New York County Lawyers Association Professional Ethics Committee

Formal Opinion 750

March 29, 2017

TOPIC: Whether a lawyer “adding” an adverse party or witness on Snapchat constitutes an ethical violation.

DIGEST: A lawyer is prohibited, either directly or indirectly, from using deceptive means to access the restricted electronic social media maintained by an adverse party or witness. A lawyer is prohibited, directly or through his or her agent, from seeking to add the adverse party or witness as a “friend” because there is no ability simultaneously to inform the Snapchat user of the lawyer’s role in the pending adverse proceeding and the reason the lawyer is seeking access, such that seeking to add the adverse party or witness would result in deception by omission.

RULES OF PROFESSIONAL CONDUCT: 4.1; 4.2, 3.5, 5.3(b)(1), 8.4(c).

OPINION: Social media has become a significant factor in U.S. litigation. Publicly available social media can provide important information in various stages of a litigation, including the pre-filing investigation, discovery, jury selection and trial. As of August 2016, there were an estimated 3,532,000,000 unique visits to the top 15 social media sites.1 Some commentators have suggested that a lawyer’s failure to review publicly available information about an adversary, witness or juror may constitute a violation of the lawyer’s duty of competence under Rule 1.1. See, e.g., Hope A. Comisky & William M. Taylor, “Don’t Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas – Discovery, Communications with Judges and Jurors, and Marketing, 20 Temp. Pol. & Civ. Rts. L. Rev., 302 (observing that “an attorney’s ethical obligation to thoroughly research the facts of a case dictates that he should investigate whether a party or witness’s public pages contain useful information”); see also New York State Bar Association Social Media Guidelines, http://www.nysba.org/socialmediaguidelines/ (stating that a “lawyer has a duty to understand the benefits and risks and ethical implications associated with social media, including its use as . . . as a means to research and investigate matters”).

Since at least 2009, lawyers have been cautioned that there are ethical limits to their ability to access and use information posted on electronic social media by adverse parties, adverse witnesses, and jurors. See, e.g., NYCLA Formal Op. 743 (2011) (ethical for lawyer to conduct pretrial search of prospective juror’s social networking site, and post-voir dire searches on social networking sites, provided there is no contact or communication with the prospective juror and the lawyer does not seek to “friend” jurors, subscribe to their Twitter accounts or otherwise communicate with the juror); N.Y. City Formal Op. 2010-2 (lawyer may not gain access to a social networking website, directly or through an agent, by using false pretenses, but may use truthful information to gain access); N.Y. State Op. 843 (2010) (lawyer representing a client in pending litigation may access public pages of another party’s social networking website to obtain possible impeachment material, but is prohibited from employing deception to “friend” another party, directly or indirectly, to access private pages); Philadelphia Bar Op. 2009-02 (March 2009) (allowing the inquiring lawyer to cause a third party to “friend” a witness to access a witness’s Facebook and MySpace pages that were not publicly available in order to obtain impeachment material would constitute deception in violation of Pennsylvania Rules 8.4(c) and 4.1). Critical in each of those ethics opinions is the prohibition of a lawyer from engaging in a range of prohibited conduct in the course of conducting informal discovery using electronic social media. Proscriptions include Rule 4.1

ABA Formal Op. 466 (2014) sheds further light on when a lawyer’s access of a subscriber's electronic social media constitutes an impermissible communication in violation of the Model Rules, but in the context of mining a juror’s electronic social media. Opinion 466 concludes that a lawyer may not, either personally or through someone else, send an access request to a juror's electronic social media in order to gain access to information the juror has not made public because doing so would violate Model Rule 3.5, which prohibits a lawyer from communicating with a member of the jury venire or with a juror post-voir dire. The opinion observes that public access to electronic social media or websites will vary, and makes clear that the prohibition against a lawyer making access requests applies to information on a juror-subscriber’s social media service that is restricted to other subscribers to whom the juror has granted permission. In addition, Opinion 466 concludes that “a lawyer who uses a shared [electronic social media platform] to passively view juror [electronic social media] . . . does not communicate with the juror” (emphasis added). For example, a lawyer who views a LinkedIn subscriber’s profile, which is publicly available, has not caused an improper communication with the subscriber by passively viewing the subscriber's LinkedIn profile and generating a notification to the person who maintains the profile. Moreover, passive review of a LinkedIn profile is distinguishable from “friend” requests on Facebook; “friend” requests were deemed to be impermissible communications in the New York ethics opinions cited in this opinion because the lawyers making the “friend” requests did not reveal their true identity or purpose in seeking access to the Facebook subscriber’s restricted communications.

In addition, if the act of a lawyer accessing an adverse party or witness via social media constitutes a communication with the witness or adversary (as distinguished from viewing a LinkedIn profile maintained by a witness or adversary), the lawyer will have additional ethical proscriptions to consider. Rule 4.2 (a) prohibits a lawyer from communicating or causing another to communicate about the subject of the representation with someone the lawyer knows to be represented by another lawyer in the matter absent the prior consent of the other lawyer or authorization under the law. Therefore, where a lawyer wishes to access the social media of a represented party or witness and such access constitutes a communication with that person, the lawyer seeking access must first contact the lawyer representing the party or witness to seek permission.

Determining what is or is not permissible when lawyers wish to mine the social media of an adverse party or witness has become more complicated with the increasing number of social media platforms and changes in the way that each platform is accessed by users. Early ethics opinions focused on Facebook and Myspace, but since that time social media subscribers have moved on to other social media platforms where the means of accessing or retaining posted information varies. The variability in the
way that each of these platforms is accessed may have implications for when a lawyer may ethically mine social media in the course of a representation; the constant is that lawyers continue to be prohibited from using deceptive means to access this information. It follows that lawyers are prohibited, directly or through an agent, from obtaining even temporary access to a social media user’s restricted information if this access was obtained through deception or omission.

This opinion responds to a specific request for guidance regarding a lawyer’s permissible use of Snapchat to obtain information about an adversary. The inquirer asks whether “adding” an adverse party on Snapchat constitutes a per se ethical violation. By way of background, Snapchat is a photo and video messaging application that was launched in 2011. A Snapchat subscriber can also post multiple snaps to his or her story in a day in order to create a narrative, and Snapchat also has a messaging feature. Snapchat permits subscribers to send photos and videos (“snaps”) without leaving a permanent record in cyberspace because the messages disappear after a pre-determined period of time. It is possible, however, to take a screenshot of “snaps” in order to save them in picture form. When preserved by screenshots, individual snaps and snaps that are broadcast to a Snapchat subscriber’s followers (“stories”), which normally are available for viewing by other Snapchat users only for a 24 hour period, may be preserved indefinitely.

Particularly pertinent is the manner in which Snapchat subscribers are able to view other subscribers’ snaps and stories. Swiping down on the main Snapchat screen or tapping on the Snapchat logo allows a Snapchat subscriber to access the contacts screen. From the contacts screen, a subscriber can add friends, view who has added the subscriber, and browse a friend’s snaps. A Snapchat subscriber makes a request to add a new friend by using the other subscriber’s username or snapcode, or identifying a Snapchat user who is nearby, and sending an “add friend” request. After making a friend request, the first subscriber can begin viewing the second subscriber’s public stories, but only if the second subscriber has set his or her profile to permit stories to be visible by “Everyone.” The second subscriber will have received a notification that he or she has been added as a friend, but will not be connected to the first subscriber unless and until the second subscriber accepts the first subscriber by clicking the “+” icon. If the second subscriber only permits his or her Snapchat “friends” to view the subscriber’s snaps or stories – and thus restricts all of his or her Snapchat communications – the second subscriber will not have any content that is publicly available.

Here, the inquirer seeks to “add” an adverse party on Snapchat in order to view that party’s publicly available stories. The inquirer argues that although the “add” feature sends a notification to the subscriber, it only permits the lawyer to obtain access to any publicly available material, so it is more akin to accessing the electronic social media platform rather than a direct communication with the subscriber. It is also true, however, that the “add friend” notification in Snapchat prompts the Snapchat subscriber to add the lawyer as a friend or take no action on the request; if the second subscriber adds the lawyer as a Snapchat friend, the lawyer will have gained access to the adverse party’s or witness’s restricted postings without having revealed the reason he or she sought out the Snapchat subscriber, resulting in a prohibited deception by omission. Accordingly, because Snapchat is a social media platform that, at least as currently configured, does not provide a means for the lawyer to make the requisite disclosure when seeking to access restricted information maintained by a Snapchat user, lawyers are ethically prohibited from sending an “add friend” request to an adverse party or witness. The same prohibition would apply to any social media platform that similarly does not provide a means for a lawyer to make an adequate disclosure prior to gaining access to restricted information maintained on the platform.

3 As of 2015, Snapchat averaged 100 million daily active subscribers generating well over 700 million snaps a day, and more than 18% of social media subscribers use Snapchat. Anthony Maina, "Popular Social Media Sites," Small Business Trends (May 4, 2016), https://smallbiztrends.com/2016/05/popular-social-media-sites.html.
CONCLUSION: A lawyer is prohibited from using deception to access the restricted electronic social media maintained by an adverse party or witness, regardless of whether the lawyer personally seeks the information or asks someone else to retrieve the restricted information. Applying this general principal to Snapchat as currently configured, lawyers are prohibited, either directly or through an agent, from sending an “add friend” request to an adverse party or witness because there is no means to disclose the lawyer’s role in the pending adversarial proceeding prior to the Snapchat user acting on the request.