

Ethical Issues In Discovery Regarding Social Media

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**Facebook, Google,
Twitter, Instagram,
Linkedin, YouTube, etc.**

As of July 2016 facebook had 1.71 billions users per month and 1.13 billion users per day

- 1. Should you search for information about your clients, witnesses, and other parties?**
- 2. Should you discuss the use of social media sites with your clients?**
- 3. Can you obtain discovery of social media information?**

Practical Applications of Social Media In and Out of the Courtroom – Alford and McMahon (Pa. Bar Assn Quarterly – April 2017)

Ethical Obligations for Attorneys Using Social Media
(formal opinion 2014-300)

Philadelphia Bar Association Ethics Opinion 2014-5 (July, 2014)

- **May connect with clients and former clients on social media, but must adhere to the rules**
- **May, subject to certain limitations, advise clients about the content of social media (See rules 1.1 - competence, 3.3 – candor , 3.4 - fairness, and 4.1 - truthfulness)**
- **May comment or respond to online reviews but may not reveal confidential client information (See rules 1.6 – confidentiality and 3.6 – publicity)**
- **May not contact or friend a represented person through social media (See rule 4.2 – communication)**

- May generally contact an unrepresented person through social media, but may not use a pretext for viewing otherwise private information (See rules 4.3 – unrepresented persons and 8.4 – nonlawyer assistance)
- May generally comment or respond to reviews or endorsement, and may solicit endorsements provided they are monitored for accuracy (See rules 7.2 – advertising and 8.4 - misconduct)
- May generally endorse other attorneys on social media (See rule 8.4 – misconduct)

- May review a juror’s social media (See rule 3.5 – ex parte communication)
- May connect with judges on social media provided that the purpose is not to influence the judge

Pennsylvania Cases

Hoy v. Holmes – Schuylkill County

**Offenback v. L.M. Bowman Inc. -
M.D. Pa.**

Brogan v. Rosenn – Lack. Co.

Spoliation

Lester v. Allied Concrete (Va. Cir. Ct.)

Gatto v. United Airlines (D.N.J.)

Practice Tips!

- **Advise clients of risk of social media activity**
- **Advise clients that past social media posts may be uncovered and used in the case**
- **Suggest clients ask friends, family, and others to not post information, photos, videos, etc. of them on social media sites during the case**
- **Never advise a client to delete anything from social media in anticipation of, or during litigation, unless it is preserved**

- **Hypothetical for thought**
 - You represent a defendant in a car accident case
 - Case is in litigation and deposition of plaintiff is approaching
 - Using your real name and profile, you attempt to friend the plaintiff
 - YES or NO?
 - Result any different if its LinkedIn?

- **Hypothetical for thought**
 - You are taking the deposition of the defendant in a drunk driving car accident injury case
 - During the deposition you see on the public portion of the defendant's facebook public profile photos posted the night of the accident showing him drinking and start asking questions
 - During a break the defendant makes all of the photos private
 - What do you do?
 - What does defendant's lawyer do?

- **Hypothetical for thought**
 - Takes deposition and uncovers a facebook account after the deposition.
 - Before trial find in public portion of the account photos posted and prints them off
 - At trial on cross examination you want to use the photos, but have not disclosed them to the other side
 - YES or NO?

THE END
