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LegalCURRENTS

California Ethics Committee on social media mining

For trial attorneys, social media sites have the potential to be a treasure trove of evidence. However, as is the case with any type of pre-trial discovery and evidence gathering, information gleaned from online profiles must be obtained ethically.

Very few ethics committees have addressed issues related to mining social media sites to locate information to support pending cases, in large part because social media is a relatively new phenomenon.

However, prior to May of this year, when the San Diego County Bar Association Legal Ethics Committee issued its recent decision on social media data mining, a few ethics committees had tested the waters. Although the opinions addressed different issues, the cornerstone of each conclusion was that attorneys must avoid engaging in deception when attempting to obtain information via social media sites from parties to litigation.

One decision addressed the issue of whether public social media profiles can be mined for evidence, while the other two considered whether it was ethical to “friend” an unrepresented party to litigation.

First, in Opinion 843 (Sept. 10, 2010), the New York State Bar Ethics Committee concluded that as long as a lawyer does not engage in deception to obtain access to a social media network, the lawyer may ethically access a party’s public social media profiles to obtain evidence for use in pending litigation.

Next, in Formal Opinion 2010-2, the New York City Bar Association Ethics Committee determined that an attorney may, directly or through an agent, “friend” an unrepresented party to litigation without disclosing the reason for the request, but “[r]ather than engage in ‘trickery,’ lawyers can — and should — seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful ‘friending’ of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual’s social networking page.”

And, in Opinion 2009-02, the Philadelphia Bar Association Professional Guidance Committee addressed the very same issue regarding sending a friend request to an unrepresented party and

concluded that an attorney or agent may not “friend” an unrepresented person (as opposed to a party) on a social networking site with the intent to obtain evidence from their social media profile for use in pending litigation without first disclosing the purpose of the friend request.

However, until recently, there were no ethics opinions addressing the issue of whether an attorney or agent may “friend” a party to pending litigation. But in May, the San Diego County Bar Association Legal Ethics Committee did just that in Opinion 2011-2. The committee concluded that sending a “friend” request to a represented party is impermissible under any circumstances and is permissible in regard to an unrepresented witness only if the reason for the communication is disclosed:

“[[The] rules bar an attorney from making an *ex parte* friend request of a represented party. An attorney’s *ex parte* communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are

used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney’s duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn’t have ‘friends’ like that and no one — represented or not, party or non-party — should be misled into accepting such a friendship.”

Thus, in keeping with opinions that preceded it, the San Diego Ethics Committee likewise stressed that when mining social media sites for evidence, deception should be avoided at all costs, which makes sense. Lawyers are prohibited from engaging in deception when seeking to obtain evidence offline and the same rules should apply to conduct occurring online.

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