

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Legal LOOP

D.C. Bar on mining social media for evidence and more

Last month I wrote about D.C. Bar Opinion 370, which addresses the ethics of lawyers using social media for marketing purposes, among other things. The D.C. Bar also simultaneously issued a separate opinion on a related matter: lawyers using social media in providing legal services.

In Opinion 371 (online: <https://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm>), the DC Bar Ethics Committee addressed a number of interesting issues, including two of my favorite topics: the ethics of mining social media for evidence and using social media to research jurors.

At the outset, the committee wisely acknowledged that lawyers who ignore technology do so at their peril: "(C)ompetent representation always requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to carry out the representation. Because of society's embrace of technology, a lawyer's ignorance or disregard of it, including social media, presents a risk of ethical misconduct."

The committee specifically addressed the obligation of lawyers to acquire knowledge about the workings of social media, opining that lawyers who do not understand social media are failing to provide adequate legal representation: "Because the practice of law involves use or potential use of social media in many ways, competent representation under Rule 1.1[3] requires a lawyer to understand how social media work and how they can be used to represent a client zealously and diligently[4] under Rule 1.3.[5] Recognizing the pervasive use of social me-



By **NICOLE BLACK**
Daily Record
Columnist

dia in modern society, lawyers must at least consider whether and how social media may benefit or harm client matters in a variety of circumstances."

Next the committee turned to using social media to research information about parties to a litigation matter, where said data is not behind a privacy wall and is thus publicly available. The committee agreed with the other ethics committees that have addressed this topic, concluding that it is ethically permissible to do so: "Lawyers can and do look at the public social media postings of their opponents, witnesses, and other relevant parties, and ... may even have an ethical obligation to do so. Postings with privacy settings on client social media are subject to formal discovery and subpoenas."

For parties to litigation who are represented by counsel, attempting to "friend" a party in order to access information behind a privacy wall constitutes impermissible communication. The committee explained, "A lawyer's review of a represented person's public social media postings does not violate the Rule because no communication occurs. On the other hand, requesting access to information protected by privacy settings, such as making a 'friend' request to a represented person, does constitute a communication that is covered by the Rule."

For unrepresented parties, information behind a privacy wall can be accessed. But in order to do so ethically, lawyers and their agents must provide identifying information when attempting to connect with that person on social media in order to view postings behind the privacy wall: "(I)n social media communication with unrepresented persons, lawyers should identify themselves, state that they are lawyers, and identify whom they represent and the matter."

Next the committee turned to researching jurors on social media and reached the same conclusion as other committees that have addressed this topic, namely that lawyers may only review information about jurors that is publicly available and is not behind a privacy wall.

Of particular interest is the fact that the committee sided with the rationale handed down by the American Bar Association's Standing Committee on Ethics and Responsibility (in Opinion 466) and concluded that passive communications, like those that occur when LinkedIn notifies users that another person has viewed their profile, do not constitute impermissible communication with jurors: "(S)ome social media networks automatically provide information to registered users or members about persons who access their information. In the Committee's view, such notification *does not constitute a communication* between the lawyer and the juror or prospective juror." (Emphasis added).

Notably the New York City Bar Committee on Professional Ethics opined otherwise

Continued on next page

Continued from previous page

in Formal Opinion 2012-2, as did the New York County Lawyers Association Ethics Committee in Formal Opinion 743.

The D.C. opinion also covered the obligations of lawyers when it comes to their client's use of social media, along with the use of social media by judges, arbitrators

and more. So even if you don't practice in D.C., it would be well worth your while to review the committees' analysis of these timely, and interesting, issues.

Nicole Black is a director at MyCase.com, a cloud-based law practice management platform. She is also of counsel to Fiandach & Fiandach in Rochester and is a GigaOM Pro

analyst. She is the author of the ABA book "Cloud Computing for Lawyers," coauthors the ABA book "Social Media for Lawyers: the Next Frontier," and co-authors "Criminal Law in New York," a West-Thomson treatise. She speaks regularly at conferences regarding the intersection of law and technology. She publishes three legal blogs and can be reached at niki@mycase.com.