Facebook – Friend or Foe? What Are the Ethical Risks of Using Facebook in Your Litigation Practice?

By Nancy L. Ripperger

Facebook is now a household word in the United States and a large portion of the world. More than one billion people use Facebook each month, with 665 million people using the site daily.\(^1\) To put these numbers in perspective, the number of people using Facebook on a monthly basis is roughly equal to the population of China and the number of people using Facebook on a daily basis is more than two times the population of the United States.\(^2\)

Clearly, Facebook is a way of life for a large portion of the world. Attorneys are no different from the general population. Attorneys use Facebook on a personal basis to keep in touch with family and friends and to connect with people who have similar interests. However, many attorneys are also now using Facebook in their practice. In fact, the American Bar Association’s 2012 Technology Survey shows that 55 percent of the lawyers surveyed reported that their firm had a Facebook page and 38 percent used Facebook in their practices.\(^3\)

Many attorneys are using Facebook for career development and networking.\(^4\) In addition, a growing number are using Facebook for investigatory purposes. Family law attorneys are particularly accustomed to using Facebook for investigatory purposes. The American Academy of Matrimonial Lawyers estimates that at least 81 percent of its members use Facebook or some other type of social media when investigating parties or witnesses.\(^5\)

Using Facebook for research, especially in family law and personal injury cases, often provides a wealth of relevant information that an attorney might never receive in traditional discovery. As divorce attorney Leslie Matthews has said, “People are just blabbing things all over Facebook.”\(^6\) For example, in *B.M. v. D.M.*,\(^7\) the wife claimed in a dissolution action that she was permanently disabled and would need life-long maintenance. Husband’s attorney used the wife’s Facebook page to refute her argument. The wife’s Facebook page included numerous pictures and postings about the wife’s frequent and strenuous belly dancing.

It is reasonable to surmise that, in the near future, an attorney may have a duty to review Facebook and other social media when investigating a matter. In 2010, the Supreme Court of Missouri in *Johnson v. McCullough*\(^8\) held that an attorney has a duty to review Case.net, Missouri’s online access to public court records, before impaneling a jury to ensure that the venire has been truthful about past litigation history. The *Johnson* case demonstrates that courts are expecting attorneys to embrace technology and use it in their practices in order to give their clients competent representation.

**Obtaining Access to A Party or Witnesses’ Facebook Account**

While Facebook can provide a wealth of information to an attorney when litigating a case, the attorney needs to ensure that he is abiding by the Rules of Professional Conduct when accessing another person’s Facebook account. Attorneys are allowed to review public portions of a party or witness’ Facebook page without violating any ethical rules.\(^9\) The Oregon Bar found that viewing public social media pages is the same as reviewing a magazine article written by the opposing party.\(^10\)

The issues become more complex when the Facebook account holder only allows “friends” to review his postings. There are ways that the attorney may be able to gain access to the account, though. For example, the attorney could create a false Facebook profile and send a “friend” request to
the person claiming to be a long lost classmate. Many Facebook users might accept the request, and the attorney would then have access to the account. However, from an ethical standpoint, this is a problem. The attorney’s actions are considered deceptive and a violation of both Rule 4-4.1(a) and Rule 4-8.4(c). Rule 4-4.1(a) provides that, in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person. Rule 4-8.4(c), in turn, prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The rule goes on to explicitly state that an attorney is prohibited from engaging in undercover operations such as assuming a false identity. In addition, if the party or witness is represented by counsel, the attorney has violated Rule 4-4.2 (communicating with a person represented by counsel).

What if the attorney makes a “friend” request to an unrepresented party using his real name? At first blush, this seems permissible, as the Facebook account holder has accurate information about the identity of the person seeking “friend” status. However, the analysis does not end there. As the Philadelphia Bar Association found in formal opinion 2009-02, the attorney’s “friend” request or communication is deceptive in that it omits the highly material fact that the purpose of the “friend” request was to obtain information to use in the litigation. The attorney’s actions are, thus, a violation of Rule 4-8.4(c). The same analysis holds true if the attorney asks a staff member to make a “friend” request using the staff member’s real name. Rule 4-8.4(a) provides that it is professional misconduct for an attorney to attempt to violate the Rules of Professional Conduct through the acts of others.

So does this mean that an attorney cannot access a party or witness’s Facebook account if the account holder has privacy settings in place? No, but it does require the attorney to use formal discovery requests to obtain access to the account.

“CLEANING UP” OR DELETING A FACEBOOK ACCOUNT

What about the attorney who knows or suspects that his client has made Facebook postings that may be detrimental to the client’s case? Should the attorney advise the client to delete the postings or shut down his account? No, as Rule 4-3.4 prohibits an attorney from destroying or concealing a document that has potential evidentiary value or from advising his client to do the same.11

FACEBOOK AND THE JURY

Unfortunately, it appears that social media jury misconduct is fairly common. Reuters Legal found that, between 2009 and 2010, courts overturned or granted new trials in 49 cases due to Internet misconduct by jurors.12 In fact, it appears many prospective jury members are posting to social media even while jury selection is ongoing, despite instructions from the court to forgo such activities. During a three-week period in 2010, Reuters Legal monitored tweets across the country that contained the words “jury selection.”13 Reuters found that prospective jury members tweeted about the process once every three minutes. Some of the tweets were harmless posts but others were much more disturbing. One person tweeted, “Jury duty is a blow. I have already made up my mind. He is guilty. lol.”14

Reviewing Facebook postings or other social media after the jury is selected also may alert an attorney to jury misconduct. For example, a Missouri wrongful death case is now on appeal due, in part, to the jury foreman’s Facebook postings.15 The foreman made numerous postings during the trial, including, “Completed deliberations and verdict delivered in less than one hour. Civic duty fulfilled and justice served. Now, where is my cocktail?” While evidence was being heard by the jury, the foreman’s “friends” made postings to his Facebook page, including comments such as, “If he is cute and has a nice butt, he’s innocent.”

While Facebook can be a valuable tool in identifying jury misconduct, an attorney should only check public postings. Otherwise, the attorney may be in violation of Rule 4-8.4(c) discussed above. If an attorney suspects that jury misconduct is occurring but the jury member’s Facebook page is restricted to “friends” only, the attorney should ask the judge to conduct an in-camera review of the jury member’s social media pages.

THE ATTORNEY’S PERSONAL FACEBOOK PAGE

Attorneys also should be very careful about posting any references to clients or cases on their own personal Facebook page. The postings could be a violation of Rule 4-1.6(a). Rule 4-1.6(a) provides that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the attorney is impliedly authorized to make the disclosure in order to carry out the representation.

In 2009, an Illinois public defender posted, among other things, that her client was taking the rap for his drug-dealing older brother. The public defender then went on to post that while her client was a college student, he was not very
smart. The attorney was fired from the public defender’s office and received a 60-day suspension for her actions. Other violations are not as obvious. Even the client’s identity and the fact of representation may be confidential, depending upon the client’s wishes.

Likewise, an attorney should not make derogatory remarks about the judiciary on the attorney’s personal Facebook page. A Florida attorney was upset about a particular judge’s actions, believing the judge was routinely denying criminal clients their right to a speedy trial. The attorney began posting on his blog and other social media about the judge. The attorney’s postings eventually deteriorated into statements calling the judge an “evil,” “unfair witch” who was “mentally ill.” The Florida Supreme Court found that the attorney’s actions violated Rule 4-8.2(a) (making a false or reckless statement regarding the qualifications or integrity of a judge) and Rule 4-8.4(d) (engaging in conduct that is prejudicial to the administration of justice.) The attorney received a public reprimand. These cases demonstrate that attorneys should forgo making any postings about their professional life on their Facebook page or other social media.

CONCLUSION

While Facebook can be a valuable tool to litigators, remember that the same ethical rules apply to attorneys when the attorneys are online as when they are in the courtroom or working in their office. Think before you access another person’s social media account or post to your account. If you do not, you may be facing ethical charges.

ENDNOTES

1 Associated Press, How Facebook Has Grown: Number of Active Users at Facebook Over the Years, May 1, 2013, http://news.yahoo.com/number-active-users-facebook-over-230449748.html.

2 The most recent estimate of China’s population is 1.349 billion and the most recent estimate of the United States’ population is 316 million. U.S. and World Population Clock, United States Census Bureau website, http://www.census.gov/popclock/.


4 Id.


6 Id.

7 31 Misc. 3d 1211, 2011 WL 1420917 (N.Y. Sup. April 7, 2011).

8 306 S.W.3d 551 (Mo. banc 2010).


11 “Cleaning up” or deleting a Facebook account may also result in the imposition of sanctions against the attorney and client and an adverse inference jury instruction. See Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. 2013). In this case, the trial court imposed a $542,000 sanction against the attorney and an $180,000 sanction against the client, along with an adverse inference jury instruction.


13 Brian Grow, supra, footnote 10.

14 Id.

15 See Taylor v. Anbari, Case No. 32562 (Mo. App. S.D.)


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