

The Ethical Duty of Investigation: Does It Reach into Social Media?

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Social Media Investigation: What does it include?

Any type of social interaction using technology

- Internet and smartphones, or any other innovations that include a combination of words, photos, video and/or audio
 - Facebook
 - Twitter
 - Linked In
 - Instagram
 - Blogs
 - Other

Why you need to know!

“An understanding of social networking sites, such as Facebook, is pivotal to accomplishing lawyerly tasks in the digital age...the sheer pervasiveness of social media in our modern society, coupled with relative ease of use, demonstrates that a lawyer who ignores social media will fail to provide competent representation.”¹

¹The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law citing John G. Browning. Univ. of Miami Law Review Vol. 68:445,457 FN 76 (2014).

Ethics Rules Guide Standard of Care

- Competence
- Diligence
- Fairness to opposing counsel
- Truthfulness in statements to others
- Communications with others represented by counsel
- Dealing with the unrepresented person
- Respect for the rights of third persons
- Non-lawyer assistants
- Unethical conduct through an agent²

²Ethics Committee Advisory Opinion #2012-13/05. Social Media Contact with Witnesses in the Course of Litigation. NHBA Ethics Committee

Duties of Debtor's Counsel

11 U.S.C. § 707(b)(4)

- (C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has
- (i) performed a *reasonable investigation* into the circumstances that gave rise to the petition, pleading, or written motion;...
- (D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

§ 707(b)(4) and “Reasonable Investigation”

“Reasonable investigation should be governed by the case law interpreting and applying the ‘reasonable inquiry’ standard under Rule 9011.”

“The reasonableness of the attorney’s inquiry should not be analyzed with the benefit of hindsight; rather, the analysis should, as under Rule 9011, focus on the attorney’s inquiry at the time that the inquiry was made.”

“Attorneys should verify information supplied by the debtor if such verification may be accomplished with a reasonable expenditure of time and expense and, in the attorney’s professional judgment, the information provided by the client is inconsistent or contains other indications of inaccuracy.”³

Note: The legal standard for best practices is Rule 9011!

³American Bar Association: Attorney Liability under § 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 February 2006 edition of The Business Lawyer, Vol. 61, No.2, p.697, 704

Duties of Chapter 7 Trustee

11 U.S.C. § 704

(a) The trustee shall...

(4) *investigate* the financial affairs of the debtor

Note: It has become common practice to search Facebook, do a “Google search” and access other social media sites to find information about Debtors. Any information about assets and income may be used.

Advising the Debtor about Social Media Posts?

There is no dispute that social media information is discoverable and may be a source of relevant information.

- In re Welsh, 2013 Bankr. LEXIS 4716 (Bankr. E.D.N.C. Nov. 7, 2013).
 - Email messages, text messages, and Facebook messages the debtor exchanged were not protected and had to be produced
 - Fifth Amendment provides absolutely no protection for the contents of private papers of any kind
 - Supreme Court has consistently held that when a person has voluntarily created a document, they may be compelled to produce the document even though it may contain incriminating information
- Reid v. Ingerman Smith, LLP, 876 F. Supp. 2d 176 (E.D.N.Y. 2012).
 - Even had plaintiff used privacy settings that allowed only her "friends" on Facebook to see postings, she "had no justifiable expectation that h[er] 'friends' would keep h[er] profile private . . ."
 - Judge allows discovery of private Facebook postings and photos

Advising the Client

Client is meeting with his attorney to prepare the Schedules and SOFA for his bankruptcy case. As part of a standard intake, should the attorney ask the following:

1. Does the Client use social media?
2. Does the Client have a cell phone?

If yes, what is the attorney to advise besides that client must schedule all assets and all income?

1. You have no expectation of privacy.
2. Be cautious what you post online.

Note:

1. Counsel should have full social media discussion with Client.
2. Be sure the Client provides a social media inventory
3. Provide a written disclosure about social media issues.

The Client and the Facebook Page/ Instagram Account...

Do you advise a Debtor to take down a social media post or leave it as is?

QUERY:

1. Is there a duty to preserve?
2. Is removal spoliation of evidence?
3. If removed, is there a duty to preserve?

Counsel Beware!

Lester v. Allied Concrete Co. – Wrongful death action

- Defense requests access to Lester's Facebook, including photos
- Prior to production, Lester's attorney instructs paralegal to have Lester "clean up his Facebook account"
- Lester complies and in fact, deletes his Facebook account. Lester then signs interrogatories at his attorney's direction that at date of signature – no Facebook account
- Before trial & in response to objections, Lester reactivates account but deletes 16 photos without informing counsel

Outcome: Lester wins at trial BUT Lester's attorney sanctioned \$542,000 & 5 year suspension

Note: Defense counsel learned of Facebook account when Lester sent "friend" request to opposing counsel

Take away: Discuss social media use with all clients!

What to do?

Debtor is meeting with her attorney for preparation of bankruptcy schedules and mentions that she has a Facebook page. Debtor refuses to allow attorney to view the page and refuses to say whether there are photos of property on Facebook that belongs to her.

Should Debtor's counsel:

1. Terminate representation?
2. Advise her again of consequences of concealing assets?
3. Advise her that whether she agrees or not, the Trustee may ask the Court to order her to disclose it?

What to do?

Attorney decides to fire client and 6 weeks later, he sees her testifying at her 341 meeting with different counsel. She testifies that she does not have a Facebook page and never has.

Should counsel talk to:

1. The former client
2. The new attorney
3. The Trustee
4. The US Trustee
5. All of the above
6. None of the above

A Duty to Investigate?

Debtor is at a meeting with her attorney to prepare the Schedules for her bankruptcy case. She mentions that she has a Facebook page but the attorney does not investigate it further. Is the Debtor required to disclose a Facebook page on her Schedules?

Did the attorney violate:

1. 11 U.S.C. § 526 (a)(2)?
2. 11 U.S.C. § 707(b)(4)(C)(i)?
3. 11 U.S.C. § 707(b)(4)(D)?
4. Fed. R. Bankr. P. 9011(b)(3)?

Oh-OHHH...

At the 341 meeting, the following exchange takes place with the Chapter 7 Trustee:

- Do you have a Facebook page?
 - Not any more.
- When did you delete it?
 - Last week after I saw my bankruptcy attorney.
- Why?
 - She gave me a paper telling me to.
- May I see the paper?

Here is what the paper says:

**Notice to Debtors
Regarding Facebook**

You are advised that if you still have a Facebook page at the time of your meeting of creditors, your Trustee may request to access it in order to investigate your assets and income. If any assets are found there that are not disclosed, you may lose your discharge and those assets. Also, DO NOT under any circumstances accept a "friend" request from someone you do not know because it might be your Trustee trying to get access to your Facebook page!

1. Is the attorney advising the illegal destruction of evidence?
2. Is the attorney aiding and abetting bankruptcy fraud?
3. Is the attorney violating 11 U.S.C. § 527(c)?
4. Is the attorney providing sound and important legal advice to her client by providing a "Social Media" disclosure notice?

What should the attorney do?

"Reasonable Investigation" includes...

Attorney represents Debtor's sister in her attempt to have Debtor's debt to her declared nondischargeable but can find no grounds. Sister reports that Debtor's Schedules fail to disclose \$25,000 wine collection and that there are pictures on his Facebook of the full wine cellar. Unfortunately, the Debtor has "defriended" her so she no longer has access to his Facebook page.

Attorney's paralegal suggests she could try to "friend" the Debtor and if accepted, she could look at the pictures on the page.

Should the attorney accept her paralegal's suggestion?

But what if...

Instead...the paralegal takes the initiative and “friends” the Debtor without discussing it with the attorney. In so doing, she finds the pictures, prints them and shows them to the attorney.

1. Can the attorney use the pictures in objecting to Debtor’s discharge?
2. Should the attorney discipline the paralegal or give her a raise?
3. Should the attorney ignore the pictures and instead seek a court order for the discovery of the Debtor’s Facebook page?
4. What if the Debtor deletes the Facebook page before the attorney gets his order?

Best Practices

- Have client prepare social media inventory
- Have a discussion on the existing social media sites
- Investigate the debtor’s social media sites and compare to information on Schedules
- A reasonable investigation is an attorney who makes “reasonable inquiry”
 - Knowledge should be interpreted to what an attorney knew or should have known with regard to accuracy of Schedules
 - Knowledge is information which was discoverable prior to filing the Petition
- Remain current on your state’s Ethics and Model Rules of Professional Conduct regarding Social Media
- Protect yourself and your client!

Ethics Committee Advisory Opinion #2012-13/05
Social Media Contact with Witnesses in the Course of Litigation

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

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

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

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

We conclude that an attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request. While there are ethical boundaries to such "friending," in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. [Footnote omitted.] NY City Bar, Ethic Op. 2010-2. Alternatively, the Philadelphia Bar Association concludes that such conduct would be deceptive. Phil. Bar Assoc., Prof. Guidance Comm., Op. 2009-02. That opinion finds that a social media request in-name-only "omits a highly

material fact” -that the request is aimed at obtaining information which may be used to impeach the witness in litigation.⁸ The Philadelphia opinion further recognizes, as does this Committee, that the witness would not likely accept the social media request if the witness knew its true origin and context. An opinion from the San Diego County Bar Association reaches the same conclusion. San Diego Cty. Bar Legal Ethics Op. 2011-2. The Committee finds that the San Diego and Philadelphia opinions are consistent with the New Hampshire Rules of Professional Conduct but that the New York City opinion is not. A lawyer has a duty to investigate but also a duty to do so openly and honestly, rather than through subterfuge.

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

CONCLUSION

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

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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 Muller 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.