

ETHICAL OBLIGATIONS FOR ATTORNEYS AND CLAIMS PROFESSIONALS USING SOCIAL MEDIA

John M. D'Amelio Jr., Esq.
Harvey Pennington, Ltd.
1800 John F. Kennedy Boulevard
Suite 1300
Philadelphia, Pennsylvania 19103
215-575-4123
jdamelio@harvpenn.com

I. Introduction

“Social media” or “social networking” websites permit users to join online communities where they can share information, ideas, messages and other content using words, photographs, videos and in other increasingly creative ways. The most popular of these sites, Facebook, Twitter and LinkedIn, are designed to permit users to share information about their personal and professional activities. As of January 2015, an estimated 74 percent of adults aged 18 and over use these sites.¹ Attorneys and claims professionals use these sites for both business and personal reasons, and their use raises ethical concerns, both in how attorneys and claim professionals use the sites to collect information in claims investigations. Although there are no specific ethical rules governing the investigation of social media sites either for legal professionals or insurance professionals, case law, statutes, and current ethical rules provide adequate guidance into social media investigations.

II. Social Media Investigation – Attorneys and Legal Professionals

For legal professionals, the most prudent use of social media is through informal discovery.² Attorneys may freely search social media content for publically available information, as the courts have favored a policy of informal discovery.³ For all jurisdictions, the following standards indicate the current understanding of best practices under the Model Rules of Professional Conduct. Of course, attorneys should consult their local Rules of Professional Conduct to ensure compliance with the model rules:

- (1) Unless a lawyer is entirely clear on the pretexting authority in his or her jurisdiction and confidently feels that the use of false identity on a social media site would fall within a pretexting exception, lawyers should never use false identities and fabricated profiles to obtain access to and information contained on social media sites.

¹ <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/>

² Allison Clemency, “Friending,” “Following,” and “Digging” up Evidentiary Dirt: *The Ethical Implications of Investigating Information on Social Media Websites*, 43 Ariz. St. L. J. 1021, 1027

³ Peter Goldman, *Social Media Sites: The Fraud Investigator’s New Best Friend...But “Friending” Can Be Risky* (2012), available at <http://www.acfe.com/fraud-examiner.aspx?id=4294971928>

- (2) A lawyer using his or her true identity may request “friend” or “follower” status of an unrepresented person, but should include with the request a statement disclosing the purpose of the request.
- (3) A lawyer may enlist a third party agent to request “friend” or “follower” status of an unrepresented person, but should also include with the request a statement disclosing the purpose of the request.
- (4) Lawyers should refrain from requesting “friend” or “follower” status of a [legally] represented person’s profile.
- (5) A lawyer should not engage in interactive review—posting, messaging, tweeting—of a represented person’s social media profile.⁴

III. Social Media Investigation – Insurance Professionals

The use of social media investigations by claims professionals is becoming an increasingly vital and cost-effective asset in claims investigations. Annually, fraud costs the insurance industry billions of dollars.^{5 6} Social media searches can give insurance professionals an immediate and often unfiltered view into the personal and professional lives of the claimants they are investigating. Often, “friending” a claimant can yield information that is useful to defending a claim.⁷ Yet, as with legal professionals, there are boundaries associated with the use of this technology.

A. Insurance Professional as Independent Investigator – Legal and Ethical Limitations

In general, insurance professionals cannot misrepresent themselves or engage in deception when using social media in a claims investigation. Social media sites generally allow users to be as transparent as they choose. As such, insurance professionals need to resist any temptation to use false pretenses or trickery in a quest to reveal a claimant’s private personal information on social media.^{8 9} While the particular limitations and penalties for engaging in

⁴ *Supra* note 3

⁵ Anthony O’Donnell, *Insurance Fraud Fighters Accused of “Snooping” on Facebook Accounts* (2011), available at <http://www.insurancetech.com/claims/insurance-fraud-fighters-accused-of-snoo/231900822>

⁶ *Supra* note 3

⁷ Wayne Partenheimer, *Using Social media in Your Claims Investigations – You’ve Got A “Friend”* (2011), available at <http://www.propertycasualty360.com/2011/02/02/using-social-media-in-your-claims-investigations?t=investigativeforensics&page=2>

⁸ Denise Johnson, *Using Social Media in Claims Investigation* (2012), available at <http://www.claimsjournal.com/news/national/2012/11/05/216789.htm>

⁹ John G. Browning, *Digging for the Digital Dirt: Discovery and the Use of Evidence from Social Media Sites*, 14 *SMU Sci. & Tech. L. Rev.* 465, 470 (2010–2011)

this type of conduct range from jurisdiction to jurisdiction, the prudent insurance professional should avoid these tactics during a claim investigation.¹⁰ Certainly, should any ambiguity or questions arise as to the legal limitations of conduct, insurance professionals should seek the advice of claims counsel or outside counsel.

Similarly, investigations into a claimant's social media content by insurance professionals are generally bound by the rules of professional and ethical responsibility, and all activities should be in compliance therewith.¹¹ As noted above, a claims investigator should not set up a fake social media in an attempt to get around the claimant's privacy settings. Importantly, there should be no active solicitation of information from a claimant, whether by an online chat or messaging as such conduct can be viewed as a violation of an insurance professional's ethical obligation of good faith claims handling.¹²

B. Insurance Professional as Agent of a Legal Professional – Legal and Ethical Limitations

In addition to the previously discussed ethical and legal limitations, insurance professionals, who act as an agent of an attorney, are also limited by the rules governing professional conduct of legal professionals. The rules governing professional responsibility of attorneys do not distinguish between the activities of a lawyer and those of an insurance investigator acting as his agent.¹³

As previously discussed, legal professionals are restricted by the Model Rules of Professional Conduct, and subsequently they may not instruct a claims investigator to conduct their investigation in a manner that may violate those rules.¹⁴ "Insurance companies and investigators must be careful because, if they work in regular collaboration with attorneys, the attorneys are bound by the rules of professional responsibility if they are associated with an in-house or outside investigator."¹⁵ Insurance professionals may jeopardize the admissibility of social networking evidence obtained through deceit and may place the lawyer at risk of ethical sanctions if they either contact a party represented by counsel or use deceit in investigations to uncover evidence.¹⁶ Therefore, it is important for an insurance professional, acting as an agent for an attorney, to abide by the Model Rules of Professional Conduct and avoid what their individual state deems to be deceptive behavior in conducting social media investigations.

¹⁰ See e.g., Cal. Ins. Code § 791.03

¹¹ John Butler, *Social Media—Another Item for the Claims Toolbox* (2011), available at <http://www.genre.com/sharedfile/pdf/InsuranceIssues201112-en.pdf>

¹² *Id.*

¹³ Or. State Bar Ass'n Bd. Of Governors, Formal Op. 2005-164, 452 (2005), available at http://www.osbar.org/_docs/ethics/2005-164.pdf

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

III. Conclusion

There are currently no ethical rules specifically governing the investigation of social media sites in claims investigation for either legal professionals or insurance professionals. However, emerging case law, statutory authority and anticipates changes to the Model Rules of Professional Conduct should serve as reminders that while social media is a useful and cost effective tool to use in claims investigations, it should be limited to informal discovery and passive surveillance of a claimant's personal and professional activities. The common thread for both legal and claims professionals is to avoid fraud or misrepresentation to procure otherwise private information about claimants. As such, a best practice is to perform due diligence on a claimant's social media information and periodically check a claimant's public sites along with other traditional methods of information gathering during the claims investigation process.