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## Legal LOOP

### Researching social media for evidence (Part 1)

In November 2015, the Colorado Bar Association Ethics Committee issued an in-depth and well-reasoned opinion covering many of the ethical issues lawyers encounter when trying to use social media to investigate their clients' cases. Because Formal Opinion 127 addresses so many different topics, I'll cover the committee's conclusions regarding how to ethically mine social media for evidence in this article. Next week I'll focus on the committee's analysis regarding how to ethically connect with or research jurors and judges online.

At the outset of this opinion, the committee wisely noted that online investigation is quite similar to research conducted offline: "In most respects, conducting investigations or discovery through social media is no different than performing these tasks by any other means."

Next, the committee tackled the ethical issues encountered when lawyers or their agents view information on social media that is publicly available and is not behind a privacy wall. The committee agreed with the conclusion reached by most other jurisdictions and determined that there is no ethical bar to viewing information that is publicly available when mining social media for evidence: "Bar association ethics committees that have addressed this issue generally agree that lawyers may view any information publicly posted by a witness, or included on the public portion of that person's social media profile. Such information is treated no differently from any other publicly available information or public record. The committee believes that the same rule applies to the public portion of a social media profile or posting established by any ... individual."

The committee then moved on to the ethics of attempting to access online information found behind a privacy wall. First the



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committee explained that lawyers and their agents may not engage in deception to access restricted information. "Engaging in any form of deception to gain access to the restricted portion of a person's social media profile violates Colo. RPC 8.4(c), and also violates Colo. RPC 4.1 if the lawyer's actions occur during the representation of a client... Lawyers also may not circumvent the prohibition against seeking information through social media by means of deception by delegating investigative tasks to another person."

Next the committee explained that if a person is known to be represented by counsel, it is impermissible to request access to restricted online information without obtaining consent from the attorney. But, the ethical obligations of lawyers who attempt to view the restricted information of a person who is not represented by counsel, whether a party or witness, are different.

The committee rejected the New York City Bar's minority view that lawyers in this situation need not disclose anything more than their name and concluded that lawyers and their agents must provide information sufficient to allow the unrepresented person to make an informed decision about granting access to social media information behind a privacy wall. The committee elaborated: "This means (1) providing the name of the lawyer requesting access or for whom the requesting person is acting as an agent, (2) disclosing that the lawyer is acting on behalf of a client, and (3) disclosing the general nature of the matter in connec-

tion with which the lawyer is seeking information. The lawyer also must identify the client if disclosure is necessary to avoid a misunderstanding regarding the lawyer's role ... and may have to explain that his or her client has interests opposed to those of the unrepresented party."

Finally, the committee considered the ethical obligations attorneys face when seeking to obtain information from another person who already has access to restricted portions of an individual's social media account. The committee explained that: "Under no circumstances may the lawyer request that the third person make requests for new or additional information from a party or witness if the lawyer would be legally or ethically prohibited from requesting or obtaining it directly. Moreover, the lawyer may not request the third person to engage in deceptive conduct to obtain access to new or additional information from a party or witness through social media."

As I mentioned above, the committee also addressed the issues lawyers encounter when attempting to connect with or research jurors and judges online. Check back next week to learn what conclusions the committee reached regarding those issues.

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