



## 2021 Annual Conference

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### Navigating the Minefield: Privacy, Ethics, and Coverage and Liability Determinations

#### I. Introduction

##### A. Social Media Boom

Changes in technology and growth of social media have significantly changed the way many people in the world communicate and do business. As of the third quarter 2019, Facebook, the top social network on the web, reported over 2.45 billion monthly active users<sup>1</sup>. Over 1.9 billion logged-in users visit YouTube each month, and every day people watch over a billion hours of video and generate billions of views.<sup>2</sup> Surprisingly, the heavy social media user group is not Millennials. In fact, Generation X (ages 35-49) spends the most time on social media: almost 7 hours per week versus Millennials, who come in second, spending just over 6 hours per week.<sup>3</sup> The vast majority of Americans – 96% – now own a cellphone of some kind. The share of Americans that own smartphones is now 81%, up from just 35% in Pew Research Center’s first survey of smartphone ownership conducted in 2011. Along with mobile phones, Americans have a range of other information devices. Nearly three-quarters of American adults own desktop or laptop computers, while roughly half own tablet computers and roughly half own e-reader devices.<sup>4</sup>

These significant changes have resulted in a plethora of personal and business information now available on the world wide web. Social media has also become fertile grounds for legal and insurance claims investigations. Questions arise as to how far an investigation can go, and what lines should not be crossed when investigating people’s social media.

##### B. Invasion of Privacy Concerns

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<sup>1</sup> / <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>

<sup>2</sup> / <https://www.youtube.com/intl/en-GB/about/press/>

<sup>3</sup> / <https://www.nielsen.com/us/en/insights/report/2017/2016-nielsen-social-media-report/>

<sup>4</sup> / <https://www.pewresearch.org/internet/fact-sheet/mobile/>

The heightened privacy concerns in social media investigation are just as applicable to the use of other means to discover facts and information during claims investigation. The good old-fashioned methods of interviewing, surveillance, and collection of records are also subject to the same ethical considerations. The violation of these ethical obligations may subject an investigator, adjuster, or attorney to civil lawsuits, claims of bad faith insurance claim handling, and/or disciplinary action.

## **II. There are State Laws that Govern Ethical Conduct by Insurers**

### **A. Unfair Claims Settlement Practice Laws**

Most jurisdictions have unfair claims settlement practice laws. Most of these statutes include a list of prohibited conduct: 1. An insurer may be acting in bad faith or unethically if the insurer delays, discounts or denies payment without a reasonable basis; 2. Fails to acknowledge and reply promptly upon notification of a covered claim; 3. Fails to pay a covered claim as a result of failing to do a proper, prompt and thorough investigation as to reasonable liability and damages based upon all available information; 4. Fails to affirm or deny coverage of claims within a reasonable time upon receipt of claim and/or proofs of loss; 5. Attempts to settle a claim for less than the amount to which a reasonable person would have believed was entitled or attempts to substantially diminish a claim requiring an insured to initiate litigation; and 6. Attempts to settle claims on the basis of an application and/or policy which were altered without notice, knowledge or consent of the Insured.

### **B. Adjuster's Code of Ethics**

Licensed adjusters also have a code of ethics governing their conduct. An example is taken from the California Association of Independent Insurance Adjusters:

- To always conduct ourselves to command respect within the industry of insurance and with the insuring public.
- To approach investigations and adjustments with an unprejudiced and open mind and a determination to be fair with insured and insurer.
- To make truthful and unbiased reports of facts as we find them.
- To assume an unvarying attitude of fairness and by competence, integrity, and respect for the person with whom we have dealings, to promote goodwill toward the business of insurance.
- To resist influence tending to promote improper and extravagant settlements.
- To avoid improper alliances.
- To refrain from improper solicitation of business.
- To be alerted to changes in policy forms and methods to render the highest quality of service.
- To work for economy of expense and equitable bills for service.
- To serve the business of insurance with loyalty and to cooperate with insurers and their designated representatives in the proper handling of claims and losses.
- To work in harmony with one another and our clients to foster cordial relationships among ourselves and with the insurance fraternity.

## **C. Model Rules of Professional Conduct for Attorneys**

### **1. ABA Model Rules of Professional Conduct**

It is engrained into attorneys to not lie, cheat and steal. All state bars have their own Rules of Professional Responsibility governing the ethical conduct of their attorneys. While not all states have adopted the ABA, Model Rules of Professional Responsibility, most have similar rules. Notably, there is no specific rule that addresses social media or any other forms of investigation. There has been ethics opinion in various states that have addressed investigation tactics in the context of the broader and general rules of professional responsibility.

### **2. No Specific Rules Governing Investigation**

There are currently no known State ethical opinions which prohibit informal discovery of social networking sites through directly searching of those sites when the information is “publicly” available. In August 2005, the Oregon State Bar Association Board of Governors specifically addressed this issue in the context of an attorney visiting an adverse party’s social media site; and noted that “[a]ccessing an adversary’s public website is no different from reading a magazine article or purchasing a book by that adversary.”<sup>5</sup>

### **3. No Rules Against Researching Social Media**

Similarly, in 2010, the New York Bar concluded that a lawyer “may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer’s client in litigation as long as the party’s profile is available to all members in the network and the lawyer neither “friends” the other party nor directs someone else to do so. It has become routine for attorneys and claims personnel to conduct a comprehensive Google internet search of an adverse claimant or represented party for their public social media information.

### **4. Attorneys Have Duty to Research Social Media**

In fact, some State ethical opinions go as far as to indicate that a failure to conduct a sufficient investigation of available social media information could be considered below the minimum standards of representation. The D.C. Bar has concluded that the D.C. Rules of Professional Conduct 1.1 and 1.3 “may require investigation of potentially relevant social media postings of adverse parties and their counsel, other agents, and experts.”<sup>6</sup> Citing that state’s Rules of Professional Conduct 1.1 and 1.3, the New Hampshire Bar found that attorneys have a duty “to be aware of social media as a source of potentially useful information in litigation, to be

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<sup>5</sup> / Or. St. Bar Ass’n Bd. Of Governors, Formal Op. No. 2005-164, *available at* <http://www.osbar.org/docs/ethics/2005-164.pdf> (last visited Feb. 19, 2017)

<sup>6</sup> / DC Bar Ass’n Ethics Op. 371 (2016), *available at* <https://www.dcbbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm> (last visited Feb. 13, 2017).

competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.”<sup>7</sup>

### **III. Ethical Investigations**

Here are a few suggested ways to assure that the investigations are performed ethically: avoid conflicts of interest; act with due diligence; be honest and truthful; do not advise against seeking advice of counsel; be fair and objective when interviewing witnesses; treat the claims in accordance with the policy; conduct fair and complete investigations; take proper care when dealing with the elderly or anyone with known disabilities; do not negotiate with a represented party; provide full disclosure to the insured of coverage for which the policy must respond; return telephone calls, letters and other communications promptly and in sufficient detail; and respond to enquiries without undue delay.

Where coverage is denied under a policy of insurance the adjuster shall take steps to arrange for the claimant or policyholder to be advised promptly in writing, of the reason for the denial of liability. When consideration is not given to a potential claim by a third party the adjuster shall, on the instruction of his client, promptly notify the claimant of the denial.

### **IV. Investigation Gone Bad**

#### **A. The Do Not Ever, Ever**

There are blatant unethical acts/conduct and ones that border on unethical conduct. The obvious: there is no lying, cheating, stealing, invasion of privacy, and engagement of criminal offense. Some no-noes include trespassing, using a camera and zooming into a residence, filming over a privacy fence, climbing trees for a view. What is captured by camera and video must be in public view. Investigators should not participate in hard following because it is considered harassment. Also, they cannot extract information by pretexting or lying about who you are.

Additional practice pointers for no no's: failing to inform clients or policyholders of any material fact that may prejudice their interests; taking improper advantage of a policyholder's inexperience, lack of education, youth, lack of sophistication, language barrier; using abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from an adjuster.

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<sup>7</sup> / See, e.g. SDCBA Legal Ethics Op. 2011-2 (2011), *available at* <https://www.sdcb.org/?pg=LEC2011-2> (last visited Feb. 13, 2017); Ky Bar Ass'n Ethics Op. KBA E-434 ( 2012), *available at* <http://www.kybar.org/237> (last visited Feb. 16, 2017) (“If the site is “public,” and accessible to all, then there does not appear to be any ethical issue); Colo. St. Bar Ass'n Rule 127 (2015) (“A lawyer may always view the public portion of a social media profile and any posts made by a person through social media.”)

During investigations, although some attorneys master at this art, it is generally unethical to give a leading or misleading statement as it may produce a response that would not otherwise be the normal words of the subject. Although ruses and pretexts are a form of obtaining information, it is incumbent upon the investigator to use them with caution and under specific situations. If the welfare or safety of children is of concern, the safety of the children is an exigent and overriding consideration. An invasion of privacy occurs when a person encroaches upon the place of solitude or seclusion, and such encroachment is highly offensive to the reasonable person. This includes using deceit or trickery. This may or may not be physical trespassing. This may occur by phone, email, fax, and email – any form of communication or interaction.

#### **B. No Creation of Fake Social Media Accounts**

There appears to be a consensus that overt deception, such as creating a fake social media profile to obtain access to “non-public” portions of a social media site, would not be ethical and violates Model Rule of Professional Responsibility. The jury is still out on whether “friending” someone using one’s real name is unethical behavior.

#### **C. Friend Request is Ok, So Long as Use Real Name**

In 2010, The Association of the Bar of the City of New York Committee on Professional Ethics concluded that “an attorney or her agent may use her real name and profile to send a ‘friend request’ to obtain information from an unrepresented person’s social networking website without also disclosing the reasons for making the request.”<sup>8</sup> So long as the attorney used her own name in the “truthful” friending of an unrepresented person, the New York Bar did not consider the omission of the purpose for the request to be deceptive.

In 2013, the Oregon Bar held that an attorney may request access to a non-represented person’s non-public social media information without representing that the attorney is “disinterested”.<sup>9</sup> A request to access non-public information does not imply that the attorney is “disinterested” in the pending legal matter. However, “if the holder of the account asks for additional information to identify the attorney or if the attorney has some other reason to believe that that person misunderstands her role, the attorney must either provide the additional information or withdraw the request.”<sup>10</sup>

#### **D. Cannot “Friend” Unless Disclose Purpose of Request**

In contrast, a 2011 decision by the San Diego County Bar, citing ABA Model Rule 4.1, held that an attorney may not send a “friend request” to an unrepresented party without disclosing the purpose of the request, as it violates the attorney’s ethical duty not to deceive.<sup>11</sup>

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<sup>8</sup> / NYC Eth. Op. 2010-2 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 2010 WL 8265845 (2010).

<sup>9</sup> / OR Eth. Op. 2013-189 (Oregon State Bar Association), 2013 WL 8482075 (2013).

<sup>10</sup> / Id.

<sup>11</sup> / SDCBA Legal Ethics Op. 2011-2 (2011), available at <https://www.sdcba.org/?pg=LEC2011-2> (last visited Feb. 13, 2017).

In 2012, the New Hampshire Bar, held an attorney may not send a request to a witness to access restricted information using only the attorney's name or the name of a third party (a "name only" request). Any such request must "truthfully" identify the attorney, the identity of the client and the matter in litigation.<sup>12</sup>

In Roberttelli v. New Jersey Office of Atty. Ethics, 224 N.J. 470; 134 A.3d 963; 2016 N.J. LEXIS 323 (2016), the Supreme Court of New Jersey permitted the plaintiff in a civil action to file a grievance against the defendant's attorney, with the Office of Attorney Ethics (OAE) Director for obtaining his non-public Facebook information. On March 10, 2007, a police car driven by a sergeant with the Oakland Police Department allegedly struck a pedestrian, Dennis Hernandez. Hernandez claimed that he suffered permanent injuries, and commenced suit against the Borough, the police department, and the sergeant. Plaintiffs, who are attorneys licensed in New Jersey, were employed by the law firm that represented the defendants in the lawsuit. To obtain information about Hernandez, plaintiffs directed a paralegal employed by the firm to search the internet. Among other sources, she accessed Hernandez's Facebook page. Initially, the page was open to the public. At a later point, the privacy settings on the account were changed to limit access to Facebook users who were Hernandez's "friends." The OAE contends that plaintiffs directed the paralegal to access and continue to monitor the non-public pages of Hernandez's Facebook account. She therefore submitted a "friend request" to Hernandez, without revealing that she worked for the law firm representing defendants or that she was investigating him in connection with the lawsuit. Hernandez accepted the friend request, and the paralegal was able to obtain information from the non-public pages of his Facebook account.

The Colorado Bar also held that requesting access to restricted portions of a social media profile should not be made without identifying the attorney's role in pending litigation. The Colorado Bar specifically defined that to mean: (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 connection which the lawyer is seeking the information. In addition, under certain circumstances, the Colorado Bar felt that a lawyer may have to explain that his or her client has interests opposed to those of the unrepresented party.<sup>13</sup>

## **V. Insurance Professionals – What are Your Ethical Obligations?**

There is no set of rules or even any ethics publication governing a claims professional use of social media. However, investigations by insurance professionals should be conducted carefully to comply with claim handling rules of professional and ethical responsibility.<sup>14</sup>

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<sup>12</sup> / NHBA Ethics Committee Advisory Opinion 2012-13/05, *available at* [https://www.nhbar.org/legal-links/Ethics-Opinion-2012-13\\_05.asp](https://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_05.asp) (last visited Feb. 16, 2017).

<sup>13</sup> / Colo. St. Bar Ass'n Rule 127 (2015), *available at* <http://www.cba.cobar.org/index.cfm/ID/22347/CETH/Formal-Ethics-Opinions/> (last visited Feb. 13, 2017).

Insurance professionals do not have equivalent ethics opinions for insurance professionals provided by governing insurance agencies or organizations that directly address these social media investigation questions. Claim professionals must look to the states' prohibited insurance claims handling practices and company guidelines. It is strongly recommended that insurance professionals err on the side of caution and utilize the principles set forth in available bar organization ethics opinions as guidelines for their social media investigations.

That means investigation of "public" portions of a social media site is acceptable, while attempting to "friend" a claimant to gain access to their "non-public" information is generally not acceptable and is certainly not if the person is represented by counsel. Of course, any overt deception, such as setting up a false profile, is unacceptable.

If there is any doubt, consider whether the activity would be okay if it is another form of communication, and whether the social media communication in this circumstance is different. Finally, always remember, do not obtain restricted information through improper actions of a third party, such as having them attempt to "friend" an unrepresented party in hopes that he or she will not recognize them and understand that the purpose is for you to get their information. Remember, if you cannot do it yourself, you should not have someone else do it for you either.

## **VI. Conclusion**

Access to social media creates similar ethical considerations as rules governing the other investigation techniques, with surveillance, photography, video, recordings. The same rules apply. People still have a right to privacy and be free from harassment. There are several ethical opinions governing the conduct of attorneys in the use of social media. Although attorneys are governed by a very stringent set of rules of conduct, claims professional are not bound by those rules. However, aim for a higher standard of conduct.

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<sup>14</sup> / John Butler, William Baumann and William Lentz, *Social Media—Another Item for the Claims Toolbox* (2011), available at <http://www.genre.com/sharedfile/pdf/InsuranceIssues201112-en.pdf> (last visited Feb. 21, 2017).