

Ethics, Technology and Communications

Ethical Use of Social Media

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A volume of legislation is emerging which attempts to control an investigator's use of social media by restricting and prohibiting access to certain protected areas assumed to be private. The logic of these new laws is based upon two very important concepts. One is a long accepted ethical constraint under the American Bar Association Rules of Professional Conduct¹. The other is the generally accepted interpretation of the word "Communication."

SOCIAL MEDIA

Before embarking into a discussion of these laws it is important to define the concept of social media. It may seem obvious that the term refers to various methods of "posting" or "advertising" oneself in public forums available through the Internet and cellular technology. In its infancy the first "social media" consisted of e-mail and texting. Now myriads of forums exist wherein a person can post or reveal information about him or herself in or on a device (computer, transportable computer, cellular telephone or variations of the aforementioned). The word "Social" refers to the fact that information is being presented so that it might be read by others in a given society or group of people. "Media" refers to the fact that this information is going out to the public in a manner which is broadcast either specifically or without restraint. E-mail, texting, Twitter, Tumbler, Instagram, Snap Chat, Facebook, MySpace, LinkedIn, Flickr, Friendster, eHarmony and hundreds more comprise a potpourri of locations where anyone can write virtually anything about themselves or another person.

PRIVACY OBSESSION

All of this is being done in a world that coincidentally appears to be obsessed with privacy. It's a conundrum that is mind blowing. Everyone wants the right to reveal the most intimate details



and photographs of themselves, but anticipates that NOTHING will or should be viewed by persons whom they have not invited or allowed to view these images. Yet this is being done on a forum meant to be a tool of sharing information and ideas. The words "invasion of privacy" has become a battle cry for persons wishing total control over their image and information. This, in a world that collects data with every keystroke. Investigators wishing to gather information become hampered by every politician attempting to take a stance and every jurist initiating new legislation. The privacy versus publicity issue creates an imperfect world where investigators must tread carefully.

SOCIAL MEDIA AND THE INVESTIGATOR

Both the ABA Rules (Rule 5.3) and my own *Code of Professional Conduct: Standards and Ethics for the Investigative Profession*² Rule 4.2) agree that the investigator who is working for an attorney must abide by those rules applicable to the attorney. As the agent or employee of a member of the Bar, an investigator is prohibited from doing things contrary to the rules of the Bar. While an investigator may only be "looking"

for publicly available information he or she may actually be caught in the communication quandary. This is specifically relevant to the concept of ex-parte contact. Simply put, ex-parte contact is communication with a person represented by counsel without the privilege of that counsel being present. In this scenario an investigator is asked to represent an attorney and discover information about an adversarial person represented by counsel. Under the attorney's rules of ethics, there are various limitations upon the manner in which this can and should be done. As investigators we work as an arm of the legal community. We have become, by virtue of our employment, agents of the lawyers we represent. Many states have found it not only inappropriate, but illegal to gather information from within the private pages of an individual's social media site.

THE EVOLUTION OF NEW RULES

Unfortunately, the law in many cases seems to be blind to the fact that there is more on the Internet than Facebook. The majority of current prohibitions are based upon an agent of an attorney attempting to delve into the private life of a

represented adversary by “friending” him or her on their Facebook page. This had been done regularly by investigators nationwide either by being invited into a site or by using another individual as an intermediary to view the postings on a private Facebook page. Determinations based upon the concept that Facebook is the only culprit have declared that hiding one’s identity or using a pseudonym do not exonerate the investigator from contact with a represented party through social media sources. According to recent decisions it is not legal to FRIEND a represented party in an effort to find background information that is incriminating.³ These laws vary within local and federal jurisdictions and have become a part of the codes of various ethics committees. The burden therefore falls upon the Investigator to be current with rulings that affect them and their assignment.

It is not necessarily true that the solution to protecting the invasion of one’s privacy is to prohibit an attorney or his investigator from looking at something on an “Invitee only” page.

COMMUNICATION

Here is the problem with that assumption. It simply comes down to the interpretation of the word, COMMUNICATE. If we assume that communication is the sharing or exchange of information, news or ideas⁴ then the entire premise for prohibited legislation is a fallacy. This Google definition further uses synonyms to define COMMUNICATE as “interface, interact, commune, meet, and liaise.” Using this definition it could be interpreted that there must be an exchange of information, thoughts and ideas for an actual communication to occur. It presumes that the action of “looking” is the same as interviewing or questioning a party about a case at hand. If one is not participating by asking questions of the protected party then it begs the question, Is this really a communication? It does not take into account the possibility that information is often reposted or shared without any overt or covert action on the part of the investigator. Taking the Internet or cellular technology out of the mix, it is true that an investigator is prohibited from approaching and interviewing a represented person without them having the assistance of their legal counsel. However, if one is only viewing a posted photograph or message about a fine dining experience, is this a prohibited communication? Questions are not being asked relevant to the case at hand. There is no possibility of a deposition or interrogation, so that the represented person is not placed in a position of saying something inappropriate and inadvisable that might do harm to a case strategy. We know, for example, that an investigator cannot interview a husband if the investigator represents the wife in a divorce action, except in depositions or at trial.

Is viewing a private or protected social media posting actual communication if there is no in-

teraction?

If we use the concept of COMMUNICATION to mean “convey, tell, impart, announce, report or relate”⁴ then the possibility exists that there is, in fact, a communication of sorts. Even so, the investigator has not had the privilege or opportunity to question or probe for specific information related to a particular issue in a case at hand. So is it a violation of that very sacred idea of NOT infringing upon a person’s right to counsel if we are merely surveying a site, as we might perform surveillance upon a subject?

HIDING OR REMOVING EVIDENCE

It is not generally within the realm of an investigator to advise a client regarding the privacy settings of a social media page. However, it is frequently advised by an attorney that settings be made private and photographs that might be damaging to a case (such as an injured person’s ability to dance, play golf or bowl) should be removed from that site. In such cases there are prohibitions from legal codes of ethics which become relevant to the rules of discovery. In all cases, an investigator is guided by the ethical constraints of their attorney/clients.⁵

HACKING vs LOOKING

An investigator is not above the law. Using illegal means to “break in” either physically or virtually is, of course, not allowed. The investigator’s limitation within criminal law is that of the general public. The real invasion of privacy has infected this century in the form of technologically advanced persons with the ability to hack, or break in to private information held on either a computer or cellular device. Hacking affects bank accounts, credit cards, identity theft, personal reputations, safety and security. Obviously an investigator’s mantra must be to DO NO HARM. The object of an investigator is to discover information that could legally be used in a court of law or for the advancement of an individual’s need to know. Using any method deemed illegal or inappropriate in law or in legal ethics is an immediate prohibition against it.

Looking at something posted for a segment of society differs greatly from the practice of wrongfully entering an otherwise secure location where privileged information is stored.

WHAT HAPPENS NEXT

Until the legal community comes to a consensus and clearly defines what an actual COMMUNICATION is in the realm of social media, then the investigator has an added burden of being current on those definitions in play at the moment. The investigator must be ever alert to the possibility that these rules change from state to state or within federal jurisdictions.

There will be new laws based on the current

trends towards privacy and the mass of information transmitted via all social media sites. These dictates will be created, changed, modified and superseded as our society becomes more sophisticated and places appropriate penalties to actual infractions. Until that time, the investigator is still under the auspices of the attorney-client and must at all times obey the law, whatever that law might be.

The forum for fighting these rather naive and poorly conceived prohibitions to our work is in the courtroom and through our various legislative committees. Until changes are made, we must exist in an imperfect and irregular world of rules while attempting to do the right thing for the benefit of our clients.⁶ **PI**

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6. Credit must be given to an article entitled Neither Friend nor Follower: Ethical Boundaries on the Layer’s Use of Social Media, Robert Keeling, Tami Weerasingha-Cote & John Paul Schnapper-Casteras, from which this article took its inspiration. **PI**



Kitty Hailey, CLI, is an investigator with five decades of experience. She currently is concentrating on Wrongful Convictions and Civil Rights related work. She is the recipient of numerous awards for her writing, contributions

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