

Ethics: Clients should be aware of social media pitfalls

by

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Reprinted from *Minnesota Lawyer* (September 2, 2013)

A recent survey noted that 72 percent of adults who use the Internet use some form of social media. Simply put, it appears that social media does not appear to be waning in strength or prominence in today's society. Seemingly innumerable questions arise in the context of legal ethics surrounding the use of social media, just as there have been questions raised with any new medium introduced in years past.

Previous articles touching on the subject of social media written by the director's office have addressed prohibiting the use of deception in the context of conducting social media investigations on a client's behalf and contacting a represented party (personally or through another) via social media for the purpose of obtaining litigation information under the guise of a friend request. Also addressed has been the general permissibility of accessing publicly viewable portions of even a represented party's social media page or personal website (which is like reading a book authored by the represented party). As those articles noted, what is important to remember is that while ethical obligations under the rules may evolve in some respects, the same basic ethical concepts continue to apply as always.

But what happens when it's the client, not the attorney, who lacks care in his or her use of social media? Certainly some people are less prudent than others in terms of what they decide to disclose via social media. Beware: Such disclosures have the potential to significantly affect a client's claim.

A 2012 order coming from a federal district court case out of Colorado (a case discussed in *Minnesota Lawyer* earlier this year) highlights the potential pitfalls of a client's perhaps ill-advised use of social media. See *E.E.O.C. v. Original Honeybaked Ham Co. of Georgia, Inc.*, No. 11-CV-02560-MSK-MEH, 2012 WL 5430974 (D. Colo. Nov. 7, 2012) (order on motion to compel).

The case was brought by the EEOC on behalf of a handful of female employees who allegedly suffered sexual harassment in the workplace and were retaliated against when they reported the conduct. During the discovery process, among other sources of information, the employer being sued sought access to the individual employees' social media content, text messages, and email and blog content. The presiding magistrate noted that the employer had undeniably established that the content sought contained discoverable information. What the employer showed to establish this was information

it had obtained from one of the plaintiffs' social media pages, presumably because it was accessible to the general public or it was passed along to the employer by one of her social media "friends." The information obtained by the employer included posts and at least one picture which were, at least from an outsider's point of view, incredibly damaging to the plaintiff's credibility, her claim and the alleged harm she had suffered.

While the precise content of the information initially obtained is not relevant to this discussion, what is noteworthy is that, due to that information coming to light, the magistrate ultimately ordered that each plaintiff provide to a special master — who would review the information in camera for relevance — any cell phone used to send or receive texts over the past four years, and all passwords and access information for social media websites, email, or other online communication mediums used over the past four years.

After a review of such material, previously presumed private, one would be naïve to think that the only damaging information learned in that case would be that which was originally publicly shared by the plaintiff.

While there may be no turning back the clock for the attorneys representing the plaintiffs' claims in that case, a recent ethics opinion from the New York County Lawyers' Association (NYCLA) attempts to provide some guidance regarding what advice an attorney may ethically give to a client regarding the client's social media presence. (See NYCLA Ethics Op. 745, July 2, 2013). While appropriately steering clear of answering substantive questions of law concerning spoliation and related issues attendant to litigation evidence, the opinion addresses an attorney's legal and ethical obligations with respect to preserving and revealing relevant evidence, prohibitions on bringing or maintaining a frivolous action, and prohibitions on propagating (or failing to correct) materially false information. The opinion also notes the "proactive" obligation that may exist in the competent representation of a client to, under certain circumstances, review a client's social media presence and advise the client accordingly. The NYCLA ultimately opines in part that an attorney may advise a client to turn on or maximize social media privacy restrictions, may advise the client as to what information it would perhaps be wise to post or not post on public or private pages, and may advise the client (consistent with legal and ethical obligations) what may be kept or removed from the client's social media pages.

While certainly not adopted by virtue of its mention in this article, the NYCLA opinion sheds some instructive light on the issues related to a client's use of social media and is worthy of review and consideration by Minnesota attorneys. If you are a licensed Minnesota attorney with an ethics question concerning your own present conduct related to the above or any other subject, please contact our office for an advisory opinion.