



Return to : New York Opinions Shed Light on Use of Social Media

New York -- New York Opinions Shed Light on Use of Social Media: *Top* [10/11/10]

By [Greg Jones](#), Reporter

Status updates, wall postings, pictures, comments and "Tweets" can all influence the outcome of a workers' compensation case, and attorneys in New York now have some guidance on how and when they and their agents can access this information.

The New York State Bar Association and the New York City Bar Association both recently published ethics opinions that prohibit the use of deception as a way of gaining access to private profile information. However, the two opinions seem to contradict each other when it comes to sending friend requests.

The city bar association said an attorney may send a friend request provided they are honest about who they are and do not engage in deception. The state bar association, on the other hand, says that an attorney can view public profile of another party involved in litigation providing they do not use a friend request to gain access to any information.

Conflicting guidelines might seem to muddy the waters, but Carol Levitt, co-author of "The Lawyer's Guide to Fact Finding on the Internet" and one of the founders of the website Internet For Lawyers, said the state bar opinion trumps the local bar opinion.

"Go with the hierarchy," Levitt said. "The state bar can discipline you and the city bar can't. Definitely go with the state bar opinion."

Attorneys who are truly concerned about which opinion to adhere to can use the formal discovery process instead after a recent court decision in New York said that privacy expectations on sites like Facebook and MySpace are limited because of the public nature of these websites.

Nicole Black, co-author of the book "Social Media for Lawyers: The Next Frontier," said the ethics opinions issued by the New York bar associations and a similar opinion published last year by the Philadelphia Bar Association are necessary to help guide lawyers through the application of existing rules of conduct to emerging technology.

"I think there is a need to issue these decisions that take real-life situations and apply them to the online world," she said. "Social media is a new medium people are interacting on and because it is so new there isn't much out there."

The New York State Bar Association's Committee on Professional Ethics, in Opinion 843 released in September, said a lawyer representing a client in pending litigation can access public pages of another party's social networking site for the purpose of obtaining information that might be relevant at trial.

"Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted," the committee wrote.

The committee contrasted the situation it was looking at in which the profile was public and not protected by a privacy setting with a case explored by the Philadelphia Bar Association Professional Guidance Committee in 2009. The Philadelphia committee determined that sending a friend request without properly admitting to being an attorney or investigator and without stating that the true purpose of the request was to gain evidence for use at trial is deceptive and unethical.

The New York ethics committee said there is no ethics violation as long as the lawyer doesn't submit a friend request — or direct a third-party to submit a friend request — to view the information.

Similarly, in Formal Opinion 2010-2, the New York City Bar Committee on Professional Ethics looked at the question of whether an attorney or an attorney's agent can contact an unrepresented individual to request permission to access a private web page when the intent is to obtain information in litigation. The committee ultimately determined that such activity is allowed, again, as long as it doesn't involve deception.

The committee acknowledged that there is greater temptation to use deception in online communications. People are less guarded with their information about their private lives in the virtual world than they are in the real world.

"For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth and review the witness's personal diary, the witness almost certainly would slam the door shut and perhaps even call the police," the committee wrote. "In contrast, in the 'virtual' world, the same stranger is more likely to be able to gain admission to an individual's personal web page and have unfettered access to most, if not all, of the foregoing information."

While it might be easy to create a fake profile to gain access to a private account, becoming friends with an individual under false pretenses to obtain evidence from a social networking site violates the New York Rules of Professional Conduct proscribing dishonesty, fraud, deceit or misrepresentation, the ethics committee concluded.

"Rather 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 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," the city bar's ethics committee opinion states. "Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness online."

The availability of information through formal discovery methods is something of a gray area itself, but there is more clarity in New York following the Sept. 21 decision of the Supreme Court in Suffolk County. In the case *Romano v. Steelcase Inc.*, the court held an individual has no reasonable expectation of privacy on sites like Facebook and MySpace regardless of the privacy setting.

In the case, Kathleen Romano was seeking damages for personal injuries which included compensation for a loss of enjoyment of life. Steelcase said there was information on the publicly accessible portion of Romano's Facebook and MySpace profile pages suggesting she recently traveled to Florida and Pennsylvania, contradicting claims that she was prohibited by her injury from doing so.

The court said that Romano called into question the legitimacy of her claim through the postings that were available to the public, and those public postings indicated that additional discovery could lead to relevant and admissible evidence located behind the privacy settings of the same accounts.

While sites like Facebook and MySpace are covered by the Federal Stored Communications Act and the Electronic Communications Privacy Act which prohibit a service provider from turning over e-mail and other electronic data without the user's permission, those rules do not prevent the provider from providing requested information in response to a subpoena.

Furthermore, the court noted that the privacy policy for MySpace cautions that "no security measures are imperfect or impenetrable" and Facebook warns that regardless of privacy settings and information "may become publicly available."

Romano agreed to these conditions when she created her accounts, created a profile and posted information about herself, the court said.

"Thus, when plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings," the court wrote. "Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist."

The court ultimately determined that Steelcase's need to access information outweighed any privacy concern Roman might have, and ordered her to provide consent and authorization so that Steelcase could gain access to all Facebook and MySpace records, including any records that had been deleted.

Levitt, of the website Internet for Lawyers, said ethics opinions and the New York court decision pertaining to social networks were "a long time coming." Bar associations and courts are years behind existing technology, she said, and the process of establishing how online information can be obtained and used is just beginning.

Levitt also said the opinions are helpful because without them the question of what is and isn't ethical will vary in different courts and with different judges.

Black, who is of counsel to Fiandach and Fiandach in Rochester, New York, said there will be continuing and increased interest in data mining social network sites as more people start using them and because "people post the stupidest stuff on there."

The recent opinions are helpful in providing clarity on how lawyers can use these sites, but they currently only cover a few jurisdictions. According to Black, however, for attorneys in jurisdictions without published opinions, the question of whether something is ethical is largely a matter of common sense.

"If it seems deceptive, you shouldn't do it online or offline," she said. "If you think you're crossing a line, you probably shouldn't do it or you should at least do some research before you do. There are going to be test cases and hopefully yours isn't the test case."

The Romano v. Steelcase decision can be read here:

http://www.courts.state.ny.us/REPORTER/3dseries/2010/2010_20388.htm.

To read the New York City Bar ethics opinion, click here:

<http://www.workcompcentral.com/pdf/2010/misc/NYCityEthicsOpinion.pdf>.

To read the New York State Bar ethics opinion, click here:

<http://www.workcompcentral.com/pdf/2010/misc/NYStateBarEthicsOpinion.pdf>.

To read the Philadelphia Bar ethics opinion, click here:

<http://www.workcompcentral.com/pdf/2010/misc/PhiladelphiaBarEthicsOpinion.pdf>.

Return to : New York Opinions Shed Light on Use of Social Media

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