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Private Eyes & Public Profiles: The Ethics of Using Social Media in Investigations

As the events—both inconsequential and monumental—in people’s lives have spread onto Facebook, Twitter, Instagram, SnapChat, TikTok, and other platforms, a record has been created of comings and goings, personal opinions and piques, that can be a trove for private investigators.

As investigators, we spend a great deal of time on these platforms reviewing information posted by and about the subjects of our investigations. Someone hiding a boat from creditors? On Facebook, you might find a recent photograph of them aboard the boat and a caption identifying their location. A witness claims she does not know your client? It will be hard for her to maintain that position when confronted with the “likes” she gave to and comments she made on your client’s social media posts.

Social media postings may also constitute evidence or provide leads to potential witnesses. For example, many of the far-right agitators behind the 2017 Unite the Right rally in Charlottesville, Virginia openly coordinated their mayhem online. A number of their posts appear in the complaint against them and will likely be entered into evidence at trial.

At trial, publicly accessible social media accounts can also yield information about potential jurors which can help counsel assess their honesty during *voir dire*, support preemptory challenges, and identify ways to increase the jury appeal of arguments. The ABA has found that it is proper to conduct a passive review of a juror’s social media presence, provided there is no overt contact with the juror.

Conducting research and contacting potential witnesses via social media is relatively new, but the laws and ethics that govern an investigator’s interactions with third-parties are rooted in longstanding principles with which lawyers retaining investigators need to be familiar.

First principle: an investigator is almost always prohibited from using misrepresentation or dissemblance to obtain information, and it is evident that this injunction applies to social media investigations. In New York, as in most states, conduct involving dishonesty, fraud, deceit, or misrepresentation is prohibited under NY Rules of Professional Conduct, Rule 8.4 (c). Further, it is axiomatic that lawyers may not violate the rights of third parties when obtaining evidence. Most jurisdictions have adopted ABA Model Rule 8.4(a), stating that an investigator’s unethical acts may be imputed to the attorney. Even in states that

have not explicitly adopted it, there is “substantial case law that supports the proposition that the duty of an attorney. . . not to deceive extends beyond the courtroom.”

Bar associations have also addressed the question of how investigators may contact people on social media. The New York City Bar Association says investigators may contact unrepresented parties without violating ethical rules provided that there are no overt misrepresentations. The San Diego County Bar Association takes a stricter view, requiring that even where contact or “friending” may be otherwise proper, an attorney should not make contact with an individual without disclosing that she is an attorney and the purpose of the contact. When investigating in different jurisdictions—and keeping in mind that most social media companies are headquartered in California—it is wise to adopt the more restrictive guidance.

Further, it should be noted that many sites, like LinkedIn, may automatically notify the account holder when someone looks at an account. Some recent ethical opinions state that “contacts” of this type are not prohibited under the ethical rules, since it is the social network’s communication and not a prohibited communication by a lawyer. However, if an investigator repeatedly views a site and each “view” generates a separate notification, the repeated notifications may be considered harassing and violative of the third-parties rights under Rule 4.4(a).

The methodology used for researching, contacting, and communicating with people on social media can be critical to the success of an investigation and the investigator’s approach will necessarily vary depending upon the requirements of the investigation.

Social media can be used to contact witnesses, such as through direct messaging to an individual. Investigators can draft an introductory message for review by counsel, who will ensure it is truthful and balances the client’s desire for discretion with relevant legal and ethical considerations. Deception can play no role. Another method of contact is through private online communities, such as affinity groups (like those found on Facebook), where people feel more comfortable sharing personal experiences with like-minded individuals. These groups can be a rich source of witnesses, but caution is warranted. As certain affinity groups are open only to select populations, group administrators often require that individuals confirm they fall within that population by answering questions before granting them access to the group. An investigator should consider joining an affinity group only if she can share her reason for requesting access with a group administrator. On social media, as in life, deception, impersonation, and dissemblance cannot be used to “friend” potential witnesses or gain their trust.

The media is replete with examples of counsel and investigators who ran afoul of the above-cited rules. Notoriously, when facing criticism for his behavior in the workplace, Harvey Weinstein hired investigators who identified witnesses on social media and employed “avatars” and operatives “skilled in social engineering” to contact them. The deception—an embarrassment to the investigators—posed ethical problems for counsel. Yet one need not invoke the Weinstein debacle to illustrate that employing deceptive practices when using social media as part of your investigation far outweighs any benefits you might obtain. A simple reading of the rules of professional conduct and the guidance offered by bar associations across the country makes clear that investigators who obtain information through deception provide their clients with nothing more than “evidence” that will never be admitted in court.

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