ETHICAL IMPLICATIONS OF SOCIAL MEDIA DISCOVERY

Social media discovery is becoming a more frequent topic in the world of e-discovery, as are the ethical questions brought up by the increasing popularity of new technology. Mining for data is nothing new; lawyers have been doing that through standard discovery since the profession was first invented. What is new though is the ease with which information can be gathered through social media discovery and methods that can be used to access this information. Has easy access blurred the line between acceptable and invasive discovery tactics? Where is the ethical boundary?

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As beneficial as social media discovery has been in cases (now, with over 689 published cases from 2010 through 2011, not counting *de minimis* entries), courts are scrambling to define what ethical and acceptable practices are. There have been several opinions issued by various state bars in an effort to define exactly what constitutes permissible social media discovery. Unfortunately, at this point, the inconsistency among opinions is the only consistency; opinions on the legal ethics involved vary as widely as the details of the cases themselves.

SOCIAL MEDIA DISCOVERY AS PART OF E-DISCOVERY

Given that there are more than 800 million Facebook profiles, using social media discovery to gather personal Facebook data during the usual discovery process makes a lot of sense. Many lawyers are accessing social media pages during the discovery process for witnesses and opposing parties alike as a matter of routine, using their findings to augment evidence and improve cross-examination techniques.

Information has been unearthed through social media discovery, which directly affects case outcomes. One example of relevant evidence occurs in personal injury cases; for example, plaintiff claims of an injury's severity are proven false after photographs are found through social media outlets showing that the injury is not as disabling as the plaintiff would have the court believe. Damning evidence has been found through social media discovery often enough that casual investigation of social media profiles has become standard, by both plaintiff and defendant counsel. Yet, what constitutes casual, standard, or acceptable discovery with regard to social media profiles?

ADMISSIBLE USE AND FACEBOOK

Courts are also addressing a range of issues related to what exactly ***is*** permissible use of e-discovery in social media outlets. Some judges have ruled that a private Facebook profile, which can be accessed only by other Facebook members to whom one has given permission, bears a reasonable right to privacy and is exempt from social media discovery. Others have ruled that using Facebook, Twitter, MySpace, or other social media platforms is fair game, since they are part of the Internet, and the Internet is public space. More recently, decisions regarding the admissibility of e-discovery are giving shape to new precedence: namely, that a request for broad information and unrestricted access to social media profiles in an attempt to find evidence which can support (or destroy) a case is not acceptable. However, a specific social media discovery request made seeking relevant information, which is directly related to any allegations in question, will most likely be approved.

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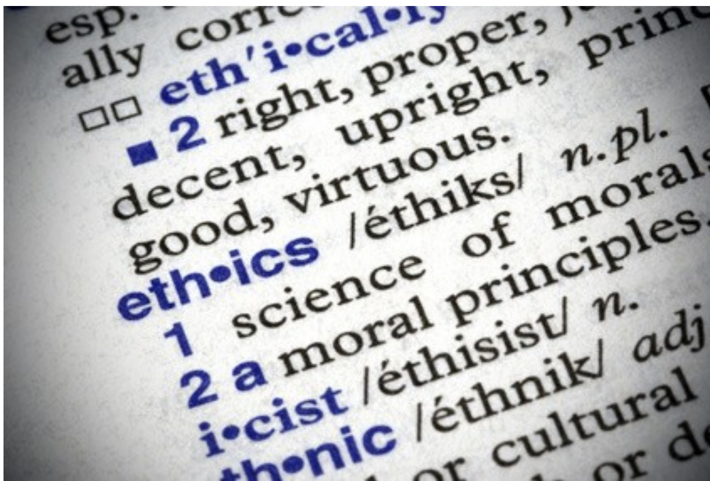

SOCIAL MEDIA USE IN ACTIVE CASES

Another ethical point, which is raised regarding social media discovery, is how clients in active cases may (or should) continue to use their social media profile. Clients (and their representation) need to understand that discussion of the case, or any relevant information to the case, will likely be revealed through social media discovery. Case-relevant information found through the e-discovery process, will not be protected by any privacy privileges.

SOCIAL MEDIA AND PROFESSIONAL LIFE

Evidence gathered through social media discovery can affect a case even for those not directly involved. LinkedIn is a social network, specifically geared for professional connections; members can show that they know each other through their links, and former employers or supervisors can issue recommendations directly on the site. In a suit, these professional profiles could be subject to the discovery process, right along with personal social media profiles.

Unfortunately, even the issue of performance recommendations can come under fire during a suit: lawyers for management personnel recommend against using the recommendation feature of LinkedIn for either current or former employees due to litigation risks. The reason?... a positive review could later be used as evidence in case of employment termination. That review would effectively show that the termination was discriminatory rather than performance-based. Additionally, any form-letter style recommendations, which are issued for all former employees and are uncovered during social media discovery, might also be used in a discrimination claim.

THE ABA AND ETHICS

In 2011, the American Bar Association Commission on Ethics 20/20 redefined several parameters in regard to the Internet and social media. Though not specific to social media discovery, existing guidelines were restructured in order to make them applicable in the digital age of e-discovery and social media. Language was changed to reflect that not all communication is made in person—or even verbally anymore—just as most communication records are found via e-discovery rather than as physical records. The ABA stated that "...lawyers would benefit from more guidance on how to use new client development tools in a manner that is consistent with the profession's core values" and that the advent of e-discovery and digital interaction requires clarification of "how lawyers can use new technology to disseminate important information about legal services and develop clients" while staying within ethical bounds.

Both the Philadelphia and San Diego committees regarding bar ethics determined that to "friend" opposing parties in order to gain access to private social media profiles, including photos and other data, was not only improper and misleading, but also a violation of the long-standing ethics rule regarding any direct contact taking place with represented parties.

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ROGUE SOCIAL MEDIA DISCOVERY

While not part of the discovery process from either plaintiff or defendant, North Carolina District Court Judge B. Carlton Terry Jr. was issued a public reprimand for discussing an active case with the defending attorney on Facebook. During the course of the case, Judge Terry also visited the plaintiff's website and the information found there influenced his ruling.

Although Judge Terry did not reveal his search to the other parties involved, his independent findings affected the case. He later disqualified himself, because his impartiality had been affected by his *snooping*; a new trial was started shortly thereafter. His behavior was determined to be a clear violation of the Code of Judicial Conduct. This case is the perfect reminder of how, in the digital age, information is more easily accessed than ever before. That doesn't mean that the information should be gathered, or that all social media discovery will benefit the case in question.

SOCIAL MEDIA AS SURVEILLANCE

A few years ago, the Electronic Frontier Foundation (EFF) filed a lawsuit against multiple government agencies, who had failed to disclose their policies regarding using social media platforms and setting up false profiles as resources for investigations. James Tucker, a student who worked with EFF said, "As Congress debates new privacy laws covering sites like Facebook, lawmakers and voters alike need to know how the government is already using this data and what is at stake." Data gained through social media discovery is one thing; data gained through unscrupulous surveillance techniques is another. Legal counsel must use ethical methods in their discovery process, or they put their clients' cases at risk of dismissal, and themselves at risk of loss of reputation.

SOCIAL MEDIA DISCOVERY PRECEDENT CASES

The preceding case is just one example of new legal precedents that are being set regarding social media discovery; there are several more examples and not all of them agree with the others.

The Florida Judicial Ethics Advisory Committee convened to address several questions regarding social networking; one of which was whether a judge may ethically post comments or other material on their personal page of a social networking site, as long as that material is not in violation of the Code of Judicial Conduct, including during election campaigns. The question was also raised regarding whether lawyers and other judges could list themselves as "fans" through a judge's public social networking campaign page. Though the committee decided the answer to both social media discovery questions was yes, they also added that judges could not add lawyers who appeared before them as "friends" on Facebook, nor permit lawyers to "friend" them:

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SOCIAL MEDIA DISCOVERY PRECEDENT CASES (cont'd from previous page)

"The Committee believes that listing lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge. This is not to say, of course, that simply because a lawyer is listed as a "friend" on a social networking site or because a lawyer is a friend of the judge, as the term friend is used in its traditional sense, means that this lawyer is, in fact, in a special position to influence the judge. The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence the judge. The Committee concludes that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted."

BARNES V. CUS NASHVILLE

In Barnes v. CUS Nashville, a personal injury case, the court denied a motion to compel social media discovery, finding that the information from Facebook, which was requested by the defendant was protected by the Stored Communications Act, is not subject to discovery. The court also found that private Facebook messages or postings, which are pursuant to civil subpoena, were also immune from social media discovery falling under the same protection. Defendant subpoenaed the plaintiff for Facebook information and, when that was denied, her friends' information. The court found these subpoenas unenforceable in the Nashville district court. Both parties were chastised by the magistrate judge for lengthy procedural delays due to failure to cooperate appropriately with due discovery process; the judge volunteered to set up his own Facebook account and "friend" the necessary parties in order to get the required social media discovery:

"The Defendant's mishandling of the Facebook subpoena was the cause of a major delay. Plaintiff's counsel could have helped resolve the matter by clearing up the issue of the various witnesses, who are 'friends' of the Plaintiff, to produce the various photos on Facebook.[...] In order to try to expedite further discovery regarding the photographs, their captions, and comments, the Magistrate Judge is willing to create a Facebook account [...] for the sole purpose of reviewing photographs and related comments in camera, [which] he will promptly review and disseminate any relevant information to the parties. The Magistrate Judge will then close this Facebook account."

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In fact, the Court notes that electronically connected "friends" are not among the litany of relationships targeted by the Exchange Act or the regulations issued pursuant to the statute. Indeed, "friendships" on Facebook may be as fleeting as the flick of a delete button."

QUIGLEY CORP V. KARKUS

In Quigley Corp. v. Karkus, allegations were leveled that corporation shareholders had violated the Securities and Exchange Act, because they had refused to disclose their virtual relationships. Attempts at social media discovery were made, stating that the list of Facebook friends was relevant to these claims. The court found that revealing Facebook "friends" was unnecessary, as they did not hold any significance in that specific litigation:

"For purposes of this litigation, the Court assigns no significance to the Facebook "friends" reference. [...] Regardless of what Facebook's apparent popularity or usefulness may say about the nature of 21st century communications and relationships, the site's designers' selections of icons or labels offer no substance to this dispute. In fact, the Court notes that electronically connected "friends" are not among the litany of relationships targeted by the Exchange Act or the regulations issued pursuant to the statute. Indeed, "friendships" on Facebook may be as fleeting as the flick of a delete button."

NEW TECHNOLOGY, SAME ETHICS

In the end, the ethics surrounding social media discovery are not so different after all from other legal ethical demands. As with all technological advances, social medial discovery is a new field with new precedents being formed around every corner. Addressing the concerns of which tactics are allowed or appropriate, and to what extent your clients' digital life may be accessed by the discovery process, are all contributing factors to this newly-forming ethical code. As with other communication methods, using social networking platforms, which invite social media discovery, should be treated with care and caution by clients and legal professionals alike.

If you would like to learn more about social discovery and X1 Discovery tools, please contact us.

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