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LegalLOOP

Decision on mining social media for evidence

Massachusetts bar's Ethics Committee

As I've often discussed in past columns, lawyers are increasingly turning to social media to obtain evidence about parties, non-parties, and jurors. However, when doing so, it's important to have a thorough understanding of the ethical issues involved and to carefully review any ethical opinions handed down in the jurisdiction in which you practice.

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Most ethics committees have concluded that lawyers may view publicly available evidence without violating their ethical obligations and that they may not engage in deception when attempting to obtain information on social media that is behind a privacy wall, regardless of whether the party from whom information is sought is represented by counsel.

See, for example: Oregon State bar Ethics Committee Op. 2013-189 (lawyer may access an unrepresented individual's publicly available social media information but "friending" known represented party impermissible absent express permission from party's counsel); New York State Bar Opinion No. 843 [9/10/10] (attorney or agent can look at a party's protected profile as long as no deception was used to gain access to it); New York City Bar Association Formal Opinion 2010-2 (attorney or agent can ethically "friend" unrepresented party without disclosing true purpose, but even so it is better not to engage in "trickery" and instead be truthful or use formal discovery); Philadelphia Bar Association Opinion 2009-02 (attorney or agent cannot "friend" unrepresented party absent disclosure that it relates to pending lawsuit); San Diego County Bar Association Opinion 2011-2 (attorney or agent can never "friend" represented party even if the reason for doing so is disclosed); and New York County Lawyers Association Formal Opinion No. 743 (attorney or agent can monitor jurors' use of social media, but only if there are no passive notifications of the monitoring. The attorney must tell court if s/he discovers improprieties and can't use the discovery of improprieties to gain a tactical advantage). ABA Op. 466 [4/24/14] (lawyer may research jurors using social media as long as the information is publicly viewable and even if passive notifications are sent to the juror).

And now Bob Ambrogi reports on his blog, Lawsites (www.lawsitesblog.com), that on May 8, the Massachusetts Bar Association's House of Delegates approved Opinion 2014-T05, which addresses the issue of whether lawyers can mine social media to obtain evidence regarding an unrepresented adversary. The opinion has not yet been posted on the MBA's website but can be viewed online at Lawsites: bit.ly/1nCq68r .

In this opinion, the committee joined the majority of jurisdictions in concluding that lawyers may not use deception in order to access information behind a privacy wall and instead must specifically inform the unrepresented party of both their identities and the reason for the connection request: "A lawyer for a party may 'friend' an unrepresented adversary in order to obtain information helpful to her representation from the adversary's nonpublic website only when the lawyer has been able to send a message that discloses his or her identity as the party's lawyer."

In reaching its decision, the committee analogized the online conduct of "friending" an unrepresented party to the offline conduct of calling the party on the phone without providing adequate identification information prior to questioning the individual about issues related to the legal case at issue.

The committee's analysis is sound and provides good guidance for both Massachusetts attorneys and lawyers who practice in jurisdictions that have not yet addressed this issue and who seek to use social media to obtain evidence related to their client's case. The bottom line: When in doubt, avoid deception and disclose your identity. As I always say, better safe than sorry.

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