

Duties: _____

Please briefly describe the nature of your dispute and the day on which the dispute occurred or the approximate day you became aware of the dispute: _____

Prior **claims and/or settlements** (types, dates, attorneys):

NAME AND ADDRESS OF ALL PARTIES INVOLVED:

_____

_____

_____

_____

WITNESSES:

1. NAME & ADDRESS: _____

_____

_____

Telephone Number: (__)_____

Relationship (fellow employees, supervisors, bystanders, etc.):

_____

What did each see? _____

Would they be willing to testify in court to what he/she saw? _____

2. NAME & ADDRESS :_____

_____

_____

Telephone Number: (__)_____

Relationship (fellow employees, supervisors, bystanders, etc.):

_____

What did each see? _____

Would they be willing to testify in court to what he/she saw? _____

3. NAME & ADDRESS: _____

_____

_____

Telephone Number: (__)_____

Relationship (fellow employees, supervisors, bystanders, etc.):

_____

What did each see? _____

Would they be willing to testify in court to what he/she saw? _____

4. NAME & ADDRESS: _____

_____

_____

Telephone Number: (__)_____

Relationship (fellow employees, supervisors, bystanders, etc.):

_____

What did each see? _____

Would they be willing to testify in court to what he/she saw? _____

5. NAME & ADDRESS: _____

_____

_____

Telephone Number: (__)_____

Relationship (fellow employees, supervisors, bystanders, etc.):

_____

What did each see? _____

Would they be willing to testify in court to what he/she saw? _____

DAMAGES:

Please list all damages you feel you have incurred due to this dispute (including all economic damages, lost wages, cost of repair/replacement, etc.) as well as your source of documentation:

_____

ADDITIONAL INFORMATION:

Any other information you feel may assist us in representing you for this claim? _____

DIAGRAM OF HOW ACCIDENT OCCURRED:

DAMAGES:

How have your injuries changed your lifestyle:

Loss of consortium (relationship with spouse, children, others): _____

_____

Sports: _____

_____

Social Activities: _____

_____

_____

Job Duties: _____

_____

Household Chores: _____

_____

Have you had to hire domestic help? _____

How do you feel you have been damaged emotionally by these injuries? _____

_____

_____

How do you feel you have been damaged financially by these injuries? _____

_____

_____

_____

01-31-2008 | 11:23 AM *Author: Peggy Goodman*

Initial Interview with a Potential Client

The purpose of the client interview is to obtain as much information in respect to the situation presented by the client. A second purpose is to sell the attorney's services. In order to convince the client to retain the attorney, it is necessary to gather as much information as possible about the issue presented by the potential client and the confidently explain what can reasonably be done.

GATHERING INFORMATION

Some information, such as name, address, telephone numbers, and email address, are common to all clients. Other information is matter specific. While many firms have adopted various fill-in-the-blank forms, others use available online forms, such as Lexis provided HotDocs, which allow an attorney to enter information once for use in standard forms.

Standard Information

Information to be gathered on every client and potential client includes everything needed to contact the client. The interviewing attorney should obtain not only the name and address of the client, but also place of employment, home, office, and cell phone numbers, e-mail address, and fax access.

If the client is seeking representation on behalf of a corporation, the attorney will also need information on the full corporate name, where it is chartered, the names of the corporate officers, the name and address of the resident agent, if any, the corporate address, e-mail address, and all contact names and phone numbers.

At this point it is important that the attorney clarify exactly who is the client. When someone from a corporation seeks an attorney's assistance, the attorney needs to determine whether he will represent the person talking to the attorney or the corporation itself. When a trustee approaches an attorney, it is important to know whether the attorney will be representing the trustee, the trust, or the beneficiary. There are other circumstances in which the client is not the payor.

The Comment to RULE 1.8 ABA MODEL RULES OF PROFESSIONAL CONDUCT (2002) states:

Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client.

ABA Model Rules of Professional Conduct Rule 1.8 cmt. 11 (2002).

Once the attorney determines who is the client, it is time to get specific information related to the issue at hand.

PARTICULAR PRACTICE AREAS

Insurance

Insurance practice covers a wide variety of matters. While the mainstay of an insurance practice concerns claims against insurance company, law firms are also involved in compliance issues. Each state has adopted statutes and rules regulating sale of policies, policy forms, payment of claims, cash reserves, accounting, and investments.

Claims against insurers:

- Name of insured
- Address of insured
- Name of policy holder, if different
- Address of policy holder
- Name of Insurance Company
- Address of Insurance Company
- Type of Policy
- Policy Number
- Effective date of policy
- Type of claim
- Date insurer was notified
- Narrative details of the claim

Where personal injuries or illness is involved, also ask:

- Date of birth of insured
- Social Security number of insured
- Employer
- Income

If ERISA claim:

- Name of plan
- Plan administrator
- Address of claim administrator
- Name of employer
- Address of employer

Claims against an insured:

- Name of claimant
- Address of claimant
- Social security number of claimant, if known
- Name of insured
- Address of insured
- Name of Insurance Company
- Address of Insurance Company
- Type of Policy
- Policy Number
- Effective date of policy
- Type of claim
- Date insurer was notified
- Narrative details of the claim

Compliance issues:

- Name of the insurance company
- Address of the insurance company
- Responsible employee
- Phone number of responsible employee
- Narrative details of the issue

In addition to gathering information, it is also important to gather all correspondence concerning the issue.

Securities

Securities litigation most often revolves around the buying and selling of stocks and bonds, in manners violating federal and state securities laws. The most frequently cited violation is § 10(b) of the Securities Exchange Act of 1934, 15 USCS § 78j(b), and Rule 10(b)-5 promulgated thereunder, 17 CFR 240.10b-5, and Rule 10(b)-5 promulgated thereunder, . Other provisions, including those found in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USCS § 1961 et seq., also provide sources of securities litigation, both civil and criminal. Criminal actions are usually brought by the United States. Civil actions are brought by individuals or classes of individuals. It should be remembered that pleadings alleging fraud must be stated with all of the alleged details constituting the fraud. RICO claims must include predicate acts. Derivative actions contend that directors and officers acted in ways that hurt the corporation. et seq., also provide sources of securities litigation, both civil and criminal. Criminal actions are usually brought by the United States. Civil actions are brought by individuals or classes of individuals. It should be remembered that pleadings alleging fraud must be stated with all of the alleged details constituting the fraud. RICO claims must include predicate acts. Derivative actions contend that directors and officers acted in ways that hurt the corporation.

Civil claims

- Name of purchaser of stocks
- Date stocks were purchased
- Price paid for such stocks
- If sold, date of sale of stocks

If sold, amount received at sale

Current value of stock

Names of officers and directors involved in the alleged wrongful acts

Sufficient narrative details to be able to determine whether wrongful acts took place

Narrative details of defenses to the alleged wrongful acts

Criminal claims

Position of client in the corporation

Duties of client

Details of the allegation

Stated defenses

Actions of others within the corporation

Commercial Law

Commercial law frequently involves the purchase or lease of goods. Most business transactions are governed by the Uniform Commercial Code (UCC). Issues arise over whether the goods that were purchased were delivered on time, whether delivery was excused, whether they performed as warranted, whether they were paid for. Lease contracts covered under the UCC are for lease of goods, such as cars, office equipment, construction equipment, or tents and party goods. The UCC does not apply to leases of real property. Other actions under the UCC involve collections on negotiable instruments, funds transfers, letters of credit, bulk transfers, title documents involving bills of lading and warehouse receipts, transfer of investment securities, and secured transactions.

There are certain basic principles that apply to all of the UCC's provision, including the necessity for fair dealing and good faith, as well as reasonable standards of conduct. There are also the provisions that permit parties to a contract to choose which court would have jurisdiction if there is a dispute and what law will apply.

For the counseling obligations of the draftsman of a contract, see 5-1 Forms & Procedures Under the UCC P 11.01.

For a typical Sales Contract, see 5-1 Forms & Procedures Under the UCC P 21.00.

UCC – Article 2 Sales

Name of purchaser
Address of purchaser
Name of seller
Address of seller
Type and amount of goods sold
Price
Expected delivery date
Payment due date
Actual date of delivery
Any express warranties
Details of the alleged breach

For Information on Leases under the USS, see 6-4A Current Legal Forms for Commercial § 4A.37.

UCC – Article 2A Leases

Name of lessor
Address of lessor
Name of lessee
Address of lessee
Type and amount of goods sold
Expected delivery date
Actual date of delivery
Any express warranties
Length of the lease
Begin date of lease
Payments
Repair responsibilities
Details of the alleged breach

For information on negotiable instruments, see 5A-1 Forms & Procedures Under the UCC P 31.00

UCC – Article 3 Negotiable Instruments

Name of payor
Address of payor
Name of payee
Address of payee
Name of holder
Address of holder
Why the note was given
Circumstances of any negotiation
Amount of note
Amount of interest on note
Due date of note
Amount of any payments made
Amount still owed
Any alleged defenses to payment

For information on bulk sales, see 7-5 Current Legal Forms for Commercial § 5.24

UCC – Article 6 Bulk Sales
Name of seller
Address of seller
Name of buyer
Address of buyer
Goods sold
Date of sale
Date of transfer
Terms of sale
Proposed notification
Persons to be notified

For a summary of the scope of Article 9, Secured Transactions, see 5C-1 Forms & Procedures under the UCC P R91.02.

UCC – Secured Transactions
Name of creditor
Address of creditor
Name of Debtor
Address of debtor
Amount of debt
Basis for the debt
Collateral
Any assignments of debt
Any assignments of collateral

Intellectual Property

Intellectual property law covers the fields of patent, trademark, trade dress, and copyrights. These are specialized fields requiring specialized training. The attorney needs to have knowledge of the product presented by the client and a full understanding of the administrative process involved in protecting the product. Practice areas involve registering the product, licensing it, selling the rights to it, and litigating infringements.

Infringement litigation
Name of owner of property at issue (patent, trademark, copyright)
Address of owner
Registration number of property
Date of registration
Name of alleged infringer
Address of infringer
Details of infringement action
Defenses to action

General Corporation Law

Corporations cannot represent themselves and need attorneys from a period of time before they are incorporated through a period of time after they are dissolved. Attorneys are necessary to draft subscription agreements, articles of incorporation, and bylaws. They help the corporation comply with state and federal laws, proceed through administrative regulations, and contract with other companies and individuals, in the United States and abroad. The kind of information to be gathered by an attorney during an initial interview is dependent on the reason the corporation sought attorney help

Environmental

Environmental law covers not just dealings with the Environmental Protection Agency, but also toxic torts, such as asbestos claims and lead paint poisoning, and Superfund clean up. The bulk of an environmental practice involves either administrative compliance issues or toxic tort litigation. The information to be gathered during the initial client interview is wholly dependent on the business of the client.

Toxic Torts

See The Decision Whether to Accept a Toxic Tort Case, 1-1 Toxic Torts Guide § 1.03

- Name of injured party
- Address of injured party
- Type of exposure
- Cause of exposure
- Owner of property causing exposure
- Address of property causing exposure
- Damages as a result of exposure
- Medical expenses
- Lost wages
- Medical treatment
- Medical providers
- Information on notice to owner

Tax

Tax disputes most often involve income taxes. Questions arise as to how much income a taxpayer has, the classification of income, and the legitimacy and amount of deductions, but disputes are not limited to income taxes. Transfer taxes, sales taxes, and even user fees all present their own cornucopia of problems and disputes. A manufacturer who sells directly to the public will have to determine whether the product is taxable in each state in which it does business.

- Name of taxpayer
- Address of taxpayer
- Years in contention
- Amount alleged to be due
- Details of allegation
- Defenses

Real Estate

A real estate practice covers not only the buying, selling, and leasing of real property, but also zoning disputes, boundary disputes, financing, foreclosures, assessments, and tax sales. The exact information the attorney needs to obtain varies with the particular matter. In all cases, the attorney will need to know the following:

- Address of the property at issue
- Owner of the property at issue
- Purpose for which the property is used
- Details of the issue

THE VALUE OF THE CASE

Every case has a value. It is up to the attorney to evaluate what that value is and convey it to the client. At the same time, the attorney must also be realistic as to the cost to obtain that value so that a potential client can make a cost-benefit analysis in deciding what course to follow.

In a criminal matter, the attorney must realistically review the evidence, determine whether the client could be found innocent, and if not, what the likely sentence would be. Only with this information can an attorney enter into a fair plea bargain on behalf of the client. In the same manner, in a personal injury case, the attorney needs to consider what an injured client can reasonably hope to get through a settlement or from a jury. What are the costs to go through a trial? What would a delay in resolving the issue mean to the client? A similar type of analysis is necessary with each client.

In valuating a case, an attorney has a wide variety of sources. One of the most important is the attorney's own experience and that of his co-workers. In litigation, knowledge of the judges and the community where the case will be tried is essential. Some communities are much more generous in awarding damages or in punishing tortfeasors than others. In federal courts, judges are usually randomly assigned. Once a case is assigned to a judge, that judge follows the case from the time of filing to post-trial motions. In state courts, particularly those courts with a lot of judges, it is rare that one judge will follow the case from beginning to end. Unless a case is particularly complex, the attorney will appear before a different judge for motions, discovery disputes, settlement conferences, and trials.

Other sources available to an attorney are online databases and periodicals giving the latest verdicts in a wide variety of cases. Many of these sources also provide vital information on the contested issues, expert witnesses, and circumstances peculiar to the case.

In addition to the facts of the matter at hand and the results in typical cases, the attorney must also objectively consider the client. Is the client a person who will be sympathetic to the jury or one whom the jury will dislike? Is the corporation one with a solid reputation or one that has recently received a lot of very adverse publicity?

SELLING SERVICES

After getting information from the client and evaluating the case, the attorney has to sell his services to the client. This requires that the attorney convey to the client the approximate value of the case and confidence that the attorney can accomplish the client's goals.

At times, the client's goals will be unreasonable. It is up to the attorney to convince the client as to what is reasonable. At the same time, the attorney must be willing to achieve as much as possible in the client's best interests. For example, a client is being sued for lead paint poisoning affecting a child. The facts might suggest that it is unrealistic that the client not be held responsible. However, the attorney can explain that there might be avenues that would limit the client's exposure.

It is most important that the attorney be candid and realistic in order to avoid problems with the client. The candor displayed by the attorney in discussing the case must also be used in discussing the attorney's fees.

FEES

An attorney's fee is dependent upon the type of case involved. In personal injury plaintiff claims, the attorney usually takes a contingency fee, a fee that will be paid only if the attorney is successful. In personal injury defense claims, the attorney is paid an hourly fee. For certain types of benefits, such as worker's compensation or Social Security disability, the attorney may be limited to statutory percentage amounts.

The predominant method of billing by law firms is for hourly fees. In some cases, the losing party in a lawsuit is responsible for payment of the prevailing party's legal fees. Courts most often use the lodestar method of determining the amount of fee and costs are reasonable and should be paid by the losing parties. This method takes into consideration the expertise of the attorney, the prevailing hourly rate of similar attorneys, the complexity of the matter, the reasonable time for each action, any frivolous actions or duplication of efforts, and any contract for fees.

For a discussion on attorney fees, see 1-4 How to Manage Your Law Office § 4.02.

Tags: ***Professional Toolbox***

Six Best Practices for Capturing Social Media for Use as Evidence in a Court of Law

Law Technology Today February 20, 2018 TECHSHOW Guest Posts

Our team of experts at Page Vault hear this question almost daily: “Can social media be used as admissible evidence in a court of law?” Whether you’re a legal professional looking for answers on Facebook posts and comments, Instagram pictures, Twitter tweets or YouTube videos, the short answer is yes; both public and private social media content can be admissible in litigation.

At Page Vault, we specialize in helping legal professionals capture and preserve web content such as web pages, websites, social media, videos, and images. It’s important to remember that there are best practices to follow when collecting social media content that strengthens a web capture’s admissibility.

Here are the top six that we recommend to all legal professionals:

Best Practice 1: Capture Content in Full

Capture an entire social media profile including all profile sections, such as Facebook About, Groups, and Friends pages. In addition to all sections, capture all posts and comments (including scrolling, expandable and archived content) within a profile to not only have it documented in case it gets deleted, but also to provide the full context of the posts and conversations.

Many cases, such as *IL v. Lorenzo Kent*, demonstrate why it’s vital to capture an entire Facebook profile and not just parts of it.

Best Practice 2: Know the Hiding Spots

Social media platforms have numerous tabs and expandable comments that contain content that may not be immediately visible. Since these platforms change constantly, be certain to know—or ask an expert—where evidence may hide within each platform.

For example, in a recent rape trial out of England, law enforcement was unfamiliar with Facebook and failed to collect conversations that would have proved a young man innocent prior to him being wrongfully convicted.

Best Practice 3: Collect Key Metadata

Capture all metadata associated with the content to prove authenticity (IP addresses, timestamps, URLs, etc.). Even if you don't think you'll need it, it's always safer to collect it from the start.

Best Practice 4: Stay Out of the Chain of Custody

Leverage web collection technology that serves as a trusted third-party and removes attorneys and their staff from the chain of custody. If you or your staff handle the collection directly, you may become unnecessarily involved in a case.

Best Practice 5: Support Your Evidence with Affidavits

Obtain an affidavit to verify the authenticity of the web capture technology and the capture method.

Best Practice 6: Document Content Accurately

Capture a true and accurate representation of the web content so that when saving or printing, it looks exactly like it appears online and won't cause confusion if presented in court.

If a legal professional is not able to follow these best practices, it's better to work with a web collection service designed for legal that would be able to properly assist and collect specified web content during discovery or litigation.

Other Information You Need to Know About Admissible Social Media Evidence:

- In 2017, the Federal Rules of Evidence (FRE) were amended to add two additional sections (Rule 902(13) and (14)) that address electronic data and authentication, including web evidence. Prior to these amendments, an attorney would have needed an expert sworn in to testify to the authenticity of the web evidence. Now, a certification from a qualified e-Discovery collection expert can attest to the authenticity. Read more web evidence collection rules.
- An attorney has ethical responsibilities when searching on social media platforms and collecting content to be used as evidence. For instance, it's unethical to attempt to gain access to private content or a private Facebook account in a deceitful manner (e.g. "friending" someone to gain access to non-public content), or advise a client to change their social media content so as to tamper with evidence. Even failing to stay up to date on current technology platforms can cause ethical issues for attorneys when advising clients. Read more about social media ethics.

122 Amazing Social Media Statistics and Facts

A collection of 122 social media statistics and facts looking at the major platforms and how people around the world use them for pleasure and business.

It is a fact of the internet that every click, every view and every sign-up is recorded somewhere.

Depending on your view, this is either very creepy or fantastically interesting.As we're data nerds here at Brandwatch we fall firmly in the second camp.

We come across all sorts of interesting stats about social media platforms and users, so we've collated the best of them in this bumper facts list. And it comes as a great fact sheet to give context to your social media marketing efforts.

For the curious, these represent a series of numbers that boggle the mind, users counted in tens and hundreds of millions, and time in millions and billions of hours. For marketers, knowing the statistics behind the social networks can inform strategy and spend, allowing focused targeting of users.

Snapchat statistics

Social media statistics

For context, as of January 2019, total worldwide population is **7.7 billion**

The internet has **4.2 billion users**

There are **3.397 billion** active social media users

On average, people have **5.54 social media accounts**

The average daily time spent on social is **116 minutes a day**

91% of retail brands use 2 or more social media channels

81% of all small and medium businesses use some kind of social platform

Internet users have an average of **7.6 social media accounts**

Social media users grew by **320 million** between Sep 2017 and Oct 2018.

That works out at a new social media user every 10 seconds.

Facebook Messenger and Whatsapp handle **60 billion messages a day**

User numbers

4Chan: **22 million**

Airbnb: **150 million users**

Facebook: **2.271 billion users**

Flickr: **90 million users**

Google+: **111 million users**

Instagram: **1bn users**

LinkedIn: **562 million users**

MySpace: **15 million users**

Periscope: **10 million users**

Pinterest: **200 million users**

Reddit: **542 million users**

Snapchat: **186 million daily users**

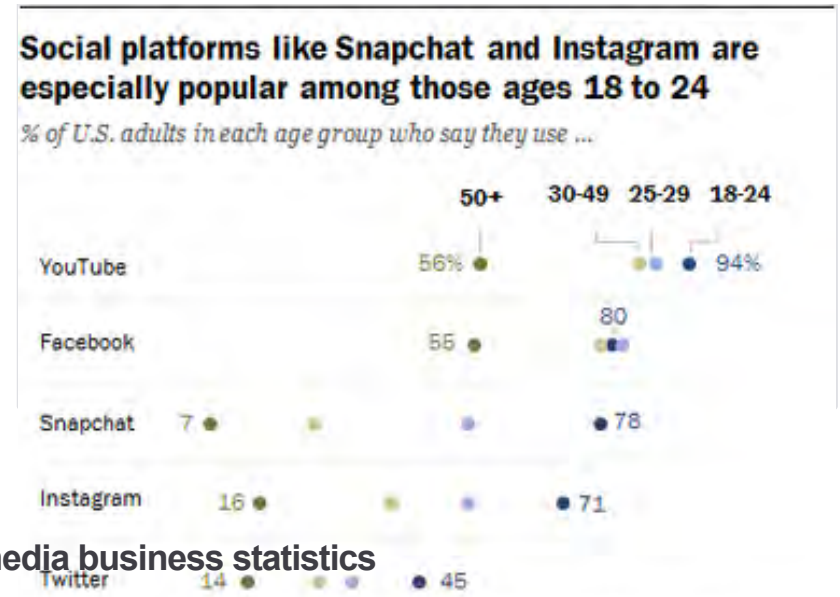
Twitter: **326 million users**

Wechat: **1.12 billion users**

Weibo: **600 million users**

WhatsApp: **900 million users**

Youtube: **1.5 billion users**



Social media business statistics

Social networks earned an estimated **$8.3 billion from advertising** in 2015

$40bn was spent on social network advertising in 2016

38% of organizations plan to spend **more than 20% of their total advertising budgets** on social media channels in 2015, up from 13% a year ago

Only 20 Fortune 500 companies actually engage with their customers on Facebook, **while 83% have a presence on Twitter**

People aged 55-64 are more than twice as likely to **engage with branded content** than those 28 or younger

96% of the people that discuss brands online do not follow those brands' owned profiles

78 percent of people who complain to a brand via Twitter expect a response**within an hour**

Social video statistics

Facebook now sees **8 billion average daily video views** from 500 million users

Snapchat users also sees **8 billion average daily video views**

US adults spend an average of 1 hour, 16 minutes each day watching **video on digital devices**

Also in the US, there were **175.4m people watching digital video content**

78% of people watch online videos every week, 55% watch every day

It's estimated that video will **account for 74% of all online traffic in 2017**

Content statistics

On WordPress alone, **74.7 million blog posts are published every month**

A **2011 study by** AOL/Nielsen showed that 27 million pieces of content were shared every day, and **today 3.2 billion images are shared each day**

The **top 3 content marketing tactics** are social media content (83%), blogs (80%), and email newsletters (77%)

89% of B2B marketers use content marketing strategies

Google statistics

Google processes **100 billion searches a month**

That's an average of **40,000 search queries every second**

91.47% of all internet searches are carried out by Google

Those searches are carried out by **1.17 billion unique users**

Every day, **15%** of that day's queries have never been asked before

Google has answered **450 billion** unique queries since 2003

60% of Google's searches come from mobile devices

By 2014, Google had indexed over **130,000,000,000,000 (130 trillion) web pages**

To carry out all these searches, Google's data centre uses **0.01% of worldwide electricity**, although it hopes to cut its energy use by 15% using AI

Facebook statistics

Facebook adds 500,000 new users every day; **6 new profiles every second**

68% of all Americans are on Facebook

79% of all online US adults use Facebook

76% of Facebook users check it every day

The average user spends **35 minutes on Facebook a day**

The average (mean) **number of friends is 155**

Half of internet users who do not use Facebook themselves **live with someone who does**

Of those, **24%** say that they look at posts or photos on that person's account

There are an estimated **270 million fake Facebook profiles**

The most popular page is **Facebook's main page with 204.7m likes.** The most liked non-Facebook owned page is Christiano Ronaldo's with 122.6m.

There are **60 million** active business pages on Facebook

Facebook has **5 million active advertisers** on the platform.

Facebook accounts for **53.1% of social logins** made by consumers to sign into the apps and websites of publishers and brands

Want more? Head to our full list of **Facebook statistics**.

YOU MIGHT LIKE

The Latest Social Media Image Sizes Guide

This is our up-to-the-minute list of social image sizes and dimensions for Facebook, Twitter, Instagram, Google+, Pinterest, LinkedIn and Youtube. We're constantly updating this post, so bookmark it to ensure your social images are as picture perfect as possible.

READ THE ARTICLE

Twitter statistics

500 million people visit Twitter each month without logging in

There is a total of **1.3 billion accounts**, with **326 million monthly active users**

Of those, **44%** made an account and left before ever sending a Tweet

The average Twitter user has **707 followers**

But 391 million accounts have **no followers at all**

There are **500 million Tweets** sent each day. That's 6,000 Tweets every second

Twitter's top 5 markets (countries) account for **50% of all Tweets**

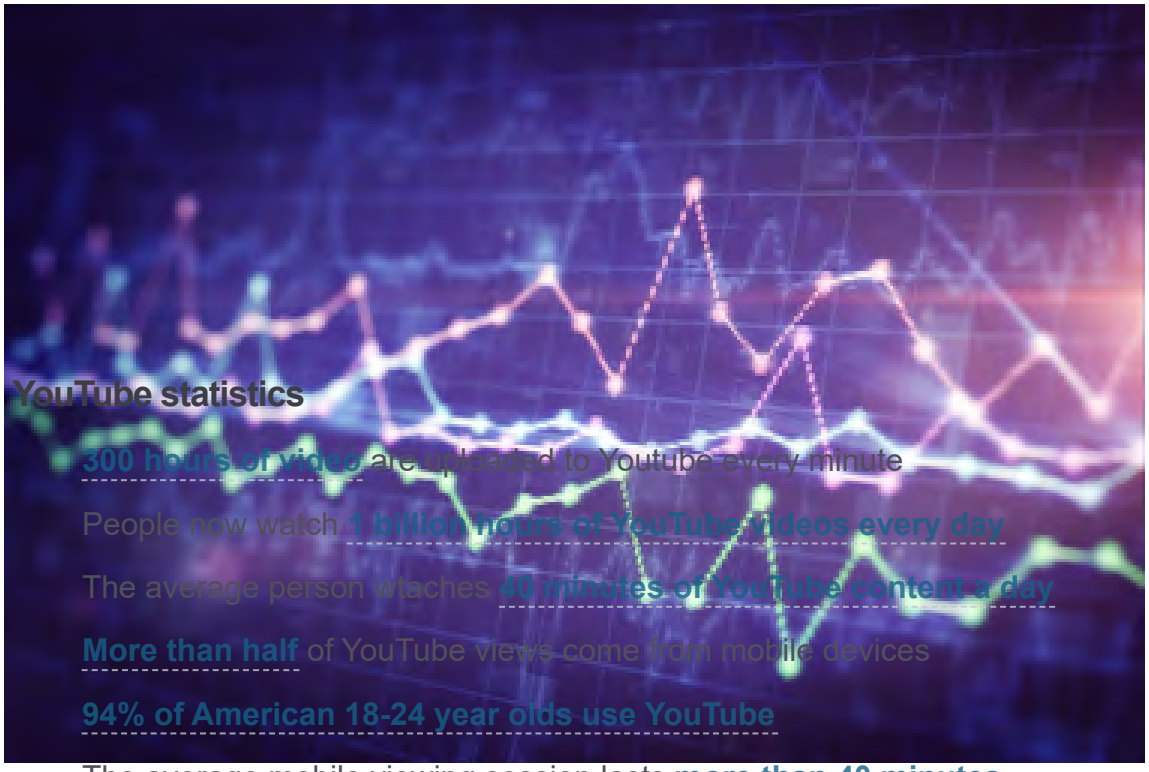
It took **3 years, 2 months and 1 day** to go from the first Tweet to the billionth

45% of Americans use Twitter

65.8% of US companies with 100+ employees use Twitter for marketing

77% of Twitter users feel more positive about a brand when their Tweet has been replied to

We have a much more extensive **list of Twitter statistics here**.



- The average mobile viewing session lasts **more than 40 minutes**
- The user submitted video with the most views is the **video for Luis Fonsi's song 'Despacito'** with 4.36 billion views
- YouTube sees around **1,148bn mobile video views** per day
- In 2014, **the most searched term** was music. The second was Minecraft
- **9% of U.S small businesses** use Youtube
- You can navigate YouTube in a total of **76 different languages** (covering 95% of the Internet population)

We've got loads more **Youtube statistics here**.

Instagram statistics

- There are **800 million Monthly Active Users** on Instagram
- **Over 95 million** photos are uploaded each day
- There are **4.2 billion Instagram Likes** per day
- More than 40 billion photos have been shared so far
- The average Instagram user spends **15 minutes a day on the app**
- 90 percent of Instagram users are **younger than 35**

When Instagram introduced videos, more than **5 million were shared in 24 hours**

Pizza is the **most popular Instagrammed food**, behind sushi and steak

The **most liked picture on Instagram** is one of an egg

71% of Americans now use the platform

24% of US teens cite Instagram as their **favorite social network**

Want more? We've got a much longer list of **Instagram statistics available**.

Pinterest statistics

Pinterest has 200 million active users each month

31% of all online US citizens use the platform

67% of Pinterest users are **under 40-years-old**

The best time to Pin is Saturday from 8pm-11pm

In 2014, male audience grew 41% and their average time spent on Pinterest tripled to more than 75 minutes per visitor

LinkedIn statistics

LinkedIn has **500 million members**

106 million of those access the site on a **monthly basis**

More than 1 million members have **published content on LinkedIn**

The average CEO has **930 LinkedIn connections**

Over **3 million companies** have created LinkedIn accounts

But only **17% of US small businesses** use LinkedIn

We also have a much larger list of **LinkedIn statistics**.

Snapchat statistics

Snapchat has **187m active daily users**

60% of them are under 25

- In 2016, **$90m was spent on Snapchat ads**
- The average user spends **25 minutes a day on Snapchat**
- 78% of American **18-24 year olds use the platform**
- 47% of US teens think **it's better than Facebook**, while 24% think it's better than Instagram

Head here to check out our bigger list of **Snapchat statistics**.

That's your fill of social media statistics for now, with just a tiny fraction of the weird and wonderful stats and facts available out there. We'll be updating this list as we get new data points.

If you're looking for in-depth insights about your audience, brand or competitors, get in touch with us for a **free demo**, and see how Brandwatch Analytics can boost your social media strategy.

September 19, 2018

Discovery and Preservation of Social Media Evidence

Margaret (Molly) DiBianca

The ubiquitous nature of social media has made it an unrivaled source of evidence. Particularly in the areas of criminal, personal-injury, employment, and family law, social media evidence has played a key role in countless cases. But the use of social media is not limited to these practice areas. Businesses of every size can be affected by social media – both in the duty to preserve social media content and in the desire to access relevant social media evidence in litigation.

The Duty to Preserve Social Media Evidence

Data residing on social media platforms is subject to the same duty to preserve as other types of electronically stored information (ESI). The duty to preserve is triggered when a party reasonably foresees that evidence may be relevant to issues in litigation. All evidence in a party's "possession, custody, or control" is subject to the duty to preserve. Evidence generally is considered to be within a party's "control" when the party has the legal authority or practical ability to access it.

As an initial matter, social media content should be included in litigation-hold notices instructing the preservation of all relevant evidence. Once the litigation-hold notice has been issued, parties have available to them a number of ways to preserve social media data, depending on the particular platform or application at issue.

Methods of Preservation

Facebook offers the ability to "Download Your Info." With just one click of the mouse, users can download a zip file containing timeline information, posts, messages, and photos. Information that is not available by merely logging into an account also is included, such as the ads on which the user has clicked, IP addresses that are logged when the user accesses his or her Facebook account, as well as other potentially relevant information.

Twitter offers a similar, although somewhat limited, option. Twitter users can download all Tweets posted to an account by requesting a copy of the user's Twitter "archive." Twitter does not, however, offer users a self-serve method of obtaining other, non-public information, such as IP logs. To obtain this additional information, users must request it directly from Twitter by sending an e-mail to privacy@twitter.com with the subject line, "Request for Own Account Information." Twitter

will respond to the e-mail with further instructions.

Although these self-help methods can be an excellent start, they do not address all possible data. Therefore, it may be prudent to employ the assistance of a third-party vendor in order to ensure complete preservation. CloudPreservation and X1 Social Discovery are two examples of commercially available tools that are specifically designed for archiving and collecting social media content.

Consequences of Failing to Preserve

Regardless of the method employed, preservation of social media evidence is critically important and the consequences of failing to preserve can be significant. In the worst case, both counsel and client may be subject to sanctions for a failure to preserve relevant evidence. In the first reported decision involving sanctions in the social media context, *Lester v. Allied Concrete Co.*, No. CL08-150 (Va. Cir. Ct. Sept. 01, 2011), *aff'd*, No. 120074 (Va. Ct. App. Jan. 10, 2013), the court sanctioned both the plaintiff and his counsel based, in large part, on its determination that they had engaged in spoliation of social media evidence. In that case, the lawyer told his paralegal to make sure the plaintiff "cleaned up" his Facebook page. The paralegal helped the plaintiff to deactivate his page and delete 16 pictures from his account. Although the pictures were later recovered by forensic experts, the court found that sanctions were warranted based on the misconduct.

In contrast to *Lester*, a federal court in New Jersey imposed a significantly less severe remedy for the removal of Facebook posts. In *Katiroll Company, Inc. v. Kati Roll and Platters, Inc.*, No. 10-3620 (GEB) (D.N.J. Aug. 3, 2011), the court determined that the defendant committed technical spoliation when he changed his Facebook profile picture, where the picture at issue was alleged to show infringing trade dress. Because the defendant had "control" over his Facebook page, he had the duty to preserve the photos.

Because the photos were relevant to the litigation, their removal was "somewhat prejudicial" to the plaintiff. Instead of harsh monetary or evidentiary sanctions though, the court ordered a more practical-driven resolution. Specifically, the court ordered the defendant to coordinate with the plaintiff's counsel to change the picture back to the allegedly infringing picture for a brief time during which the plaintiff could print whatever posts it believed to be relevant.

Critical to the court's decision not to award sanctions was its finding that the plaintiff had not explicitly requested that the defendant preserve his Facebook account as evidence. The court

concluded, instead, that it would not have been immediately clear to the defendant that changing his Facebook profile picture would constitute the destruction of evidence. Thus, any spoliation was unintentional. This decision supports the idea that counsel should consider issuing a litigation-hold notice to opposing parties, as well as to one's own client.

Even inadvertent negligence for which sanctions are not warranted, can result in the loss of potentially relevant social media evidence. For example, in *In re Pfizer, Inc. Securities Litigation*, 288 F.R.D. 297 (S.D.N.Y. Jan. 8, 2013), the plaintiff-shareholders sought sanctions against Pfizer for failing to preserve data from "e-rooms." The "e-rooms" were internal collaboration applications maintained by the company for use by employees in sharing documents and calendars, archiving e-mails, and communicating via discussion boards and instant messaging. Although the company had preserved (and produced) a tremendous amount of ESI, it had failed to preserve the data associated with the relevant e-rooms.

The court took issue with the scope of Pfizer's litigation-hold measures because they did not include e-rooms. Although documents and information included in the e-rooms were likely also maintained elsewhere and had likely been preserved and produced, the deletion of the e-rooms had resulted in the loss of discoverable information concerning the manner in which the employees internally organized information.

The court found that this information was relevant because it would allow the plaintiffs to draw connections and understand the narrative of events in a way "not necessarily afforded by custodial production." Thus, the court concluded, the company breached its duty to preserve because the scope of its litigation hold did not include the e-rooms. Sanctions, however, were not warranted because the conduct was merely negligent and the plaintiffs had not shown that any lost data was, indeed, relevant to their claims.

Preservation in a "BYOD" World

One question that remains unanswered relates to the obligation of a company to preserve the potentially relevant social media content of its employees. In *Cotton v. Costco Wholesale Corp*., No. 12-2731 (D. Kan. July 24, 2013), the court denied the employee-plaintiff's motion to compel text messages sent or received by employees on their personal cell phones, finding that the employee had failed to show that the employer had any legal right to obtain the text messages. In other words, the phones and the data they contained were not in the "possession, custody, or control" of the

employer. This recent discussion is one of the first of its kind and observers will have to wait to see whether the approach is adopted by other courts in cases to come.

The Discoverability of Social Media

Preservation of social media evidence, of course, is only one part of the process. Parties will want to obtain relevant social media evidence as part of their informal and formal discovery efforts. Although some courts continue to struggle with disputes involving such efforts, discovery of social media merely requires the application of basic discovery principles in a somewhat novel context.

No Reasonable Expectation of Privacy

The user's right to privacy is commonly an issue in discovery disputes involving social media. Litigants continue to believe that messages sent and posts made on their Facebook pages are "private" and should not be subject to discovery during litigation. In support of this, litigants claim that their Facebook pages are not publicly available but, instead, are available only to a limited number of designated Facebook "friends."

Courts consistently reject this argument, however. Instead, courts generally find that "private" is not necessarily the same as "not public." By sharing the content with others – even if only a limited number of specially selected friends – the litigant has no reasonable expectation of privacy with respect to the shared content. Thus, the very purpose of social media – to share content with others – precludes the finding of an objectively reasonable expectation that content will remain "private." Consequently, discoverability of social media is governed by the standard analysis and is not subject to any "social media" or "privacy" privilege.

Relevancy as the Threshold Analysis

Relevancy, therefore, becomes the focus of the discoverability analysis. Courts are wary about granting discovery of social media content where the requesting party has not identified some specific evidence tending to show that relevant information exists. However, a requesting party is only able to satisfy this burden if at least some part of producing party's social media content is publicly available. Thus, when a litigant's social-networking account is not publicly available, the likelihood of its discovery diminishes significantly. As more and more users understand the importance of privacy settings, the burden on the requesting party becomes more and more difficult to satisfy.

Methods of Access to Social Media Evidence

Assuming a litigant is able to meet its burden to establish the relevancy of social-networking content, the question becomes a practical one – how to obtain the sought-after information? Currently, this question has no good answer. There have been a variety of methods requested by litigants and ordered by the courts, with mixed degrees of success.

Direct Access to Social Media Accounts

One of the most intrusive methods of discovery is to permit the requesting party access to the entire account. If analogized to traditional discovery, this would be the equivalent of granting access to a litigant's entire office merely because a relevant file is stored there. Not surprisingly, this method of "production" has not been popular with parties or with courts.

Nevertheless, there now are several decisions in which a court has ordered a party to produce his or her login and password information to the other side in response to a discovery request. One of these decisions, *Largent v. Reed*, No. 2009-1823 (Pa. C.C.P. Nov. 8, 2011), illustrates some of the procedural challenges that can result.

In *Largent*, the court ordered the plaintiff to turn over her Facebook login information to defense counsel within 14 days of the date of the order. Defense counsel then would have 21 days to "inspect [the plaintiff's] profile." After that period, the plaintiff could change her password to prevent any further access to her account by defense counsel. Although the order specifically identified the defendant's lawyer as the only party who would be given the login information, it did not specify whether the defendant was permitted to view the account's contents once the attorney had logged in.

Another case involving the exchange of login information resulted in more serious and permanent harm. In *Gatto v. United Airlines, Inc.*, No. 10-1090-ES-SCM (D.N.J. Mar. 25, 2013), the plaintiff voluntarily provided his Facebook password to the defendants' counsel during a settlement conference facilitated by the court. When the defendants' attorney later logged into the account and printed portions of the plaintiff's profile page as previously agreed, Facebook sent an automated message to the plaintiff, alerting him that his account had been accessed from an unauthorized ISP address.

The plaintiff attempted to deactivate the account but deleted it instead. As a result, all of the data associated with the account was automatically and permanently deleted 14 days later. The court found that the plaintiff had failed to preserve relevant evidence and granted the defendants' request for an adverse-inference instruction as a sanction.

Not all courts have endorsed the idea of direct access to a party's social media account. One court went so far as to hold that a blanket request for login information is *per se* unreasonable. In *Trail v. Lesko*, No. GD-10-017249 (Pa. C.C.P. July 3, 2012), both sides sought to obtain Facebook posts and pictures from the other. Neither complied and both parties filed motions seeking to compel the other to turn over its Facebook password and username.

The court explained that a party is not entitled to free-reign access to the non-public social-networking posts of an opposing party merely because he asks the court for it. "To enable a party to roam around in an adversary's Facebook account would result in the party to gain access to a great deal of information that has nothing to do with the litigation and [] cause embarrassment if viewed by persons who are not 'Friends.'"

One court went even further. In *Chauvin v. State Farm Mutual Automobile Insurance Company*, No. 10-11735, 2011 U.S. Dist. LEXIS 121600 (S.D. Mich. Oct. 20, 2011), the court affirmed an award of sanctions against the defendant due to its motion to compel production of the plaintiff's Facebook password. The court upheld the decision of the magistrate judge, who had concluded that the content the defendant sought to discover was available "through less intrusive, less annoying and less speculative means," even if relevant. Furthermore, there was no indication that granting access to the account would be reasonably calculated to lead to discovery of admissible information. Thus, the motion to compel warranted an award of sanctions.

In Camera Review

In an effort to guard against overly broad disclosure of a party's social media information, some courts have conducted an *in camera* review prior to production. For example, in *Offenback v. Bowman*, a No. 1:10-cv-1789, 2011 U.S. Dist. LEXIS 66432 (M.D. Pa. June 22, 2011), the magistrate judge conducted an *in camera* review of the plaintiff's Facebook account and ordered the production of a "small segment" of the account as relevant to the plaintiff's physical condition.

In *Douglas v. Riverwalk Grill, LLC*, No. 11-15230, 2012 U.S. Dist. LEXIS 120538 (E.D. Mich. Aug. 24, 2012), the court ordered the plaintiff to provide the contents for *in camera* review. After

conducting its review of "literally thousands of entries," the court noted that "majority of the issues bear absolutely no relevance" to the case. In particular, the court found that the only entries that could be considered discoverable were those written by the plaintiff, which could be in the form of "comments" he made on another's post or updates to his own "status." The court identified the specific entries it had determined were discoverable.

Many courts, understandably, have been less than enthusiastic about the idea of doing the parties' burdensome discovery work. For example, in *Tomkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387 (E.D. Mich. 2012), the court declined the parties' suggestion that it conduct an *in camera* review, explaining that "such review is ordinarily utilized only when necessary to resolve disputes concerning privilege; it is rarely used to determine relevance."

At least one court has agreed to "friend" a litigant for the purpose of conducting an *in camera*review of the litigant's Facebook page. In *Barnes v. CUS Nashville, LLC*, No. 3:09-cv-00764, 2011 U.S. Dist. LEXIS 143892 (M.D. Tenn. June 3, 2010), the magistrate judge offered to expedite the parties' discovery dispute by creating a Facebook account and then "friending" two individuals "for the sole purpose of reviewing photographs and related comments *in camera*." The judge then would "properly review and disseminate any relevant information to the parties . . . [and would] then close Facebook account."

Attorneys' Eyes Only

In *Thompson v. Autoliv ASP, Inc.,* No. 2:09-cv-01375 (D. Nev. June 20, 2012), the defendant obtained information from the plaintiff's publicly available social-networking profiles that was relevant to the case, but asserted that the plaintiff had since changed her account settings to prevent the defendant from further access and had failed to produce (or had produced in overly-redacted form) information from these profiles in response to the defendant's formal discovery requests.

The defendant sought to have the court conduct an *in camera* review of the profiles in their entirety to determine whether the plaintiff's discovery responses were complete. Instead, the court ordered the plaintiff to provide the requested information to the defendant's counsel for an attorney's-eyes-only review for the limited purpose of identifying whether information had been improperly withheld from production. The defendant's counsel was instructed that it could not use the information for any other purpose without a further ruling by the court.

Third-Party Subpoenas

While the discoverability analysis is a product of the common law, there is at least one statute relevant to the discussion. The Stored Communications Act (SCA) limits the ability of Internet-service providers to voluntarily disclose information about their customers and subscribers. Although providers may disclose electronic communications with the consent of the subscriber, the SCA does not contain an exception for disclosure pursuant to civil discovery subpoena. The application of the SCA to discovery of communications stored on social-networking sites has produced mixed results.

Providers, including Facebook, take the position that the SCA prohibits them from disclosing social media contents, even by subpoena. From Facebook's website:

> Federal law prohibits Facebook from disclosing "user content (such as messages, Wall (timeline) posts, photos, etc.), in response to a civil subpoena. Specifically, the Stored Communications Act, 18 U.S.C. § 2701 et seq., prohibits Facebook from disclosing the contents of an account to any non-governmental entity pursuant to a subpoena or court order.

One of the earliest cases to address the issue, *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010), concluded that the SCA prohibited a social-networking site from producing a user's account contents in response to a civil discovery subpoena. In that case, the defendants served subpoenas on several third parties, including Facebook and MySpace, seeking communications between the plaintiff and another individual. The plaintiff moved to quash the subpoenas.

The court held that plaintiff had standing to bring the motion, explaining that "an individual has a personal right in information in his or her profile and inbox on a social-networking site and his or her webmail inbox in the same way that an individual has a personal right in employment and bank records." Moreover, the court determined that the providers were electronic communication service (ECS) providers under the SCA and were thus prohibited from disclosing information contained in "electronic storage."

The SCA does not override a party's obligation to produce relevant ESI, though. To the contrary, a party must produce information that is within its possession, custody, or control. Thus, a court can compel a party to execute an authorization for the release of social media content. With an executed authorization, a properly issued subpoena, and, in most cases, a reasonably small payment for associated costs, litigants can obtain all information related to a user's social media account.

Lessons Learned

Although the world of social media and other new technology continues to present novel questions, the answers are often derived by applying a “pre-Facebook” analysis. For example, businesses understand that they have an obligation to preserve potentially relevant evidence. Social media evidence is no different and should be preserved in the same way as paper documents and emails.

Similarly, parties in litigation are entitled to discovery of all relevant, non-privileged information. Thus, social media content is subject to discovery, despite the privacy settings imposed by the account user. Nevertheless, only relevant information must be produced and it is the responsibility of counsel to make the relevancy determination.

Parties and counsel are well advised to adjust their thinking so that social media becomes just another type of ESI. And, like emails and other forms of electronic data, social media must be preserved and is subject to discovery if relevant to the dispute.

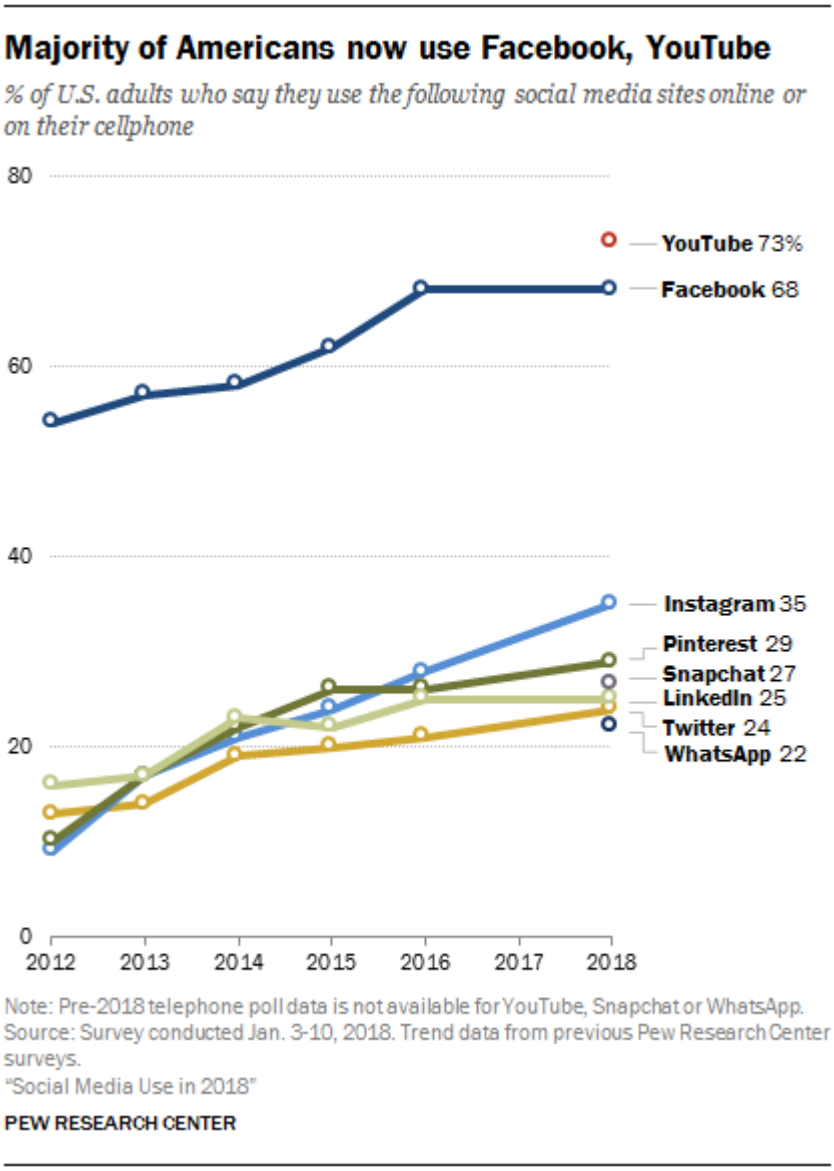
MARCH 1, 2018

Social Media Use in 2018

A majority of Americans use Facebook and YouTube, but young adults are especially heavy users of Snapchat and Instagram

BY AARON SMITH (HTTP://WWW.PEWRESEARCH.ORG/STAFF/AARON-SMITH) **AND MONICA ANDERSON** (HTTP://WWW.PEWRESEARCH.ORG/STAFF/MONICA-ANDERSON)

A new Pew Research Center survey of U.S. adults finds that the social media landscape in early 2018 is defined by a mix of long-standing trends and newly emerging narratives.



Facebook and YouTube dominate this landscape, as notable majorities of U.S. adults use each of these sites. At the same time, younger Americans (especially those ages 18 to 24) stand out for embracing a variety of platforms and using them frequently. Some 78% of 18- to 24-year-olds use Snapchat, and a sizeable majority of these users (71%) visit the platform multiple times per day. Similarly, 71% of Americans in this age group now use Instagram and close to half (45%) are Twitter users.

As has been the case (http://www.pewinternet.org/2016/11/11/social-media-update-2016/pi_2016-11-11_social-media-update_0-08/) since the Center began surveying about the use of different social media in 2012, Facebook remains the primary platform for most Americans. Roughly two-thirds of U.S. adults (68%) now report that they are Facebook users, and roughly three-quarters of those users access Facebook on a daily basis. With the exception of those 65 and older, a majority of Americans across a wide range of demographic groups now use Facebook.

But the social media story extends well beyond Facebook. The video-sharing site YouTube – which contains many social elements, even if it is not a traditional social media platform – is now used by nearly three-quarters of U.S. adults and 94% of 18- to 24-year-olds. And the typical (median) American reports that they use three of the eight major platforms that the Center measured in this survey.

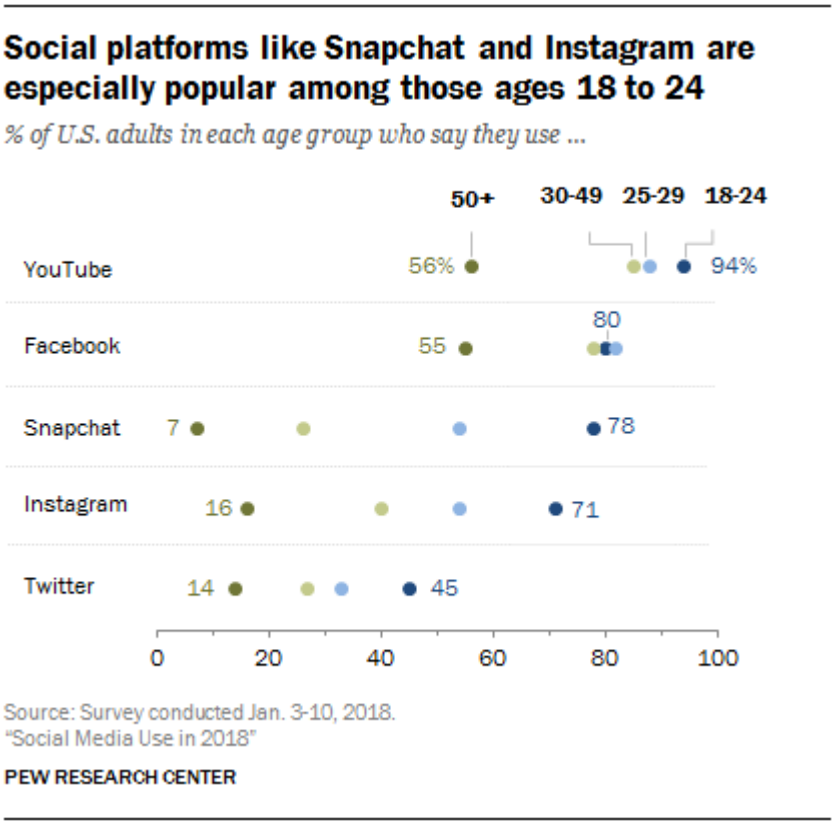
These findings also highlight the public's sometimes conflicting attitudes toward social media. For example, the share of social media users who say these platforms would be hard to give up has increased by 12 percentage points compared with a survey conducted in early 2014. But by the same token, a majority of users (59%) say it would *not* be hard to stop using these sites, including 29% who say it would not be hard at all to give up social media.

Different social media platforms show varied growth

Facebook remains the most widely used social media platform by a relatively healthy margin: some 68% of U.S. adults are now Facebook users. Other than the video-sharing platform YouTube, none of the other sites or apps measured in this survey are used by more than 40% of Americans.

The Center has asked about the use of five of these platforms (Facebook, Twitter, Instagram, LinkedIn and Pinterest) in several previous surveys of technology use. And for the most part, the share of Americans who use each of these services is similar to what the Center found in its previous survey of social media use conducted in April 2016. The most notable exception is Instagram: 35% of U.S. adults now say they use this platform, an increase of seven percentage points from the 28% who said they did in 2016.

The youngest adults stand out in their social media consumption



(http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/pi_2018-03-01_social-media_0-02/) As was true in previous Pew Research Center surveys of social media use, there are substantial differences in social media use by age. Some 88% of 18- to 29-year-olds indicate that they use any form of social media. That share falls to 78% among those ages 30 to 49, to 64% among those ages 50 to 64 and to 37% among Americans 65 and older.

At the same time, there are pronounced differences in the use of various social media platforms *within* the young adult population as well. Americans ages 18 to 24 are substantially more likely to use platforms such as Snapchat, Instagram and Twitter even when compared with those in their mid- to late-20s. These differences are especially notable when it

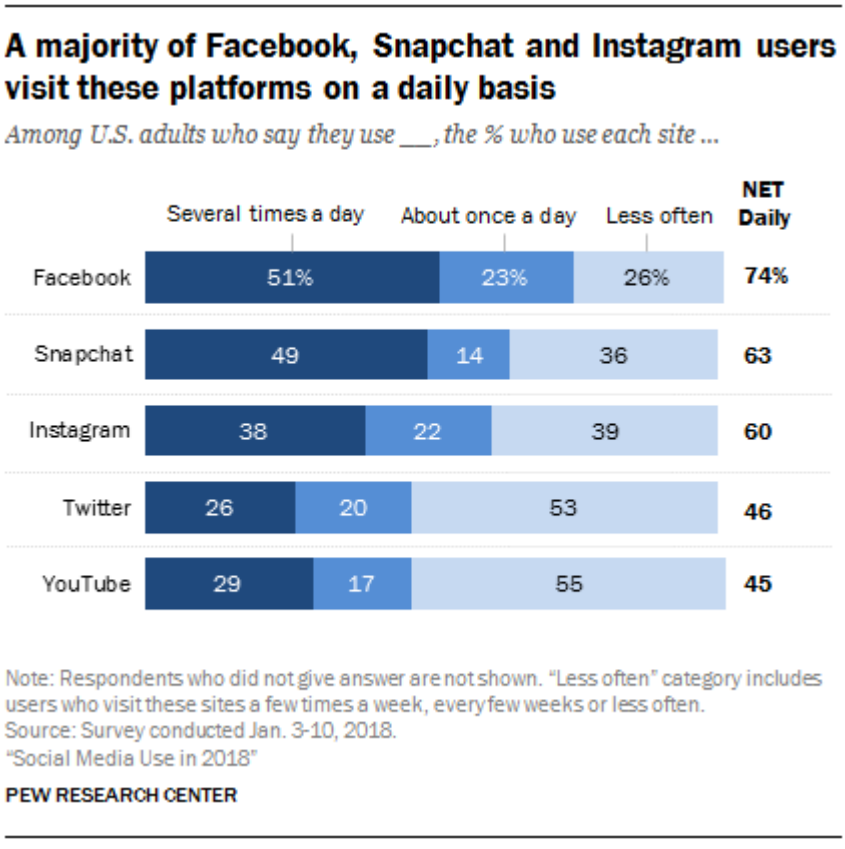
comes to Snapchat: 78% of 18- to 24-year-olds are Snapchat users, but that share falls to 54% among those ages 25 to 29.

With the exception of those 65 and older, Facebook is used by a majority of Americans across a wide range of demographic groups. But other platforms appeal more strongly to certain subsets of the population. In addition to the age-related differences in the use of sites such as Instagram and Snapchat noted above, these are some of the more prominent examples:

- Pinterest remains substantially more popular with women (41% of whom say they use the site) than with men (16%).
- LinkedIn remains especially popular among college graduates and those in high-income households. Some 50% of Americans with a college degree use LinkedIn, compared with just 9% of those with a high school diploma or less.
- The messaging service WhatsApp is popular in Latin America, and this popularity also extends to Latinos in the United States – 49% of Hispanics report that they are WhatsApp users, compared with 14% of whites and 21% of blacks.

For more details on social media platform use by different demographic groups, see Appendix A (http://www.pewinternet.org/2018/03/01/social-media-use-2018-appendix-a-detailed-table/) .

Roughly three-quarters of Facebook users – and around six-in-ten Snapchat and Instagram users – visit each site daily



(http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/pi_2018-03-01_social-media_0-03/) Along with being the most popular social media site, Facebook users also visit the site with high levels of frequency. Fully 74% of Facebook users say they visit the site daily, with around half (51%) saying they do several times a day. The share of Facebook users who visit the site on a daily basis is statistically unchanged compared with 2016, when 76% of Facebook users reported they visited the site daily.

While the overall share of Americans who use Snapchat is smaller than that of Facebook, a similar share of Snapchat users (49%) say they use the platform multiple times per day. All told, a majority of Snapchat (63%) and Instagram (60%) users indicate that they visit these platforms on a daily basis. The share of Instagram users who visit the platform daily has increased slightly since 2016 when 51% of Instagram users were daily visitors. (Note: this is the first year the Center has specifically asked about the frequency of Snapchat use in a telephone poll.)

In addition to adopting Snapchat and Instagram at high rates, the youngest adults also stand out in the frequency with which they use these two platforms. Some 82% of Snapchat users ages 18 to 24 say they use the platform daily, with 71% indicating that they use it multiple times per day. Similarly, 81% of Instagram users in this age group visit the platform on daily basis, with 55% reporting that they do so several times per day.

The median American uses three of these eight social platforms

As was true in previous surveys of social media use, there is a substantial amount of overlap between users of the various sites measured in this survey. Most notably, a significant majority of users of each of these social platforms also indicate that they use Facebook and YouTube. But this "reciprocity" extends to other sites as well. For instance, roughly three-quarters of both Twitter (73%) and Snapchat (77%) users also indicate that they use Instagram.

Substantial 'reciprocity' across major social media platforms

% of __ users who also ...

	Use Twitter	Use Instagram	Use Facebook	Use Snapchat	Use YouTube	Use WhatsApp	Use Pinterest	Use LinkedIn
Twitter	–	73%	90%	54%	95%	35%	49%	50%
Instagram	50	–	91	60	95	35	47	41
Facebook	32	47	–	35	87	27	37	33
Snapchat	48	77	89	–	95	33	44	37
YouTube	31	45	81	35	–	28	36	32
WhatsApp	38	55	85	40	92	–	33	40
Pinterest	41	56	89	41	92	25	–	42
LinkedIn	47	57	90	40	94	35	49	–

Source: Survey conducted Jan. 3-10, 2018.
"Social Media Use in 2018"

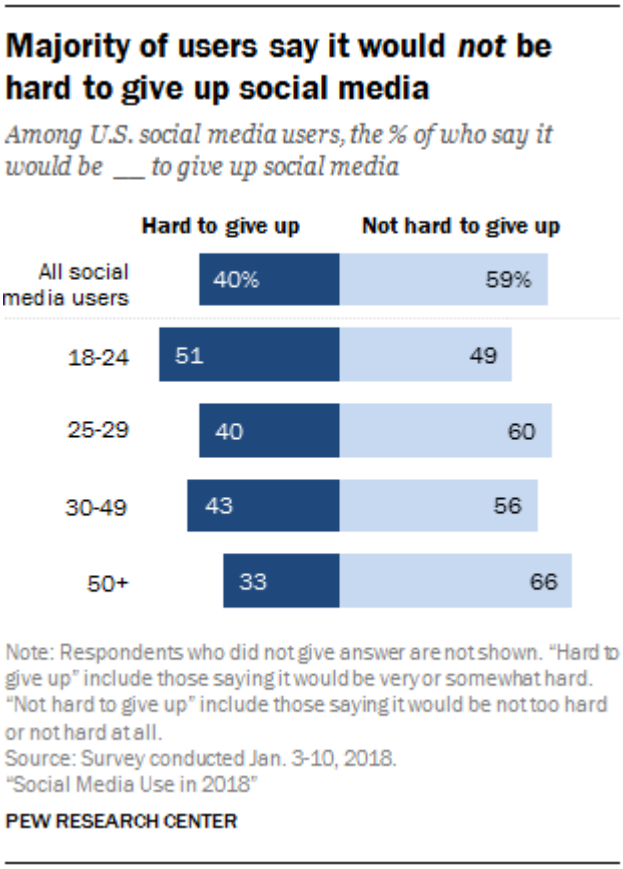
PEW RESEARCH CENTER

90% of LinkedIn users also use Facebook

This overlap is broadly indicative of the fact that many Americans use multiple social platforms. Roughly three-quarters of the public (73%) uses more than one of the eight platforms measured in this survey, and the typical (median) American uses three of these sites. As might be expected, younger adults tend to use a greater variety of

social media platforms. The median 18- to 29-year-old uses four of these platforms, but that figure drops to three among 30- to 49-year-olds, to two among 50- to 64-year-olds and to one among those 65 and older.

A majority of social media users say it would *not* be difficult to give up these sites



(http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/pi_2018-03-01_social-media_0-05/) Even as a majority of Americans now use social platforms of various kinds, a relatively large share of these users feel that they could give up social media without much difficulty.

Some 59% of social media users think it would *not* be hard to give up social media, with 29% indicating it would not be hard at all. By contrast, 40% say they would indeed find it hard to give up social media – although just 14% think it would be "very hard" to do this. At the same time, the share of social media users who would find it hard to give up these services has grown somewhat in recent years. The Center asked an identical question in a survey conducted in January 2014, and at that time, 28% of social media users indicated they would have a hard time giving up social media, including 11% who said it would be "very hard."

These findings vary by age. Roughly half of social media users ages 18 to 24 (51%) say it would be hard to give up social media, but just one-third of users ages 50 and older feel similarly. The data also fit broadly with other findings the Center has collected about Americans' attitudes toward social media. Despite using them for a wide range of reasons, just 3% of social media users indicate that they have a lot of trust (http://www.pewinternet.org/2017/09/11/how-people-approach-facts-and-information/pi_2017-09-11_factsandinfo_1-02/) in the information they find on these sites. And relatively few have confidence in these platforms to keep their personal information safe (http://www.pewinternet.org/2017/01/26/americans-and-cybersecurity/pi_01-26-cyber-00-02/) from bad actors.

Social Media

A New "Must Use" Tool in Litigation?

By Stephen P. Laitinen and Hilary J. Loynes

The use of social media as a form of informal discovery is inexorably gaining foothold.

With the exploding popularity of social media and, in particular, social networking sites, lawyers cannot afford to ignore how such media impacts every aspect of litigation. The Internet houses a potential gold mine of information that a savvy attorney can use in various litigation stages, from voir dire to discover and eliminate a potential juror who could prejudice a client, to closing to craft a persuasive argument that is tailored to an audience.

People are putting more and more personal information on the Internet. In the United States, no less than 35 percent of adult Internet users and 66 percent of Internet users under the age of 30 have a profile on a social networking site. Amanda Lenhart, *Pew Internet Project Data Memo* 1, Pew Internet & American Life Project (Jan. 14, 2009), available at http://www.pewinternet.org/Reports/2009/Adults-and-Social-Network-Websites.aspx (follow "Read Full Report" hyperlink). So while the young are still more likely to have a presence in social media than their elders, American adults have quadrupled their social media usage since 2005. *Id.* Staggeringly, Facebook has more than 400 million active users, and each month more than 100 million people log onto to MySpace. Facebook Press Room, http://www.facebook.com/press.php (follow "Statistics" hyperlink) (last visited July 9, 2010); MySpace Fact Sheet, http://www.myspace.com/pressroom?url=/fact+sheet/ (last visited July 9, 2010). Twitter, the microblogging site, has also made a startling impression on social media—it will soon post its 20 billionth tweet, only four years after its inception. GigaTweet, *Counting the Number of Tweets*, http://popacular.com/gigatweet/ (last visited July 9, 2010).

Importantly for litigators, evidence suggests that the rapid rise of social media sites "is changing the way people spend their time online and has ramifications for how people behave, share, and interact within their normal daily lives." Nielsen, *Global Faces and Networked Places: A Nielsen Report on Social Networking's New Global Footprint* 1 (Mar. 2009), available at http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/nielsen_globalfaces_mar09.pdf. Consequently, in preparing for trial, including voir dire, litigators should expand their searches to include social media sites,

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the places where people are posting, replying, and communicating, such as Facebook and Twitter.

Social Networking Sites: An Overview

Currently Facebook, MySpace and Twitter are the three most widely used social media sites in the United States. However, there are numerous ways in which a tech-savvy lawyer can find information about potential jurors.

Facebook

Facebook now boasts more than 400 million active users, and it estimates that people post over 60 million status updates each day and share over five billion pieces of content—web links, news stories, blog posts, notes, and photos—each week. Facebook Press Room, http://www.facebook.com/press.php (follow "Statistics" hyperlink) (last visited July 9, 2010) (last visited July 9, 2010). Facebook also estimates that users spend on average 55 minutes per day on Facebook. Moreover, a recent article claims that people spend more time per month on Facebook than any other Internet site. Adam Ostrow, *People Spend 3x More Time on Facebook Than Google*, Mashable: The Social Media Guide, http://mashable.com/2009/09/17/facebook-google-time-spent/. Finally, more than 100 million active users access Facebook on their mobile devices. This exorbitant usage demonstrates the veritable treasure trove of information available about potential jurors, witnesses, parties, and even opposing counsel.

Facebook enables people to connect and interact with other people by becoming "friends" online. It allows users to organize and connect in "networks" formed around any number of different common factors, such as city, school, workplace, and region. Users each have their own "profile" that they can update by making posts on their "wall," adding pictures, and posting links. Users can also comment on other users' profiles and postings. This information, depending on privacy settings, is generally only available to an individual user's Facebook friends. However, some users allow access to their profile, or parts of their profile, to anyone in the same network.

Facebook also allows users to become "fans" of various things, including businesses, nonprofits, sports teams, people, television shows, and products. Under Facebook's new privacy settings, even if a person has marked his or her profile as private, generally his or her "fan" pages are visible, along with his or her profile picture and a select list of Facebook friends. Consequently, even if a potential juror has privacy settings that limit access to his or her profile to his or her online friends, the list of his or her "fan" pages can provide a practitioner with much valuable information about that person's interests, views, and values.

MySpace

Currently, MySpace boasts more than 70 million active users in the United States alone. MySpace Fact Sheet, available at http://www.myspace.com/pressroom?url=/fact+sheet/ (last visited July 9, 2010). MySpace defines itself as "a technology company connecting people through personal expression, content, and culture. MySpace empowers its global community to experience the Internet through a social lens by integrating personal profiles, photos, videos, mobile, games, and the world's largest music community." *Id.* Similar to Facebook, MySpace users can connect and organize in a variety of different groups, post bulletins on their "bulletin board" for their MySpace friends to see, and post comments on their friends' bulletin boards.

The main difference between Facebook and MySpace is user demographics. MySpace tends to serve a young age group, generally teenagers, while statistics indicate that Facebook has an older and more professional customer base. In addition, more MySpace users employ "screen names," making them harder to track than on Facebook.

Twitter

Twitter is a "micro-blogging" site that allows users to send and receive updates known as "tweets." Tweets are limited to 140-character-long posts that are displayed on a user's page and delivered to that user's subscribers. A user may restrict access to their tweets to their circle of friends, or by default, allow anybody access to them. Twitter has gained general acceptance as a method of self-promotion. This type of self-promotion can be useful for litigators in garnering information about a juror or potential juror's bias, opinions, and values.

Twitter was started in 2006, and while it is currently third in size by user base—behind Facebook and MySpace—it is the fastest growing of the three social networks. Michelle McGiboney, *Twitter's Tweet Smell of Success*, Nielsen Wire, Mar. 18, 2009, http://blog.nielsen.com/nielsenwire/online_mobile/twitters-tweet-smell-of-success/. Indeed, over 40 million tweets are sent each day. GigaTweet, available at http://popacular.com/gigatweet/analytics.php (last visited July 9, 2010).

This type of self-promotion can be useful for litigators in garnering information about a juror or potential juror's bias, opinions, and values.

Twitter's purpose, in contrast to Facebook and MySpace, is to enable users to follow their interests, from politics and religion, to sports and knitting. According to Twitter, it "keeps you informed with what matters most to you today and helps you discovery what might matter to you most tomorrow. The timely bits of information that spread through Twitter can help you make better choices and decisions and, should you so desire, creates a platform for you to influence what is being talked about around the world." About Twitter, available at http://twitter.com/about (last visited July 9, 2010).

Other Sources of Juror Information on the Web

Potential jurors can have a significant Internet presence without ever having had a social networking page. Information about potential jurors can be found in a near-limitless number of places. Jurors post opinions online via blog postings, comments on newspaper articles or other people's blogs, or in letters to the

editor. Practitioners with limited time to research potential jurors should, in addition to checking Facebook, MySpace, and Twitter, conduct Internet searches in (1) Google, using the potential juror's name and hometown or business or occupation; (2) Google News, which will enable a user to find out if a potential juror has been the subject of a news story; (3) local news sites, which may have information that Google News did not pick up; (4) the business or employer's website where a potential juror is employed; (5) Wink.com, which is a catch-all search engine for blogs, websites, photo-sharing sites, and other social network profiles; (6) Zoominfo.com, which is a business information search engine for announcements and business information; (7) Blogsearch.google.com, for more specific blogging information; (8) Yoname.com, which can reveal if a potential juror uses any other social networking sites; and (9) "general" or "people" searches in common photo-sharing sites, such as YouTube, Shutterfly, and Flickr. Christopher B. Hopkins, *Internet Social Networking Sites for Lawyers*, Trial Advocate Quarterly, Spring 2009. If voir dire in a case lasts several days, or if it is necessary to continue juror investigation during a trial, a litigator can also search arrests and lawsuits on the county sheriff's office and the county clerk's office websites, workers' compensation claims, political contributions, and consumer complaints. *Id.*

More than one-third of adults on social networks still allow anyone to see their profile.

These sites can reveal important information about a potential juror's background and potential prejudices. Archived news articles, for example, could show that a potential juror had been in an auto accident similar to the one at issue in a case, filed a consumer complaint about a similar product, or even that the potential juror won a sizable amount in a recent lottery. There is a significant amount of information in cyberspace for practitioners to use, the scope of which is only limited by what is sought and how much time someone has to find it. Practitioners should conduct a cost-benefit analysis before conducting some of the more in-depth searches.

Social Media and Voir Dire

Social media sites provide reservoirs of information and powerful tools from which a practitioner may glean a general understanding of a potential juror. The wealth of information online, from Facebook posts to letters to the editor, produces a detailed picture of how an individual votes, spends money, and sounds off on controversial issues. While most users restrict access to their profiles and pages, more than one-third of adults on social networks still allow anyone to see their profile. Amanda Lenhart, *Pew Internet Project Data Memo* 3, Pew Internet & American Life Project (Jan. 14, 2009), available at http://www.pewinternet.org/Reports/2009/Adults-and-Social-Network-Websites.aspx (follow "Read Full Report" hyperlink).

Moreover, with social networks jockeying to make money, either by selling or allowing access to vital marketing information, more information is becoming available as sites change their privacy settings. For example, after Facebook recently altered its privacy settings, users often inadvertently shared more information than they realized, such as photos, network memberships, and their "fan" pages.

A potential juror's willingness to share his or her thoughts and activities with the world can greatly benefit an attorney during voir dire. The purpose of allowing peremptory challenges is to remove jurors that are potentially unfavorably disposed to a client's case or arguments. Social networking sites provide attorneys with additional avenues to find this information, as well as to supplement or verify information provided by a juror on a jury questionnaire or by the juror during voir dire.

For example, during voir dire for a case involving patent rights, a jury consultant discovered that a 74-year-old potential juror had a similar experience in her business as the one that formed the basis of the plaintiff's complaint—someone used her designs without permission. Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, Los Angeles Times, Sept. 29, 2008, available at http://articles.latimes.com/2008/sep/29/nation/na-jury29 (last visited July 9, 2010). Having a juror who could sympathize with the plaintiff's case would certainly have boded well for the plaintiff. However, because the information was also available to the defense, the juror was struck from the jury pool. Had the defense not been careful to do due diligence and independently research the potential jurors, it might not have discovered the woman's likely prejudice, which could have yielded unfavorable results.

Another case, which involved the infamous "dirty-bomber," Jose Padilla, further demonstrates the need to conduct independent investigations of potential jurors. In that case, a jury consultant discovered that despite a 100-question survey sent to the potential jury pool, the questionnaire failed to reveal that one potential juror had resigned from public office and was under investigation. Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. Times, Sept. 29, 2008, available at http://articles.latimes.com/2008/sep/29/nation/na-jury29. Rather, this information was only discovered after an independent investigation of each potential juror.

As discussed above, attorneys can find a person's Internet presence by searching Google or individual social networking sites with combinations of relevant information: name, residence, phone number, email address, or occupation. It is important for practitioners to remember that users often use nicknames or screen names, particularly when commenting on articles and blogs, so unless a practitioner asks a the jury panel for this information, he or she might not be able to access potentially relevant information. Of course, an attorney must weigh whether such a request would "turn off" potential jurors because although understandable, jurors may perceive that question as an invasion of privacy.

Consequently, in voir dire an attorney should carefully consider whether to ask potential jurors about their online presence and, in particular, if they have anything

that someone can read online, including blogs or a website. It may be useful to ask a question to uncover whether potential jurors have online presences in the juror questionnaire, if one is used. The benefit of such a question was demonstrated in a Wisconsin case in which the judge asked potential jurors if they blogged. *See A Trial Lawyer's Guide to Social Networking Sites, Part I*, Deliberations: Law, News, and Thoughts on Juries and Jury Trials, available at http://jurylaw.typepad.com/deliberations/2007/10/a-trial-lawyers.html (last visited July 9, 2010). One of the jurors revealed that he was, in fact, a blogger. This information led attorneys not only to the potential juror's "edgy" blog, but also to his Twitter posts from the courtroom. The juror actually posted a tweet, stating, "Still sitting for jury duty crap. Hating it immensely. Plz don't pick me. Plz don't pick me." *Id.* This information would have been difficult to discover had it not been addressed in the juror questionnaire or directly asked during voir dire. As a practical matter, an attorney is best served if the question comes from a neutral vantage point, such as a judge or a juror questionnaire, rather than directly from the attorney during voir dire questioning. A potential juror may easily become suspicious or untrusting of an attorney if the juror feels that the attorney has asked "too many" invasive, personal questions.

A similar incident occurred in another case in which the plaintiff's counsel discovered that a potential juror had updated his Facebook status to "sitting in hell 'aka jury duty.'" Kimball Perry, *Juror Booted for Facebook Comment*," Dayton Daily News, Feb. 1, 2009, at A6, available at http://content.hcpro.com/pdf/content/228698.pdf. However, the information was not uncovered from the person's answers on the juror questionnaire; rather, the plaintiff's paralegal only discovered the post while conducting informal Internet discovery on the potential jurors. The information was recovered despite the juror's privacy settings because the juror belonged to the Cincinnati, Ohio, network on Facebook. He had his page set up so that every one of the 238,000 people that belonged to the network could view his page and, consequently, his postings. *Id.* The plaintiff's counsel requested that the juror be removed from the pool, and the judge granted the request. *Id.*

In addition to discovering information about potential jurors, an attorney can use social media sites to check the veracity of a potential juror's answers to voir dire questions. For example, in one case, a potential juror denied knowing a fellow jury candidate, but his Facebook page revealed that the two not only knew each other, but they were in fact cousins. *See* Posting of Bryan Van Veck, Attorneys Using Social Networking Sites for Jury Selection, to California Labor and Employment Defense Blog (Sept. 29, 2008), http://www.vtzlawblog.com/2008/09/articles/employment-policies/attorneys-using-social-networking-sites-for-jury-selection/ (last visited July 9, 2010). The discovery got the juror dismissed for cause. *Id.* In another instance, Internet research revealed that a juror denied having a criminal record despite having two prior theft charges. *Dixon Jurors Said to Still Chat on Facebook*, Baltimore Sun, Jan. 5, 2010, available at http://articles.baltimoresun.com/2010-01-05/news/bal-md.facebook05jan05_1_five-jurors-facebook-social-networking-site (last visited July 9, 2010). Finally, in another case, social media research provided valuable information about a potential juror's affiliations. In that case, the potential juror, in responding to the juror questionnaire, indicated that he had no affiliations; however, Internet research revealed that he in fact belonged to several fringe, right-wing, conservative groups. Julie Kay, *Social Networking Sites Help Vet Jurors*, Nat'l L. J., Aug. 18, 2008. These compelling examples demonstrate that informal discovery through social media sites can yield valuable information on the veracity of a potential juror's responses to questions during voir dire and can provide valid reasons to have a juror dismissed for cause.

Frankly, the difficulty with pursuing this type of informal discovery is that often attorneys have limited time frames within which to proceed. Some states, for example, do not allow access to potential juror lists until the day that voir dire begins, while others, particularly in federal court, will provide lists well in advance. The strategy chosen for researching potential jurors will greatly hinge on how much in advance an attorney receives potential juror information. However, even if an attorney does not receive the names of potential jurors until shortly before voir dire begins, prudence dictates that an attorney do at least *some* investigating.

One method to obtain "real time" information during voir dire is to bring an Internet-enabled phone or computer into the courtroom gallery, if the trial judge allows it, which is not always the case. Reception permitting, a practitioner can ask the court for two copies of the juror list and have a member of the trial team, preferably well out of the sight of the potential jurors, run a preliminary search on each potential juror and record the relevant information next to each juror's name on the list. If the researcher can discreetly convey the information to the voir dire questioner, the questioner can formulate specific questions to ask prospective jurors to aid in juror selection. However, a researcher can have difficulty accessing the Internet, particularly in heavily shielded federal courts, due to weak signals.

In voir dire an attorney should carefully consider whether to ask potential jurors about their online presence.

Attorneys can find a wealth of information about potential jurors online, and since the time that people spend on social media sites continues to grow rapidly, the available information will only continue to grow. Certainly traditional sources of information and, at times, the proverbial "gut feeling" and simple intuition, will continue to govern voir dire. However, clearly, a tech-savvy trial team can uncover extremely useful information online, which will facilitate a careful and thoughtful assessment of a potential juror's background and experiences.

Using Social Media After Voir Dire

Social media can also prove beneficial in presenting and crafting a case. Consequently, just because a jury has been selected does not necessarily mean that

Internet research is finished. Attorneys can make use of social media to tailor their opening statements and closing arguments. For example, as discussed above, a juror's "fan" lists on his or her Facebook page can provide valuable information about that person's values and opinions. If a juror's Facebook page reveals that the person is a "fan" of a particular environmental group or charity, or that the person is an avid animal lover, when appropriate, a savvy lawyer might be able to use analogies or anecdotes to gain sympathy for a client. *See* Julie Kay, *Social Networking Sites Help Vet Jurors*, Nat'l L. J., Aug. 18, 2008.

Attorneys should exercise caution because jurors may feel that their privacy has been invaded and become distrustful of not only an attorney, but also the legal system itself.

In addition, a recent case demonstrates why an attorney needs to monitor a jury's social media profiles even during a trial. In Maryland, five jurors charged with deciding the case of the Baltimore mayor accused of misdemeanor embezzlement became Facebook friends during the trial. *Dixon Jurors Said to Still Chat on Facebook*, Baltimore Sun, Jan. 5, 2010. After the mayor's conviction, the mayor moved for a new trial based on evidence that the jurors had continued to communicate on Facebook, even though the judge specifically asked them not to talk about the case. *Id.* The judge requested that the five jurors hand over printouts of all their Facebook communications during the course of the trial and asked them not to discuss the trial issues before the hearing. However, at least three of the five communicated via Facebook with apparent sarcasm about how they did not "know" each other even after the request from the judge prohibiting communication. *Id.* In another surprising case, an undecided juror posted a poll on her Facebook "wall" with details about a case, stating, "I don't know which way to go, so I'm holding a poll." Daniel A. Ross, *Juror Abuse of the Internet*, N.Y.L.J., Sept. 8, 2009, available at http://www.stroock.com/SiteFiles/Pub828.pdf. After the attorney made the discovery, the judge dismissed the juror and allowed the case to proceed. *Id.* The attorneys in that case would not have known of this egregious misconduct had they not continued to monitor the juror's profile during the trial.

Attorneys also need to be mindful that jurors, especially tech-savvy millennial or Generation Y members, will very likely use social media to research the trial lawyers, clients, and witnesses. It is a good idea for lawyers to know what information exists in the public domain about the various trial participants to anticipate and manage juror perceptions to the extent possible.

Continual Internet research, therefore, is not only valuable for constructing and presenting a persuasive case, it can also help uncover juror misconduct and provide an attorney with cause in the rare instance that misconduct warrants a mistrial or a new trial.

Okay, But Is It Ethical?

While most people would agree that such extensive "background" checks on potential jurors are arguably invasive, the general consensus is that the practice is not unethical. Conducting background checks on potential jurors has been generally accepted practice as long as an attorney or trial team do not try to obtain information through deceit. In general, commentators dismiss concerns for privacy, arguing that on social media sites users control their own content and privacy settings—namely, "if you post something on the Internet for all the world to see, you shouldn't be surprised if all the world sees it." Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. Times, Sept. 29, 2008, available at http://articles.latimes.com/2008/sep/29/nation/na-jury29.

Courts appear to share this view. For example, the Sixth Circuit has stated that users of social networking sites "logically lack a legitimate expectation of privacy in the materials intended for publication or public posting." *Guest v. Leis*, 255 F.3d 325, 332 (6th Cir. 2001); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 438 n.3 (Md. 2009) ("The act of posting information on a social networking site, without the poster limiting access to that information, makes whatever is posted available to the world at large."); *Yath v. Fairview Clinics*, 767 N.W.2d 34, 43–44 (Minn. Ct. App. 2009) (deeming information posted on social networking websites public information).

Although relevant legal opinion on this issue is scarce at present, practitioners are encouraged to consider their state's ethics rules and, in particular, ABA Model Rules of Professional Conduct 3.5 and 8.4. The Model Rules instruct attorneys that it is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Model Rules of Prof'l Conduct R. 8.4. The Model Rules also instruct that "a lawyer shall not seek to influence a judge, juror, prospective juror or other official by means prohibited by law." Model Rules of Prof'l Conduct R. 3.5. Attorneys using social media to gather information on jurors or potential jurors should obviously avoid attempts to "friend" jurors and prospective jurors and very carefully avoid anything potentially construable as an improper, prohibited contact or an attempt to influence a juror. *See*, *e.g.*, *People v. Fernino*, 851 N.Y.S.2d 339 (N.Y. City Crim. Ct. 2008) (finding that a "friend" request on MySpace constituted contact).

In one of the only ethics opinions regarding social media usage in jury selection, the Philadelphia Bar Association issued an Advisory Opinion on informal Internet research in response to an attorney's plan to access a witness's MySpace and Facebook profiles. Philadelphia Bar Ass'n Prof'l Guidance Comm. Op. 2009-02 (March 2009). The attorney planned to have a third party, unknown to the witness, become the witness' "friend" on the sites. The third party would not lie during the process, but would not reveal the attorney's intentions. If the witness gave access to the third party, the third party would pass along information to the attorney. *Id.*

The advisory opinion relied on ethics rules to state that the attorney's plan was indeed impermissible. Even though the

interaction would have been solely between a third party and a nonparty witness, the opinion deemed it unethical because it attempted to acquire information through deceptive means. The opinion found that the proposed action was dissimilar to the ethical practice of videotaping the public conduct of a personal injury plaintiff because in that situation the videographer was not required to enter a private area to make the video. The opinion, therefore, found that the user's privacy settings, which limited access to those persons who were the witness' "friends," implicitly created a private space that an attorney could not access through deceptive means. Interestingly, the opinion noted that if the attorney directly made the "friend" request, and the witness granted it, accessing the profiles would be permissible. Philadelphia Bar Ass'n Prof'l Guidance Comm. Op. 2009-02 (March 2009).

Attorneys engaged in Internet research of jurors and potential jurors should, therefore, be duly mindful of their ethical obligations. In addition, overtly using information gathered on social media sites can be precarious. Attorneys should exercise caution because jurors may feel that their privacy has been invaded and become distrustful of not only an attorney, but also the legal system itself.

Conclusion

Despite widely divergent viewpoints on the usefulness of social media in litigation, from "everything in war is fair game," to "most of the information is noise, and useless noise at that," its use as a form of informal discovery is inexorably gaining a foothold in litigation strategy. *See* Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. Times, Sept. 29, 2008, available at http://articles.latimes.com/2008/sep/29/nation/na-jury29. While in truth, in most cases attorneys will not find that "smoking gun," the rise of social media increases the likelihood of finding that valuable information on at least a few prospective jurors.

Self-generated social media content is uniquely rich. It can provide a powerful lens through which a practitioner may view a juror or potential juror. What juror's opinions are *not* formed, at least in part, by his or her social background, education, and experience? Because this information can be easily gleaned from social networking and related sites, litigators would be remiss in failing to at least consider using social media as a litigation tool, in the right context. As some suggest, with the wealth of information available to practitioners and their clients, "Anyone who does not make use of [Internet searches] is bordering on malpractice." *Id.*

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2009-02
(March 2009)

The inquirer deposed an 18 year old woman (the "witness"). The witness is not a party to the litigation, nor is she represented. Her testimony is helpful to the party adverse to the inquirer's client.

During the course of the deposition, the witness revealed that she has "Facebook" and "Myspace" accounts. Having such accounts permits a user like the witness to create personal "pages" on which he or she posts information on any topic, sometimes including highly personal information. Access to the pages of the user is limited to persons who obtain the user's permission, which permission is obtained after the user is approached on line by the person seeking access. The user can grant access to his or her page with almost no information about the person seeking access, or can ask for detailed information about the person seeking access before deciding whether to allow access.

The inquirer believes that the pages maintained by the witness may 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. The inquirer did not ask the witness to reveal the contents of her pages, either by permitting access to them on line or otherwise. He has, however, either himself or through agents, visited Facebook and Myspace and attempted to access both accounts. When that was done, it was found that access to the pages can be obtained only by the witness's permission, as discussed in detail above.

The inquirer states that based on what he saw in trying to access the pages, he has determined that the witness tends to allow access to anyone who asks (although it is not clear how he could know that), and states that he does not know if the witness would allow access to him if he asked her directly to do so.

The inquirer proposes 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 third person would state only truthful information, for example, his or her true 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. If the witness allows access, the third person would then provide the information posted on the pages to the inquirer who would evaluate it for possible use in the litigation.

The inquirer asks the Committee's view as to whether the proposed course of conduct is permissible under the Rules of Professional Conduct, and whether he may use the information obtained from the pages if access is allowed.

Several Pennsylvania Rules of Professional Conduct (the "Rules") are implicated in this inquiry.

Rule 5.3. **Responsibilities Regarding Nonlawyer Assistants** provides in part that,

With respect to a nonlawyer employed or retained by or associated with a lawyer:…

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; …

Since the proposed course of conduct involves a third person, the first issue that must be addressed is the degree to which the lawyer is responsible under the Rules for the conduct of that third person. The fact that the actual interaction with the witness would be undertaken by a third party who, the committee assumes, is not a lawyer does not insulate the inquirer from ethical responsibility for the conduct.

The Committee cannot say that the lawyer is literally "ordering" the conduct that would be done by the third person. That might depend on whether the inquirer's relationship with the third person is such that he might require such conduct. But the inquirer plainly is procuring the conduct, and, if it were undertaken, would be ratifying it with full knowledge of its propriety or lack thereof, as evidenced by the fact that he wisely is seeking guidance from this Committee. Therefore, he is responsible for the conduct under the Rules even if he is not himself engaging in the actual conduct that may violate a rule. (Of course, if the third party is also a lawyer in the inquirer's firm, then that lawyer's conduct would itself be subject to the Rules, and the inquirer would also be responsible for the third party's conduct under Rule 5.1, dealing with Responsibilities of Partners, Managers and Supervisory Lawyers.)

Rule 8.4. **Misconduct** provides in part that,

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; …

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; …

Turning to the ethical substance of the inquiry, the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits 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. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

The fact that the inquirer asserts he does not know if the witness would permit access to him if he simply asked in forthright fashion does not remove the deception. The inquirer could test that by simply asking the witness forthrightly for access. That would not be deceptive and would of course be permissible. Plainly, the reason for not doing so is that the inquirer is not sure that she will allow access and wants to adopt an approach that will deal with her possible refusal by deceiving her from the outset. In short, in the Committee's view, the possibility that the deception might not be necessary to obtain access does not excuse it.

The possibility or even the certainty that the witness would permit access to her pages to a person not associated with the inquirer who provided no more identifying information than would be provided by the third person associated with the lawyer does not change the Committee's conclusion. Even if, by allowing virtually all would-be "friends" onto her FaceBook and MySpace pages, the witness is exposing herself to risks like that in this case, excusing the deceit on that basis would be improper. 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.

The inquirer has suggested that his proposed conduct is similar to the common -- and ethical -- practice of videotaping the public conduct of a plaintiff in a personal injury case to show that he or she is capable of performing physical acts he claims his injury prevents. The Committee disagrees. In the video situation, the videographer simply follows the subject and films him as he presents himself to the public. The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker.

Rule 4.1. **Truthfulness in Statements to Others** provides in part that,

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; …

The Committee believes that in addition to violating Rule 8.4c, the proposed conduct constitutes the making of a false statement of material fact to the witness and therefore violates Rule 4.1 as well.

Furthermore, since the violative conduct would be done through the acts of another third party, this would also be a violation of Rule 8.4a. [1]

The Committee is aware that there is controversy regarding the ethical propriety of a lawyer engaging in certain kinds of investigative conduct that might be thought to be deceitful. For example, the New York Lawyers' Association Committee on Professional Ethics, in its Formal Opinion No. 737 (May, 2007), approved the use of deception, but limited such use to investigation of civil right or intellectual property right violations where the lawyer believes a violation is taking place or is imminent, other means are not available to obtain evidence and rights of third parties are not violated.

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[1] The Committee also considered the possibility that the proposed conduct would violate Rule 4.3, **Dealing with Unrepresented person,** which provides in part that

> (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested . . .
>
> (c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter the lawyer should make reasonable efforts to correct the misunderstanding.

Since the witness here is unrepresented this rule addresses the interactions between her and the inquirer. However, the Committee does not believe that this rule is implicated by this proposed course of conduct. Rule 4.3 was intended to deal with situations where the unrepresented person with whom a lawyer is dealing knows he or she is dealing with a lawyer, but is under a misapprehension as to the lawyer's role or lack of disinterestedness. In such settings, the rule obligates the lawyer to insure that unrepresented parties are not misled on those matters. One might argue that the proposed course here would violate this rule because it is designed to induce the unrepresented person to think that the third person with whom she was dealing is not a lawyer at all (or lawyer's representative), let alone the lawyer's role or his lack of disinterestedness. However, the Committee believes that the predominating issue here is the deception discussed above, and that that issue is properly addressed under Rule 8.4.

Elsewhere, some states have seemingly endorsed the absolute reach of Rule 8.4. In *People v. Pautler*, 47 P. 3d 1175 (Colo. 2002), for example, the Colorado Supreme Court held that no deception whatever is allowed, saying,

"Even noble motive does not warrant departure from the rules of Professional Conduct. . . We reaffirm that members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive. Purposeful deception by an attorney licensed in our state is intolerable, even when undertaken as a part of attempting to secure the surrender of a murder suspect. . . . Until a sufficiently compelling scenario presents itself and convinces us our interpretation of Colo. RPC 8.4(c) is too rigid, we stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so. " The opinion can be found at http://www.cobar.org/opinions/opinion.cfm?opinionid=627&courtid=2

The Oregon Supreme Court in *In Re Gatti*, 8 P3d 966 (Ore 2000), ruled that no deception at all is permissible, by a private or a government lawyer, even rejecting proposed carve-outs for government or civil rights investigations, stating,

"The Bar contends that whether there is or ought to be a prosecutorial or some other exception to the disciplinary rules is not an issue in this case. Technically, the Bar is correct. However, the issue lies at the heart of this case, and to ignore it here would be to leave unresolved a matter that is vexing to the Bar, government lawyers, and lawyers in the private practice of law. A clear answer from this court regarding exceptions to the disciplinary rules is in order.

As members of the Bar ourselves -- some of whom have prior experience as government lawyers and some of whom have prior experience in private practice -- this court is aware that there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of the law, are useful means for uncovering unlawful and unfair practices, and that lawyers in both the public and private sectors have relied on such tactics. However, . . . [f]aithful adherence to the wording of [the analog of Pennsylvania's Rule 8.4], and this court's case law does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements. In our view, this court should not create an exception to the rules by judicial decree." The opinion can be found at http://www.publications.ojd.state.or.us/S45801.htm

Following the *Gatti* ruling, Oregon's Rule 8.4 was changed. It now provides:

"(a) It is professional misconduct for a lawyer to: . . . (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law.

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. 'Covert activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. 'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future. "

Iowa has retained the old Rule 8.4, but adopted a comment interpreting the Rule to permit the kind of exception allowed by Oregon.

The Committee also refers the reader to two law review articles collecting other authorities on the issue. See *Deception in Undercover Investigations: Conduct Based v. Status Based Ethical Analysis*, 32 Seattle Univ. L. Rev.123 (2008), and *Ethical Responsibilities of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation under Model Rules of Professional Conduct*, 8 Georgetown Journal of Legal Ethics 791 (Summer 1995).

Finally, the inquirer also requested the Committee's opinion as to whether or not, if he obtained the information in the manner described, he could use it in the litigation. The Committee believes that issue is beyond the scope of its charge. If the inquirer disregards the views of the Committee and obtains the information, or if he obtains it in any other fashion, the question of whether or not the evidence would be usable either by him or by subsequent counsel in the case is a matter of substantive and evidentiary law to be addressed by the court.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2010-2

OBTAINING EVIDENCE FROM SOCIAL NETWORKING WEBSITES

TOPIC: Lawyers obtaining information from social networking websites.

DIGEST: A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.

RULES: 4.1(a), 5.3(c)(1), 8.4(a) & (c)

QUESTION: May a lawyer, either directly or through an agent, contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation?

OPINION

Lawyers increasingly have turned to social networking sites, such as Facebook, Twitter and YouTube, as potential sources of evidence for use in litigation.[1] In light of the information regularly found on these sites, it is not difficult to envision a matrimonial matter in which allegations of infidelity may be substantiated in whole or part by postings on a Facebook wall.[2] Nor is it hard to imagine a copyright infringement case that turns largely on the postings of certain allegedly pirated videos on YouTube. The potential availability of helpful evidence on these internet-based sources makes them an attractive new weapon in a lawyer's arsenal of formal and informal discovery devices.[3] The prevalence of these and other social networking websites, and the potential

[1] Social networks are internet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to "friends" – those who have specifically sent a computerized request to view their profile page which the user has accepted. Examples of currently popular social networks include Facebook, Twitter, MySpace and LinkedIn.

[2] See, e.g., Stephanie Chen, Divorce attorneys catching cheaters on Facebook, June 1, 2010, http://www.cnn.com/2010/TECH/social.media/06/01/facebook.divorce.lawyers/index.html?hpt=C2.

[3] See, e.g., Bass ex rel. Bass v. Miss Porter's School, No. 3:08cv01807, 2009 WL 3724968, at *1-2 (D. Conn. Oct. 27, 2009).

benefits of accessing them to obtain evidence, present ethical challenges for attorneys navigating these virtual worlds.

In this opinion, we address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively "deceptive" behavior to "friend" potential witnesses. We do so in light of, among other things, the Court of Appeals' oft-cited policy in favor of informal discovery. See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493, 497 (1990) ("[T]he Appellate Division's blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."); Muriel, Siebert & Co. v. Intuit Inc., 8 N.Y.3d 506, 511, 836 N.Y.S.2d 527, 530 (2007) ("the importance of informal discovery underlies our holding here"). It would be inconsistent with this policy to flatly prohibit lawyers from engaging in any and all contact with users of social networking sites. Consistent with the policy, 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.[4] 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. See, e.g., id., 8 N.Y.3d at 512, 836 N.Y.S.2d at 530 ("Counsel must still conform to all applicable ethical standards when conducting such [ex parte] interviews [with opposing party's former employee]." (citations omitted)).

The potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web. In that connection, in seeking access to an individual's personal information, it may be easier to deceive an individual in the virtual world than in the real world. For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth, and review the witness's personal diary, the witness almost certainly would slam the door shut and perhaps even call the police.

In contrast, in the "virtual" world, the same stranger is more likely to be able to gain admission to an individual's personal webpage and have unfettered access to most, if not all, of the foregoing information. Using publicly-available information, an attorney or her investigator could easily create a false Facebook profile listing schools, hobbies,

[4] The communications of a lawyer and her agents with parties known to be represented by counsel are governed by Rule 4.2, which prohibits such communications unless the prior consent of the party's lawyer is obtained or the conduct is authorized by law. N.Y. Prof'l Conduct R. 4.2. The term "party" is generally interpreted broadly to include "represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties." N.Y. State 735 (2001). Cf. N.Y. State 843 (2010)(lawyers may access public pages of social networking websites maintained by any person, including represented parties).

interests, or other background information likely to be of interest to a targeted witness. After creating the profile, the attorney or investigator could use it to make a "friend request" falsely portraying the attorney or investigator as the witness's long lost classmate, prospective employer, or friend of a friend. Many casual social network users might accept such a "friend request" or even one less tailored to the background and interests of the witness. Similarly, an investigator could e-mail a YouTube account holder, falsely touting a recent digital posting of potential interest as a hook to ask to subscribe to the account holder's "channel" and view all of her digital postings. By making the "friend request" or a request for access to a YouTube "channel," the investigator could obtain instant access to everything the user has posted and will post in the future. In each of these instances, the "virtual" inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions. The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to "open the door" to strangers, social networking users often do just that with a click of the mouse.

Under the New York Rules of Professional Conduct (the "Rules"), an attorney and those in her employ are prohibited from engaging in this type of conduct. The applicable restrictions are found in Rules 4.1 and 8.4(c). The latter provides that "[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." N.Y. Prof'l Conduct R. 8.4(c) (2010). And Rule 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Id. 4.1. We believe these Rules are violated whenever an attorney "friends" an individual under false pretenses to obtain evidence from a social networking website.

For purposes of this analysis, it does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse. As provided by Rule 8.4(a), "[a] lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Id. 8.4(a). Consequently, absent some exception to the Rules, a lawyer's investigator or other agent also may not use deception to obtain information from the user of a social networking website. See id. Rule 5.3(b)(1) ("A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if . . . the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it . . . .").

We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. See N.Y. County 737 (2007) (requiring, for use of dissemblance, that "the evidence sought is not reasonably and readily obtainable through other lawful means"); see also ABCNY Formal Op. 2003-02 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions -- a question we do not address here -- they are, at least in

most situations, inapplicable to social networking websites. Because non-deceptive means of communication ordinarily are available to obtain information on a social networking page -- through ordinary discovery of the targeted individual or of the social networking sites themselves -- trickery cannot be justified as a necessary last resort.[5] For this reason we conclude that lawyers may not use or cause others to use deception in this context.

Rather than engage in "trickery," lawyers can -- and should -- seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful "friending" of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line.[6]

Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.

September 2010

[5] Although a question of law beyond the scope of our reach, the Stored Communications Act, 18 U.S.C. § 2701(a)(1) et seq. and the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq., among others, raise questions as to whether certain information is discoverable directly from third-party service providers such as Facebook. Counsel, of course, must ensure that her contemplated discovery comports with applicable law.

[6] While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an ethical line when she falsely identifies herself in a "friend request". See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 376, 559 N.Y.S.2d 493, 499 (1990) (permitting ex parte communications with certain employees); Muriel Siebert, 8 N.Y.3d at 511, 836 N.Y.S.2d at 530 ("[T]he importance of informal discovery underlie[s] our holding here that, so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party's former employee.").

Opinion 2014-5

May 2014

Summary: A lawyer for a party may "friend" an unrepresented adversary in order to obtain information helpful to her representation from the adversary's nonpublic website only when the lawyer has been able to send a message that discloses his or her identity as the party's lawyer.

Facts: A lawyer inquires whether she may directly request access to "non-public information" on a potential adverse party's social networking site (Facebook) to attempt to ascertain information relevant to contemplated litigation when the opposing party (X) is at present unrepresented.

Discussion: We begin our analysis with the reported fact that X is unrepresented. Rule 4.3 provides that "**(a)** In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." We will assume that as of the moment the inquirer does not know that X has counsel. Rule 4.3 states that a lawyer shall makes a reasonable effort to correct any misunderstanding of an unrepresented party with whom the lawyer is dealing concerning the lawyer's role. This requirement seems derived from the more general proposition contained in Rule 4.1(a) that "[i]n the course of representing a client a lawyer shall not knowingly. . . " make a false statement of material fact or law to a third person." Rule 8.4(c) makes the same point even more broadly: "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . . .

In the Committee's view, it is not permissible for the lawyer who is seeking information about an unrepresented party to access the personal website of X and ask X to "friend"[1] her without disclosing that the requester is the lawyer for a potential plaintiff. In so doing, the lawyer would be engaging in deceit forbidden by Rules 4.1 and 8.4(c). See Philadelphia Bar Association Opinion 2009-2 and San Diego County Bar Association Legal Ethics Opinion 2011-2. Moreover, this is a situation where not only is X likely to misunderstand the lawyer's role but also one where the lawyer has enabled the misunderstanding. See New Hampshire Advisory Ethics Opinion 2012-13/05. We do not agree with the conclusion of the Oregon Ethics Committee in its Opinion No. 2013-189 that the burden should be on the unrepresented party to ask about the inquirer's purpose rather than on the lawyer to disclose her identity and/or purpose. We believe that it is permissible to "friend" X in this situation in order to access nonpublic information only when the lawyer has been able to send a message that discloses her identity as the plaintiff's lawyer. Facebook, LinkedIn and other social media sites allow the invitation to include a message. We also do not agree with the suggestion in Formal Opinion 2010-2 of the New York City Bar Association's Committee that the lawyer's identification message may be contained in a "profile" created on the lawyer's personal social media page. It is well known that "friending" requests are often granted quite casually, and viewing the invitee's profile is not necessarily a mandatory step in accepting a "friend" request. The lawyer's message must accompany the "friending" request in order to avoid the very real possibility that the recipient will be deceived. Although this communication medium is obviously different, the bottom line resembles a telephone call in which the lawyer does not adequately identify herself.

It is incumbent on the inquiring lawyer to keep in mind, however, that at some point she may learn that in fact X has come to be represented by counsel. At such point, the Rules change and any communication with X becomes subject to the prohibition contained in Rule 4.2. (As to a lawyer's "knowledge" of representation, see Rule 4.2, Comment 5.) Rule 4.2 provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless

the lawyer has the consent of the other lawyer or is authorized by law to do so." This Opinion does not address any issues relating to social media when the restrictions of Rule 4.2 are involved.

This Opinion addresses only the factual situation described herein and is not meant to advise with respect to other hypothetical situations involving access to social networking sites.

This advice is that of a committee without official government status.

This opinion was approved for publication by the Massachusetts Bar Association's House of Delegates on May 8, 2014.

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[1] For simplicity, we refer to Facebook/Instagram terminology, but the Committee's view applies equally to connecting on LinkedIn and other similar social media.

FORMAL OPINION NO 2013-189

Accessing Information about Third Parties through a Social Networking Website

Facts:

Lawyer wishes to investigate an opposing party, a witness, or a juror by accessing the person's social networking website. While viewing the publicly available information on the website, Lawyer learns that there is additional information that the person has kept from public view through privacy settings and that is available by submitting a request through the person's website.

Questions:

1. May Lawyer review a person's publicly available information on a social networking website?

2. May Lawyer, or an agent on behalf of Lawyer, request access to a person's nonpublic information?

3. May Lawyer, or an agent on behalf of Lawyer, use a computer username or other alias that does not identify Lawyer when requesting permission from the account holder to view nonpublic information?

Conclusions:

1. Yes.

2. Yes, qualified.

3. No, qualified.

Discussion:

1. *Lawyer may access publicly available information on a social networking website*.[1]

Oregon RPC 4.2 provides:

> In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:
>
> (a) the lawyer has the prior consent of a lawyer representing such other person;
>
> (b) the lawyer is authorized by law or by court order to do so; or
>
> (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Accessing the publicly available information on a person's social networking website is not a "communication" prohibited by Oregon RPC 4.2. OSB Formal Ethics Op No 2005-164 discusses the propriety of a lawyer accessing the public portions of an adversary's website and concludes that doing so is not "communicating" with the site owner within the meaning of Oregon RPC 4.2. The Opinion compared accessing a website to reading a magazine article or purchasing a book written by an adversary. The same analysis applies to publicly available information on a person's social networking web pages.[2]

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[1] Although Facebook, MySpace, and Twitter are current popular social networking websites, this opinion is meant to apply to any similar social networking websites.

[2] This analysis is not limited to adversaries in litigation or transactional matters; it applies to a lawyer who is accessing the publicly available information of any person. However, caution must be exercised with regard to jurors. Although a lawyer may review a juror's publicly available information on social networking websites, communication with jurors before, during, and after a proceeding is generally prohibited. Accordingly, a lawyer may not send a request to a juror to access nonpublic personal information on a social networking website, nor may a lawyer ask an agent do to do so. *See* Oregon RPC 3.5(b) (prohibiting *ex parte* communications with a juror during the proceeding unless authorized to do so by

2. *Lawyer may request access to nonpublic information if the person is not represented by counsel in that matter and no actual representation of disinterest is made by Lawyer*.

To access nonpublic information on a social networking website, a lawyer may need to make a specific request to the holder of the account.[3] Typically that is done by clicking a box on the public portion of a person's social networking website, which triggers an automated notification to the holder of the account asking whether he or she would like to accept the request. Absent actual knowledge that the person is represented by counsel, a direct request for access to the person's non-public personal information is permissible. OSB Formal Ethics Op No 2005-164.[4]

In doing so, however, Lawyer must be mindful of Oregon RPC 4.3, which regulates communications with unrepresented persons. Oregon RPC 4.3 provides, in pertinent part:

> In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. . . .

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law or court order); Oregon RPC 3.5(c) (prohibiting communication with a juror after discharge if (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress, or harassment); Oregon RPC 8.4(a)(4) (prohibiting conduct prejudicial to the administration of justice). *See, generally*, ABA/BNA *Lawyers' Manual on Professional Conduct* § 61:808 and cases cited therein.

[3] This is sometimes called "friending," although it may go by different names on different services, including "following" and "subscribing."

[4] See, for example, New York City Bar Formal Ethics Op No 2010-2, which concludes that a lawyer "can—and should—seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful 'friending' of unrepresented parties."

The purpose of the rule is to avoid the possibility that a nonlawyer will believe lawyers "carry special authority" and that a nonlawyer will be "inappropriately deferential" to someone else's lawyer. *Apple Corps Ltd. v. Int'l Collectors Soc.*, 15 F Supp2d 456 (DNJ 1998) (finding no violation of New Jersey RPC 4.3 by lawyers and lawyers' investigators posing as customers to monitor compliance with a consent order).[5] A simple request to access nonpublic information does not imply that Lawyer is "disinterested" in the pending legal matter. On the contrary, it suggests that Lawyer is interested in the person's social networking information, although for an unidentified purpose.

Similarly, Lawyer's request for access to nonpublic information does not in and of itself make a representation about the Lawyer's role. In the context of social networking websites, the holder of the account has full control over who views the information available on his or her pages. The holder of the account may allow access to his or her social network to the general public or may decide to place some, or all, of that information behind "privacy settings," which restrict who has access to that information. The account holder can accept or reject requests for access. Accordingly, the holder's failure to inquire further about the identity or purpose of unknown access requestors is not the equivalent of misunderstanding Lawyer's role in the matter.[6] By contrast, if the holder of the account asks for additional information to identify Lawyer, or if Lawyer has some other reason to believe that the person misunderstands

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[5] *See also* ABA Model RPC 4.3 cmt [1] ("An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client."). *Cf. In re Gatti*, 330 Or 517, 8 P3d 966 (2000), in which the court declined to find an "investigatory exception" and disciplined a lawyer who used false identities to investigate an alleged insurance scheme. Oregon RPC 8.4(b), discussed below, was adopted to address concerns about the *Gatti* decision.

[6] *Cf. Murphy v. Perger* [2007] O.J. No 5511, (S.C.J.) (Ontario, Canada) (requiring personal injury plaintiff to produce contents of Facebook pages, noting that "[t]he plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.")

Lawyer's role, Lawyer must provide the additional information or withdraw the request.

If Lawyer has actual knowledge that the holder of the account is represented by counsel on the subject of the matter, Oregon RPC 4.2 prohibits Lawyer from making the request except through the person's counsel or with the counsel's prior consent.[7] *See* OSB Formal Ethics Op No 2005-80 (rev 2016) (discussing the extent to which certain employees of organizations are deemed represented for purposes of Oregon RPC 4.2).

3. *Lawyer may not advise or supervise the use of deception in obtaining access to nonpublic information unless Oregon RPC 8.4(b) applies.*

Oregon RPC 8.4(a)(3) prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law."[8] *See also* Oregon RPC 4.1(a) (prohibiting a lawyer from knowingly making a false statement of material fact to a third person in the course of representing a client). Accordingly, Lawyer may not engage in subterfuge designed to shield Lawyer's identity from the person when making the request.[9]

As an exception to Oregon RPC 8.4(a)(3), Oregon RPC 8.4(b) allows a lawyer "to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct." For purposes of the rule "covert activity" means:

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[7] *In re Newell*, 348 Or 396, 409, 234 P3d 967 (2010) (reprimanding lawyer who communicated on "subject of the representation").

[8] *See In re Carpenter*, 337 Or 226, 95 P3d 203 (2004) (lawyer received public reprimand after assuming false identity on social media website).

[9] See Oregon RPC 8.4(a), which prohibits a lawyer from violating the Oregon Rules of Professional Conduct (RPCs), from assisting or inducing another to do so, or from violating the RPCs "through the acts of another."

> [A]n effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

In the limited instances allowed by Oregon RPC 8.4(b) (more fully explicated in OSB Formal Ethics Op No 2005-173), Lawyer may advise or supervise another's deception to access a person's nonpublic information on a social networking website.

Approved by Board of Governors, February 2013.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.5-1 to § 8.5-2 (communications with persons other than the client), § 8.11 (conduct prejudicial to the administration of justice), § 21.3-2(a) (prohibition against misleading conduct) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 11, 98, 99–100, 103 (2000) (supplemented periodically).

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion 843 (9/10/10)

Topic: Lawyer's access to public pages of another party's social networking site for the purpose of gathering information for client in pending litigation.

Digest: 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.

Rules: 4.1; 4.2; 4.3; 5.3(b)(1); 8.4(c)

QUESTION

1. May a lawyer view and access the Facebook or MySpace pages of a party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit, including impeachment material, if the lawyer does not "friend" the party and instead relies on public pages posted by the party that are accessible to all members in the network?

OPINION

2. Social networking services such as Facebook and MySpace allow users to create an online profile that may be accessed by other network members. Facebook and MySpace are examples of external social networks that are available to all web users. An external social network may be generic (like MySpace and Facebook) or may be formed around a specific profession or area of interest. Users are able to upload pictures and create profiles of themselves. Users may also link with other users, which is called "friending." Typically, these social networks have privacy controls that allow users to choose who can view their profiles or contact them; both users must confirm that they wish to "friend" before they are linked and can view one another's profiles. However, some social networking sites and/or users do not require pre-approval to gain access to member profiles.

3. The question posed here has not been addressed previously by an ethics committee interpreting New York's Rules of Professional Conduct (the "Rules") or the former New York Lawyers Code of Professional Responsibility, but some guidance is available from outside New York. The Philadelphia Bar Association's Professional Guidance Committee recently analyzed the propriety of "friending" an unrepresented adverse witness in a pending lawsuit to obtain potential impeachment material. See Philadelphia Bar Op. 2009-02 (March 2009). In that opinion, a lawyer asked whether she could cause a third party to access the Facebook and MySpace pages maintained by a witness to obtain information that might be useful for impeaching the witness at trial. The witness's Facebook and MySpace pages were not generally accessible to the public, but rather were accessible only with the witness's permission (*i.e.,* only when the witness allowed someone to "friend" her). The inquiring lawyer proposed to have the third party "friend" the witness to access the witness's Facebook and MySpace accounts and provide truthful information about the third party, but conceal the association with the lawyer and the real purpose behind "friending" the witness (obtaining potential impeachment material).

4. The Philadelphia Professional Guidance Committee, applying the Pennsylvania Rules of Professional Conduct, concluded that the inquiring lawyer could not ethically engage in the proposed conduct. The lawyer's intention to have a third party "friend" the unrepresented witness implicated Pennsylvania Rule 8.4(c) (which, like New York's Rule 8.4(c), prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation"); Pennsylvania Rule

5.3(c)(1) (which, like New York's Rule 5.3(b)(1), holds a lawyer responsible for the conduct of a nonlawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the Rules if engaged in by the lawyer); and Pennsylvania Rule 4.1 (which, similar to New York's Rule 4.1, prohibits a lawyer from making a false statement of fact or law to a third person). Specifically, the Philadelphia Committee determined that the proposed "friending" by a third party would constitute deception in violation of Rules 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would omit a material fact (*i.e.,* that the third party would be seeking access to the witness's social networking pages solely to obtain information for the lawyer to use in the pending lawsuit).

5. Here, in contrast, the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rule 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted.[1] Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so.

CONCLUSION

6. A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. 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 Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).

(76-09)

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[1] One of several key distinctions between the scenario discussed in the Philadelphia opinion and this opinion is that the Philadelphia opinion concerned an unrepresented *witness*, whereas our opinion concerns a *party* – and this party may or may not be represented by counsel in the litigation. If a lawyer attempts to "friend" a *represented* party in a pending litigation, then the lawyer's conduct is governed by Rule 4.2 (the "no-contact" rule), which prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from the represented party's lawyer. If the lawyer attempts to "friend" an *unrepresented* party, then the lawyer's conduct is governed by Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party's interests are likely to conflict with those of the lawyer's client.Our opinion does not address these scenarios.

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 671

March 2018

QUESTION PRESENTED

May a lawyer, individually or through an agent, anonymously contact an alleged anonymous online defamer in order to obtain jurisdictional information sufficient for obtaining a deposition pursuant to Rule 202 of the Texas Rules of Civil Procedure?

STATEMENT OF FACTS

A client of a Texas lawyer has been defamed or harassed online by an anonymous party. In preparation for bringing potential claims, the lawyer wishes to conduct a Texas Rule of Civil Procedure 202 deposition but needs to obtain jurisdictional information about the anonymous party first. The lawyer proposes to anonymously contact, or to request that an agent for the lawyer anonymously contact, the party for the purpose of obtaining such information.

DISCUSSION

The internet has many virtues as a forum for communication, but simultaneously presents certain dangers. Technology can permit an anonymous person to disseminate defamatory statements to millions of readers, ruining reputations and careers with the click of a button. The challenge for a party contemplating a lawsuit is identifying who is behind such postings. Yet for those injured by anonymous online defamation or harassment, the Texas Supreme Court has made it clear that a Texas court cannot order a pre-suit deposition to identify an anonymous online defamer unless the alleged defamer has sufficient contacts with Texas for personal jurisdiction. *In re: John Doe a/k/a "Trooper,"* 444 S.W.3d 603, 610 (Tex. 2014).

Like Texas, courts in many jurisdictions have sought to balance constitutional protections for anonymous speech and personal jurisdictional requirements with the ability to pursue defamation causes of action. But any proposed solution to the conundrum poses ethical concerns that relate to the propriety of attorneys and their agents anonymously seeking to obtain identifying or jurisdictional information from an anonymous individual.

In general, Rules 4.01(a) and 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct address a Texas lawyer's duty to avoid making material misrepresentations to third parties and engaging in conduct that involves dishonesty, fraud, deceit, or misrepresentation. Rule 4.01 provides in part that, in the course of representing a client, "a lawyer shall not knowingly; (a) make a false statement of material fact or law to a third person…." Rule 8.04(a)(3) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Furthermore, Rule 4.03, which governs dealing with unrepresented persons, provides that a lawyer shall not state or imply that the lawyer is disinterested, and further provides that "[w]hen a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." Additionally, Rule 5.03 subjects a lawyer to discipline if the lawyer orders, encourages, or permits conduct by an agent that would be in violation of the Rules if engaged in by the lawyer.

Several ethics committees in other states have dealt with the analogous situation of attorneys and their agents contacting individuals via social media for purposes of case investigation or pre-suit information gathering, such as sending a "friend" request on Facebook, requesting to be connected to someone on LinkedIn, or following someone on Instagram or Twitter. The New York City Bar Association Committee on Professional Ethics, for example, has opined that a lawyer shall not "friend" an unrepresented individual using "deception," and that there is no deception when a lawyer uses his "real name and profile" to send a "friend" request to obtain information from an unrepresented person's social media account. *Ass'n of the Bar of the City of New York Prof' Ethics Comm., Formal Opinion* 2010-2 (2010). That jurisdiction does not require the lawyer to disclose the reason for making the request. Similarly, both the New York State Bar Association Committee on Professional Ethics and the Philadelphia Bar Association Ethics Committee concluded that a lawyer, or someone working under a lawyer's supervision (such as a paralegal), cannot "friend" a witness under false pretenses. *New York State Bar Association Commission on Professional Ethics, Opinion 843 (2010); Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02 (2009).* Both of these bodies relied upon their respective state's counterparts to Rule 8.04(a)(3). As the Philadelphia Committee observed, failing to tell the witness of the attorney's identity and role (or the paralegal's, or investigator's) "omits a highly material fact, namely, that the third party who [requests] 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." As the New York City Bar opinion observed, the fact that deception is even easier in the virtual world than in person makes this an issue of heightened concern in the Digital Age.

Other ethics committees have insisted that an attorney engaging in such online investigation must be even more forthcoming. A New Hampshire Bar Association opinion explains that a request to "friend" must "inform the witness of the lawyer's involvement in the disputed or litigated matter," and provide disclosure of the "lawyer by name as a lawyer," and the identification of "the client and the matter in litigation." *N.H. Bar Ass' n Ethics Committee Advisory Comm. Opinion 2012-13/ 05.* In Massachusetts, it is not permissible for a lawyer to make a "friend" request to a third party in a lawsuit "without disclosing that the requester is the lawyer for a potential plaintiff." *Massachusetts Bar Ass'n Comm. On Prof. Ethics Opinion 2014-5 (2014).* A San Diego Bar Association opinion requires disclosure of the lawyer's "affiliation and the purpose for the request." *San Diego County Bar Ass'n Legal Ethics Comm. Opinion 2011-2 (2011).* An Oregon ethics opinion states that if the person being sought out on social media asks for additional information to identify the lawyer, or if the lawyer has some other reason to believe that the person misunderstands his role the "[l]awyer must provide the additional information or withdraw the request." *Oregon State Bar Comm. On Legal Ethics, Formal Opinion 2013-189 (2013).*

By analogy, it is the opinion of this Committee that the failure by attorneys and those acting as their agents to reveal their identities when engaging in online investigations, even for the limited purpose of obtaining identifying or jurisdictional information, can constitute misrepresentation, dishonesty, deceit, or the omission of a material fact. Accordingly, lawyers may be subject to discipline under the Rules if they, or their agents, anonymously contact an anonymous online individual in order to obtain jurisdictional or identifying information sufficient for obtaining a Rule 202 deposition. In order to comply with the Rules, attorneys, and agents of attorneys, must identify themselves and their role in the matter in question.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, Texas lawyers, and their agents, may not anonymously contact an anonymous online individual in order to obtain jurisdictional or identifying information sufficient for obtaining a deposition pursuant to Rule 202 of the Texas Rules of Civil Procedure.

SDCBA Legal Ethics Opinion 2011-2

(Adopted by the San Diego County Bar Legal Ethics Committee May 24, 2011.)

I. FACTUAL SCENARIO

Attorney is representing Client, a plaintiff former employee in a wrongful discharge action. While the matter is in its early stages, Attorney has by now received former employer's answer to the complaint and therefore knows that the former employer is represented by counsel and who that counsel is. Attorney obtained from Client a list of all of Client's former employer's employees. Attorney sends out a "friending"[1] request to two high-ranking company employees whom Client has identified as being dissatisfied with the employer and therefore likely to make disparaging comments about the employer on their social media page. The friend request gives only Attorney's name. Attorney is concerned that those employees, out of concern for their jobs, may not be as forthcoming with their opinions in depositions and intends to use any relevant information he obtains from these social media sites to advance the interests of Client in the litigation.

II. QUESTION PRESENTED

Has Attorney violated his ethical obligations under the California Rules of Professional Conduct, the State Bar Act, or case law addressing the ethical obligations of attorneys?

III. DISCUSSION

A. Applicability of Rule 2-100

California Rule of Professional Conduct 2-100 says, in pertinent part: "(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer. (B) [A] "party" includes: (1) An officer, director, or managing agent of a corporation . . . or (2) an. . . employee of a . . .corporation . . . if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." "Rule 2-100 is intended to control communication between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule." (Rule 2-100 Discussion Note.)

Similarly, ABA Model Rule 4.2 says: **"**In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Comment 7 to ABA Model Rule 4.2 adds: "In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

1. Are the High-ranking Employees Represented Parties?

The threshold question is whether the high-ranking employees of the represented corporate adversary are "parties" for purposes of this rule.
In *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187 (2003), a trade secrets action, the Court of Appeal reversed an order disqualifying counsel for the defendant-former sales manager for ex parte contact with plaintiff-event management company's current sales manager and productions director. The contacted employees were not "managing agents" for purposes of the rule because neither "exercise[d] substantial discretionary authority over decisions that determine organizational policy." Supervisory

status and the power to enforce corporate policy are not enough. (*Id*. at 1209.) There also was no evidence that either employee had authority from the company to speak concerning the dispute or that their actions could bind or be imputed to the company concerning the subject matter of the litigation. (*Id*. at 1211.)

The term "high-ranking employee" suggests that these employees "exercise substantial discretionary authority over decisions that determine organizational policy" and therefore should be treated as part of the represented corporate party for purposes of Rule 2-100. At minimum, the attorney should probe his client closely about the functions these employees actually perform for the company-adversary before treating those high-ranking employees as unrepresented persons.

2. Does a Friend request Constitute Unethical Ex Parte Contact with the High-Ranking Employees?

Assuming these employees are represented for purposes of Rule 2-100, the critical next question is whether a friend request is a direct or indirect communication by the attorney to the represented party "about the subject of the representation." When a Facebook user clicks on the "Add as Friend" button next to a person's name without adding a personal message, Facebook sends a message to the would-be friend that reads: "[Name] wants to be friends with you on Facebook." The requester may edit this form request to friend to include additional information, such as information about how the requester knows the recipient or why the request is being made. The recipient, in turn, my send a message to the requester asking for further information about him or her before deciding whether to accept the sender as a friend.

A friend request nominally generated by Facebook and not the attorney is at least an indirect ex parte communication with a represented party for purposes of Rule 2-100(A). The harder question is whether the statement Facebook uses to alert the represented party to the attorney's friend request is a communication "about the subject of the representation." We believe the context in which that statement is made and the attorney's motive in making it matter. Given what results when a friend request is accepted, the statement from Facebook to the would-be friend could just as accurately read: "[Name] wants to have access to the information you are sharing on your Facebook page." If the communication to the represented party is motivated by the quest for information about the subject of the representation, the communication with the represented party is about the subject matter of that representation.

This becomes clearer when the request to friend, with all it entails, is transferred from the virtual world to the real world. Imagine that instead of making a friend request by computer, opposing counsel instead says to a represented party in person and outside of the presence of his attorney: "Please give me access to your Facebook page so I can learn more about you." That statement on its face is no more "about the subject of the representation" than the robo-message generated by Facebook. But what the attorney is hoping the other person will say in response to that facially innocuous prompt is "Yes, you may have access to my Facebook page. Welcome to my world. These are my interests, my likes and dislikes, and this is what I have been doing and thinking recently."

A recent federal trial court ruling addressing Rule 2-100 supports this textual analysis. In *U.S. v. Sierra Pacific Industries* (E.D. Cal. 2010) 2010 WL 4778051, the question before the District Court was whether counsel for a corporation in an action brought by the government alleging corporate responsibility for a forest fire violated Rule 2-100 when counsel, while attending a Forest Service sponsored field trip to a fuel reduction project site that was open to the public, questioned Forest Service employees about fuel breaks, fire severity, and the contract provisions the Forest Service requires for fire prevention in timber sale projects without disclosing to the employees that he was seeking the information for use in the pending litigation and that he was representing a party opposing the government in the litigation. The Court concluded that counsel had violated the Rule and its reasoning is instructive. It was undisputed that defense counsel communicated directly with the Forest Service employees, knew they were represented by counsel, and did not have the consent of opposing counsel to question them. (2010 WL 4778051, *5.) Defense counsel claimed, however, that his questioning of the Forest Service employees fell within the exception found in Rule 2-100(C)(1), permitting "[c]ommunications with a public officer. . .," and within his First Amendment right to petition the government for redress of grievances because he indisputably had the right to attend the publicly open Forest Service excursion.

While acknowledging defense counsel's First Amendment right to attend the tour (*id*. at *5), the Court found no evidence that defense counsel's questioning of the litigation related questioning of the employees, who had no "authority to change a policy or grant some specific request for redress that [counsel] was presenting," was an exercise of his right to petition the government for redress of grievances. (*Id*. at *6.) "Rather, the facts show and the court finds that he was *attempting to obtain*

information for use in the litigation that should have been pursued through counsel and through the Federal Rules of Civil Procedure governing discovery." (*Ibid*., emphasis added.) Defense counsel's interviews of the Forest Service employees on matters his corporate client considered part of the litigation without notice to, or the consent of, government counsel "strikes at . . . the very policy purpose for the no contact rule." (*Ibid*.) In other words, counsel's motive for making the contact with the represented party was at the heart of why the contact was prohibited by Rule 2-100, that is, he was "attempting to obtain information for use in the litigation," a motive shared by the attorney making a friend request to a represented party opponent.

The Court further concluded that, while the ABA Model Rule analog to California Rule of Professional Conduct 2-100 was not controlling, defense counsel's ex parte contacts violated that rule as well. "Unconsented questioning of an opposing party's employees on matters that counsel has reason to believe are at issue in the pending litigation is barred under ABA Rule 4.2 *unless the sole purpose of the communication* is to exercise a constitutional right of access to officials having the authority to act upon or decide the policy matter being presented. In addition, advance notice to the government's counsel is required." (*Id*. at *7, emphasis added.) Thus, under both the California Rule of Professional Conduct and the ABA Model Rule addressing ex parte communication with a represented party, the purpose of the attorney's ex parte communication is at the heart of the offense.
The Discussion Note for Rule 2-100 opens with a statement that the rule is designed to control communication between an attorney and an opposing party. The purpose of the rule is undermined by the contemplated friend request and there is no statutory scheme or case law that overrides the rule in this context. The same Discussion Note recognizes that nothing under Rule 2-100 prevents the parties themselves from communicating about the subject matter of the representation and "nothing in the rule precludes the attorney from advising the client that such a communication can be made." (Discussion Note to Rule 2-100). But direct communication with an attorney is different.

3. Response to Objections

a. Objection 1: The friend request is not about the subject of the representation because the request does not refer to the issues raised by the representation.

   It may be argued that a friend request cannot be "about the subject of the representation" because it makes no reference to the issues in the representation. Indeed, the friend request makes no reference to anything at all other than the name of the sender. Such a request is a far cry from the vigorous ex parte questioning to which the government employees were subjected by opposing counsel in *U.S. v. Sierra Pacific Industries*.[2]

   The answer to this objection is that as a matter of logic and language, the subject of the representation need not be directly referenced in the query for the query to be "about," or concerning, the subject of the representation. The extensive ex parte questioning of the represented party in *Sierra Pacific Industries* is different in degree, not in kind, from an ex parte friend request to a represented opposing party. It is not uncommon in the course of litigation or transactional negotiations for open-ended, generic questions to impel the other side to disclose information that is richly relevant to the matter. The motive for an otherwise anodyne inquiry establishes its connection to the subject matter of the representation.

   It is important to underscore at this point that a communication "about the subject of the representation" has a broader scope than a communication relevant to the issues in the representation, which determines admissibility at trial. (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1392.) In litigation, discovery is permitted "regarding any matter, not privileged, that is relevant to the subject matter of the pending matter. . . ." (Cal. Code Civ. Proc. § 2017.010.) Discovery casts a wide net. "For discovery purposes, information should be regarded as 'relevant to the subject matter' if it might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof." (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2010), 8C-1, ¶8:66.1, emphasis in the original, citations omitted.) The breadth of the attorney's duty to avoid ex parte communication with a represented party about the subject of a representation extends at least as far as the breadth of the attorney's right to seek formal discovery

from a represented party about the subject of litigation. Information uncovered in the immediate aftermath of a represented party's response to a friend request at least "might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof." (*Ibid*.) Similar considerations are transferable to the transactional context, even though the rules governing discovery are replaced by the professional norms governing due diligence.

In *Midwest Motor Sports v. Arctic Cat Sales, Inc.* (8th Cir. 2003) 347 F.3d 693, Franchisee A of South Dakota sued Franchisor of Minnesota for wrongfully terminating its franchise and for installing Franchisee B, also named as a defendant, in Franchisee A's place. A "critical portion" of this litigation was Franchisee A's expert's opinion that Franchisee A had sustained one million dollars in damages as a result of the termination. (*Id*. at 697.) Franchisor's attorney sent a private investigator into both Franchisee A's and Franchisee B's showroom to speak to, and surreptitiously tape record, their employees about their sales volumes and sales practices. Among others to whom the investigator spoke and tape-recorded was Franchisee B's president.

The Eighth Circuit affirmed the trial court's order issuing evidentiary sanctions against Franchisor for engaging in unethical ex parte contact with represented parties. The Court held that the investigator's inquiry about Franchisee B's sales volumes of Franchisor's machines was impermissible ex parte communication about the subject of the representation for purposes of Model Rule 4.2, adopted by South Dakota. "Because every [Franchisor machine] sold by [Franchisee B] was a machine not sold by [Franchisee A], the damages estimate [by Franchisee A's expert] could have been challenged in part by how much [Franchisor machine] business [Franchisee B] was actually doing." (*Id*. at 697-698.) It was enough to offend the rule that the inquiry was designed to elicit information about the subject of the representation; it was not necessary that the inquiry directly refer to that subject.

Similarly, in the hypothetical case that frames the issue in this opinion, defense counsel may be expected to ask plaintiff former employee general questions in a deposition about her recent activities to obtain evidence relevant to whether plaintiff failed to mitigate her damages. (BAJI 10.16.) That is the same information, among other things, counsel may hope to obtain by asking the represented party to friend him and give him access to her recent postings. An open-ended inquiry to a represented party in a deposition seeking information about the matter in the presence of opposing counsel is qualitatively no different from an open-ended inquiry to a represented party in cyberspace seeking information about the matter outside the presence of opposing counsel. Yet one is sanctioned and the other, as *Midwest Motors* demonstrated, is sanctionable.

b. Objection 2: Friending an represented opposing party is the same as accessing the public website of an opposing party

The second objection to this analysis is that there is no difference between an attorney who makes a friend request to an opposing party and an attorney suing a corporation who accesses the corporation's website or who hires an investigator to uncover information about a party adversary from online and other sources of information.

Not so. The very reason an attorney must make a friend request here is because obtaining the information on the Facebook page, to which a user may restrict access, is unavailable without first obtaining permission from the person posting the information on his social media page. It is that restricted access that leads an attorney to believe that the information will be less filtered than information a user, such as a corporation but not limited to one, may post in contexts to which access is unlimited. Nothing blocks an attorney from accessing a represented party's public Facebook page. Such access requires no communication to, or permission from, the represented party, even

though the attorney's motive for reviewing the page is the same as his motive in making a friend request. Without ex parte communication with the represented party, an attorney's motivated action to uncover information about a represented party does not offend Rule 2-100. But to obtain access to *restricted* information on a Facebook page, the attorney must make a request to a represented party outside of the actual or virtual presence of defense counsel. And for purposes of Rule 2-100, that motivated communication with the represented party makes all the difference.[3]

The New York State Bar Association recently has reached the same conclusion. (NYSBA Ethics Opinion 843 (2010).) The Bar concluded that New York's prohibition on attorney ex parte contact with a represented person does not prohibit an attorney from viewing and accessing the social media page of an adverse party to secure information about the party for use in the lawsuit as long as "the lawyer does not 'friend' the party and instead relies on public pages posted by the party that are accessible to all members in the network." That, said the New York Bar, is "because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so."

c. Objection 3: The attorney-client privilege does not protect anything a party posts on a Facebook page, even a page accessible to only a limited circle of people.

The third objection to this analysis may be that nothing that a represented party says on Facebook is protected by the attorney-client privilege. No matter how narrow the Facebook user's circle, those communications reach beyond "those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the [Facebook user's] lawyer is consulted. . . ." (Evid. Code §952, defining "confidential communication between client and lawyer." Cf. *Lenz v. Universal Music Corp.* (N.D. Cal. 2010) 2010 WL 4789099, holding that plaintiff waived the attorney-client privilege over communications with her attorney related to her motivation for bringing the lawsuit by e-mailing a friend that her counsel was very interested in "getting their teeth" into the opposing party, a major music company.)

That observation may be true as far as it goes[4], but it overlooks the distinct, though overlapping purposes served by the attorney-client privilege, on the one hand, and the prohibition on ex parte communication with a represented party, on the other. The privilege is designed to encourage parties to share freely with their counsel information needed to further the purpose of the representation by protecting attorney-client communications from disclosure.
"[T]he public policy fostered by the privilege seeks to insure the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, citation and internal quotation marks omitted.)

The rule barring ex parte communication with a represented party is designed to avoid disrupting the trust essential to the attorney-client relationship. "The rule against communicating with a represented party without the consent of that party's counsel shields a party's substantive interests against encroachment by opposing counsel and safeguards the relationship between the party and her

attorney. . . . [T]he trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition." (*U.S. v. Lopez* (9th Cir. 1993) 4 F.3d 1455, 1459.) The same could be said where a client is lured into clandestine communication with opposing counsel through the unwitting acceptance of an ex parte friend request.

d. Objection 4: A recent Ninth Circuit ruling appears to hold that Rule 2-100 is not violated by engaging in deceptive tactics to obtain damaging information from a represented party.

Fourth and finally, objectors may argue that the Ninth Circuit recently has ruled that Rule 2-100 does not prohibit outright deception to obtain information from a source. Surely, then, the same rule does not prohibit a friend request which states only truthful information, even if it does not disclose the reason for the request. The basis for this final contention is *U.S. v. Carona* (9th Cir. 2011) 630 F.3d 917, 2011 WL 32581. In that case, the question before the Court of Appeals was whether a prosecutor violated Rule 2-100 by providing fake subpoena attachments to a cooperating witness to elicit pre-indictment, non-custodial incriminating statements during a conversation with defendant, a former county sheriff accused of political corruption whose counsel had notified the government that he was representing the former sheriff in the matter. "There was no direct communications here between the prosecutors and [the defendant]. The indirect communications did not resemble an interrogation. Nor did the use of fake subpoena attachments make the informant the alter ego of the prosecutor." (*Id*. at *5.) The Court ruled that, even if the conduct did violate Rule 2-100, the district court did not abuse its discretion in not suppressing the statements, on the ground that state bar discipline was available to address any prosecutorial misconduct, the tapes of an incriminating conversation between the cooperating witness and the defendant obtained by using the fake documents. "The fact that the state bar did not thereafter take action against the prosecutor here does not prove the inadequacy of the remedy. It may, to the contrary, (Third) of the Law Governing Lawyers, the corporate attorney-client privilege may be waived only by an authorized agent of the corporation.
suggest support for our conclusion that there was no ethical violation to begin with." (*Id*. at *6.)

There are several responses to this final objection. First, *Carona* was a ruling on the appropriateness of excluding evidence, not a disciplinary ruling as such. The same is true, however, of *U.S. v. Sierra Pacific Industries*, which addressed a party's entitlement to a protective order as a result of a Rule 2-100 violation. Second, the Court ruled that the exclusion of the evidence was unnecessary because of the availability of state bar discipline if the prosecutor had offended Rule 2-100. The Court of Appeals' discussion of Rule 2-100 therefore was dicta. Third, the primary reason the Court of Appeals found no violation of Rule 2-100 was because there was no direct contact between the prosecutor and the represented criminal defendant. The same cannot be said of an attorney who makes a direct ex parte friend request to a represented party.

4. Limits of Rule 2-100 Analysis

Nothing in our opinion addresses the discoverability of Facebook ruminations through conventional processes, either from the user-represented party or from Facebook itself. Moreover, this opinion focuses on whether Rule 2-100 is violated in this context, not the evidentiary consequences of such a violation. The conclusion we reach is limited to prohibiting attorneys from gaining access to this information by asking a represented party to give him entry to the represented party's restricted chat room, so to speak, without the consent of the party's attorney. The evidentiary, and even the disciplinary, consequences of such conduct are beyond the scope of this opinion and the purview of this Committee. (See Rule 1-100(A): Opinions of ethics committees in California are not binding, but "should be consulted by members for guidance on proper professional guidance." See also, Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02, p. 6: If an attorney rejects the guidance of the committee's opinion, "the question of whether or not the evidence would be usable either by him or by

subsequent counsel in the case is a matter of substantive and evidentiary law to be addressed by the court." But see Cal. Prac. Guide Fed. Civ. Proc. Before Trial, Ch. 17-A, ¶17:15: "Some federal courts have imposed sanctions for violation of applicable rules of professional conduct." (citing *Midwest Motor Sports*, *supra*.))

B. Attorney Duty Not To Deceive

We believe that the attorney in this scenario also violates his ethical duty not to deceive by making a friend request to a represented party's Facebook page without disclosing why the request is being made. This part of the analysis applies whether the person sought to be friended is represented or not and whether the person is a party to the matter or not.

ABA Model Rule 4.1(a) says: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person. . ." ABA Model Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." In *Midwest Motor Sports*, *supra*, the Eighth Circuit found that the violations of the rule against ex parte contact with a represented party alone would have justified the evidentiary sanctions that the district court imposed. (*Midwest Motor Sports*, *supra,* 347 F.3d at 698.) The Court of Appeals also concluded, however, that Franchisor's attorney had violated 8.4(c) by sending a private investigator to interview Franchisees' employees "under false and misleading pretenses, which [the investigator] made no effort to correct. Not only did [the investigator] pose as a customer, he wore a hidden device that secretly recorded his conversations with" the Franchisees' employees. (*Id*., at 698-699.)[5]

Unlike many jurisdictions, California has not incorporated these provisions of the Model Rules into its Rules of Professional Conduct or its State Bar Act. The provision coming closest to imposing a generalized duty not to deceive is Business & Professions Code section 6068(d), which makes it the duty of a California lawyer "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never seek to mislead the judge . . . by an artifice or false statement of fact or law." This provision is typically applied to allegations that an attorney misled a judge, suggesting that the second clause in the provision merely amplifies the first. (See e.g., *Griffith v. State Bar of Cal.* (1953) 40 Cal.2d 470.) But while no authority was found applying the provision to attorney deception of anyone other than a judicial officer, its language is not necessarily so limited. The provision is phrased in the conjunctive, arguably setting forth a general duty not to deceive *anyone* and a more specific duty not to mislead a judge by any false statement or fact or law. We could find no authority addressing the question one way or the other.

There is substantial case law authority for the proposition that the duty of an attorney under the State Bar Act not to deceive extends beyond the courtroom. The State Bar, for example, may impose discipline on an attorney for intentionally deceiving opposing counsel. "It is not necessary that actual harm result to merit disciplinary action where actual deception is intended and shown." (*Coviello v. State Bar of Cal.* (1955) 45 Cal.2d 57, 65. See also *Monroe v. State Bar of Cal.* (1961) 55 Cal.2d 145, 152; *Scofield v. State Bar of Cal.* (1965) 62 Cal.2d 624, 628.) "[U]nder CRPC 5-200 and 5-220, and BP 6068(d), as officers of the court, attorneys have a duty of candor and not to mislead the judge by any false statement of fact or law. These same rules of candor and truthfulness apply when an attorney is communicating with opposing counsel." (*In re Central European Industrial Development Co.* (Bkrtcy. N.D. Cal. 2009) 2009 WL 779807, *6, citing *Hallinan v. State Bar of Cal.* (1948) 33 Cal.2d 246, 249.)

Regardless of whether the ethical duty under the State Bar Act and the Rules of Professional Conduct not to deceive extends to misrepresentation to those other than judges, the *common law* duty not to deceive indisputably applies to an attorney and a breach of that duty may subject an attorney to liability for fraud. "[T]he case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length." (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 202.)

In *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 74, the Court of Appeal ruled that insured's judgment creditors had the right to sue insurer's coverage counsel for misrepresenting the scope of coverage under the insurance policy. The *Shafer* Court cited as authority, *inter alia*, *Fire Ins. Exchange v. Bell by Bell* (Ind. 1994) 643 N.E.2d 310, holding that insured had a viable claim against counsel for insurer for falsely stating that the policy limits were $100,000 when he knew they were $300,000.

Similarly, in *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, the Court of Appeal held that an attorney, negotiating at arm's length with an adversary in a merger transaction was not immune from liability to opposing party for fraud for not disclosing "toxic stock" provision. "A fraud claim against a

lawyer is no different from a fraud claim against anyone else." (*Id*. at 291.) "Accordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient." (*Ibid*., citation omitted.) While a "casual expression of belief" that the form of financing was "standard" was not actionable, active concealment of material facts, such as the existence of a "toxic stock" provision, is actionable fraud. (*Id*. at 291-294.)

If there is a duty not to deceive opposing counsel, who is far better equipped by training than lay witnesses to protect himself against the deception of his adversary, the duty surely precludes an attorney from deceiving a lay witness. But is it impermissible deception to seek to friend a witness without disclosing the purpose of the friend request, even if the witness is not a represented party and thus, as set forth above, subject to the prohibition on ex parte contact? We believe that it is.

Two of our sister Bar Associations have addressed this question recently and reached different conclusions. In Formal Opinion 2010-02, the Bar Association of the City of New York's Committee on Professional and Judicial Ethics considered whether "a lawyer, either directly or through an agent, [may] contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation." (*Id*., emphasis added.) Consistent with New York's high court's policy favoring informal discovery in litigation, the Committee concluded 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." In a footnote to this conclusion, the Committee distinguished such a request made to a party known to be represented by counsel. And the Committee further concluded that New York's rules prohibiting acts of deception are violated "whenever an attorney 'friends' an individual under false pretenses to obtain evidence from a social networking website." (*Id*.)

In Opinion 2009-02, the Philadelphia Bar Association Professional Guidance Committee construed the obligation of the attorney not to deceive more broadly. The Philadelphia Committee considered whether a lawyer who wishes to access the restricted social networking pages of an adverse, unrepresented witness to obtain impeachment information may enlist a third person, "someone whose name the witness will not recognize," to seek to friend the witness, obtain access to the restricted information, and turn it over to the attorney. "The third person would state only truthful information, for example, his or her true 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." (Opinion 2009-02, p. 1.) The Committee concluded that such conduct would violate the lawyer's duty under Pennsylvania Rule of Professional Conduct 8.4 not to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . ." The planned communication by the third party

> omits 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. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the [attorney] and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

(*Id*. at p. 2.) The Philadelphia opinion was cited approvingly in an April 2011 California Lawyer article on the ethical and other implications of juror use of social media. (P. McLean, "Jurors Gone Wild," p. 22 at 26, California Lawyer, April 2011.)

We agree with the scope of the duty set forth in the Philadelphia Bar Association opinion, notwithstanding the value in informal discovery on which the City of New York Bar Association focused. Even where an attorney may overcome other ethical objections to sending a friend request, the attorney should not send such a request to someone involved in the matter for which he has been retained without disclosing his affiliation and the purpose for the request.

Nothing would preclude the attorney's client himself from making a friend request to an opposing party or a potential witness in the case. Such a request, though, presumably would be rejected by the recipient who knows the sender by name. The only way to gain access, then, is for the attorney to exploit a party's unfamiliarity with the attorney's identity and therefore his adversarial relationship with the recipient. That is exactly the kind of attorney deception of which courts disapprove.

IV. CONCLUSION

Social media sites have opened a broad highway on which users may post their most private personal information. But Facebook, at least, enables its users to place limits on who may see that information. The rules of ethics impose limits on how attorneys may obtain information that is not publicly available, particularly from opposing parties who are represented by counsel.

We have concluded that those rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have "friends" like that and no one – represented or not, party or non-party – should be misled into accepting such a friendship. In our view, this strikes the right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented.

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1 Quotation marks are dropped in the balance of this opinion for this now widely used verb form of the term "friend" in the context of Facebook.

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2 *Sierra Pacific Industries* also is factually distinguishable from the scenario addressed here because it involved ex parte communication with a represented *government* party opponent rather than a private employer. But that distinction made it harder to establish a Rule 2-100 violation, not easier. That is because a finding of a violation of the rule had to overcome the attorney's constitutional right to petition government representatives. Those rights are not implicated where an attorney makes ex parte contact with a private represented party in an analogous setting, such as a corporate – or residential – open house.

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3 The Oregon Bar reached the same conclusion, but with limited analysis. Oregon State Bar Formal Opinion No. 2005-164 concluded that a lawyer's ex parte communications with represented adversary via adversary's website would be ethically prohibited. "[W]ritten communications via the Internet are directly analogous to written communications via traditional mail or messenger service and thus are subject to prohibition pursuant to" Oregon's rule against ex parte contact with a represented *person*. If the lawyer knows that the person with whom he is communicating is a represented person, "the Internet communication would be prohibited." (*Id*. at pp. 453454.)

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4 There are limits to how far this goes in the corporate context where the attorney-client privilege belongs to, and may be waived by, only the corporation itself and not by any individual employee. According to section 128 and Comment c of the Restatement

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5 The New York County Bar Association approached a similar issue differently in approving in "narrow" circumstances the use of an undercover investigator by non-government lawyers to mislead a party about the investigator's identity and purpose in gathering evidence of an alleged violation of civil rights or intellectual property rights. (NYCLA Comm. On Prof. Ethics Formal Op. 737, p. 1). The Bar explained that the kind of deception of which it was approving "is commonly associated with discrimination and trademark/copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or job seekers while negotiating or engaging in a transaction that is not by itself unlawful." (*Id*. at p. 2.) The opinion specifically "does not address whether a lawyer is ever permitted to make dissembling statements himself or herself." (*Id*. at p. 1.) The opinion also is limited to conduct that does not otherwise violate New York's Code of Professional Responsibility, "(including, but not limited to DR 7-104, the 'no-contact' rule)." (*Id*. at p. 6.) Whatever the merits of the opinion on an issue on which the Bar acknowledged there was "no nationwide consensus" (*id*. at p. 5), the opinion has

no application to an ex parte friend request made by an attorney to a party where the attorney is posing as a friend to gather evidence outside of the special kind of cases and special kind of conduct addressed by the New York opinion.

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San Diego County Bar Association

2012-13/05 Social Media Contact with Witnesses in the Course of Litigation

Ethics Committee Advisory Opinion #2012-13/05

By the NHBA Ethics Committee

This opinion was submitted for publication by the NHBA Board of Governors at its June 20, 2013 meeting.

RULE REFERENCES:

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

ANNOTATION

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.1 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.

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, usingthe 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.

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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.

A Note About Ethics Materials from the NH Bar Association Ethics Committee

Care should be exercised in determining which version of a given Rule applies as of a given date, and the extent to which the interpretation of a given opinion or article will apply to such version. Many interpretations of New Hampshire ethics law (including many ethics opinions, practical ethics articles, and ethics corner articles issued by the NHBA Ethics Committee) have been published under the prior version of the Rules of Professional Conduct or predecessor rules. Read more.

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LinkedIn Public Profile Visibility

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Control what sections of your public profile appear when people search for you on search engines.

Edit public profile sections

Your public profile displays a simplified version of your LinkedIn profile. You can **customize your public profile settings** to set limits on how much of your profile information can be displayed. Simply turn on or off the profile sections that you want to be visible on public search engines.

It's visible to people who aren't members, who aren't signed in to LinkedIn, or those who haven't linked their LinkedIn account to their account on other approved services, subject to **your off-LinkedIn visibility settings**. You can access off-LinkedIn visibility preferences, on the **profile visibility settings page**.

Your public profile appears:

- When people search for you using a public search engine like Google, Yahoo!, Bing, DuckDuckGo, etc.
- On **public profile badges**
- On affiliate and approved third-party services like Outlook, Yahoo Mail, Samsung phones mail app, etc.

Viewers who aren't signed in to LinkedIn will see all or some portions of the profile display selections you make on this page. If you'd like to change the wording or text in a specific section for your public profile, first **edit your profile** and then enable that section's public visibility as by **showing your public profile**.

You can also choose to **hide your public profile** from non-LinkedIn members and from appearing in search engine results.

Notes:

- After you change or disable your profile public, it may take several weeks for it to be added to or **removed from search engine results**.
- If you edit the **settings of your profile photo** from your profile page, then your public profile page will be updated with the new setting. For example: if you change your profile photo visibility setting from **Public** to **Your Connections**, that change will be applied to your public profile as well, and your photo will no longer appear as part of your public profile. Likewise, you can update your photo visibility settings while you're editing your public profile page (or by disabling your public profile). Before these settings were unified, some members entered into inconsistent photo visibility states

(e.g., their photo is visible in a public profile in search engine results, but is not visible to most members on LinkedIn), and those members are being prompted to reconcile their settings.

- The default photo setting is **Public**.
- Not all sections of your profile can be displayed publicly. On the **Public profile settings** page, you'll be able to see and adjust the sections of your profile that can be displayed publicly. Viewers who aren't signed in to LinkedIn will see all or some portions of the profile display selections you make on this page.

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Who’s Viewed Your Profile - Basic and Premium Features

The following differences exist between Basic (free) and Premium versions of **Who's Viewed Your Profile**:

Basic (free) account

The LinkedIn Basic account will have the following **Who’s Viewed Your Profile** features:

- If you have set your profile viewing options to display your name and headline when viewing profiles, you'll see the 5 most recent viewers in the last 90 days, as well as a list of suggestions for increasing your profile views.
- The list displays viewer insights such as:
  - Where your profile viewers work.
  - Where they found you from.
  - Their job titles

To set your profile viewing options to display your name and headline:

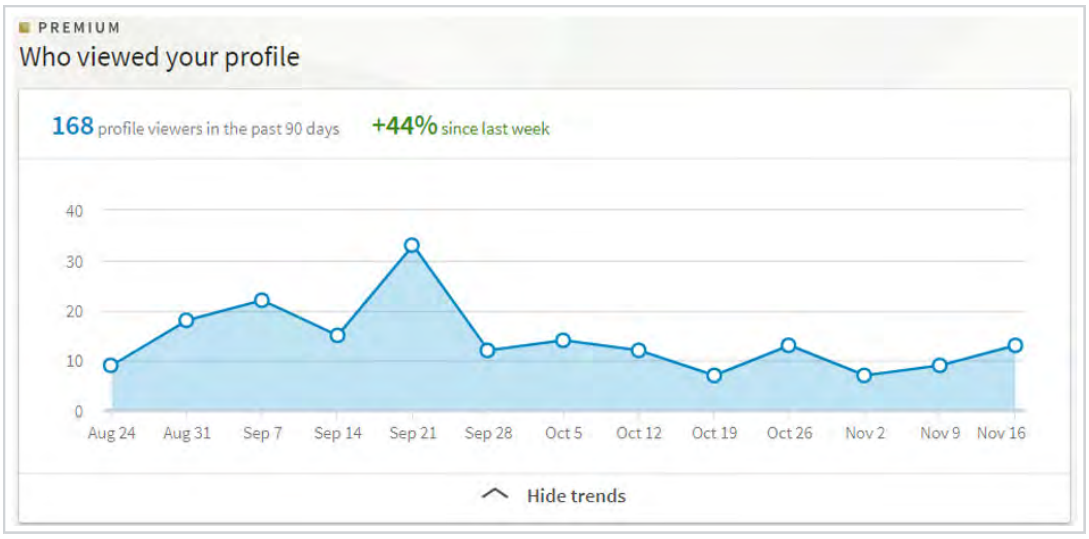
1. Click the **Me** icon at top of your LinkedIn homepage.
2. Click **Settings & Privacy**.
3. Select the **Privacy** tab at the top of the page.
4. Under the **Profile privacy** section, click **Change** next to **Profile viewing options**.
5. Under **Select what others can see when you've viewed their profile**, choose to show your name and headline.
   - Changes will be saved automatically.

Premium account

The LinkedIn Premium account will have the following **Who’s Viewed Your Profile** features:

- You'll see the entire list of viewers from the past 90 days. If you have at least one viewer in the past 90 days, you'll also see the viewer trends and insights.
- In addition to the free account experience, you'll be able to see weekly viewer insights.
- In the summary section you'll see the number of viewers from the past 90 days,if you’ve had at least one viewer in the past 90 days, along with a percentage of increase/decrease of viewers since last week.
- You’ll see a graph with weekly viewer trends. You can place your cursor on data points across the graph to see viewer insights for a particular week.

- You can click on ^ **Hide Trends** to minimize the graph.
  - Click on v **Show Trends** if you want to view the graph again.



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Notes:

- Even if you have a Premium account, you won't see the names of viewers who choose to browse in private mode. We respect the privacy of members who don't wish to reveal information about themselves when viewing profiles. Learn more about these **privacy settings**.

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