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Q&A

By Jeff Storey

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The proliferation of social media has created significant marketing opportunities for lawyers and given them access to a trove of useful information about prospective jurors, witnesses and others. But it also has created confusion about how traditional ethical rules apply to the use of Facebook, Twitter and other sites.

The Commercial and Federal Litigation Section of the New York State Bar Association recently created a social media committee, one of the first in the country, to educate attorneys about the promise and peril of social media and to have a voice in the resolution of issues that stem from its use.

Mark A. Berman, a partner with the 25-lawyer firm of Ganfer & Shore, cochairs the committee with Ignatius A. Grande of Hughes Hubbard & Reed. Berman estimates that 55 percent of the committee's work deals with substantive legal and procedural issues, 30 percent ethics and 15 percent marketing.

A graduate of Columbia University and the Benjamin N. Cardozo School of Law, Berman, 49, represents plaintiffs and defendants in complex commercial litigation. He has lectured on e-discovery, social media and ethics at judicial programs, as well as before the American Bar Association and New York State Bar Association and at various law schools.

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He is also a member of New York State E-Discovery Working Group, as well as the Commercial and Federal Litigation Section's E-Discovery Committee. He writes a column on state law e-discovery issues for the Law Journal.

Q. How did you become familiar with electronic discovery and social media issues?

A. I have been involved with advising on electronic discovery issues for the past decade, since the early days of emails. In my commercial litigation practice, social media communications are now a necessary part of my arsenal to establish my client's case or defense, especially in employment and securities disputes. Also, as the columnist for the New York Law Journal on state-law electronic discovery issues, I have noticed that over the past two years, more and more decisions are addressing the relevance and discoverability of social media communications.

Q: Why did the state bar need a social media committee?

A: The leaders of the Commercial and Federal Litigation Section no doubt realized that lawyers

needed to be educated about how social media can be effectively and ethically used in litigation and in communications with clients and prospective clients. As technology advances, how professional ethical rules apply is often not straightforward, and guidance remains sorely needed. The New York State Bar Association lacked a forum dedicated to educating lawyers and keeping up with this rapidly evolving field, and the section seized the opportunity to fill the gap. The Commercial and Federal Litigation Section also wanted to use the committee as a voice to communicate with its members through social media and to bring the forward-thinking section to the "next level" in this evolving area.

Q: What are your goals for the committee?

A: The mission of the committee is multi-faceted. It promotes the work of the state bar and the Commercial and Federal Litigation Section; educates attorneys about the risks and benefits of using social media as part of their law practice, as well as their professional obligations in using social media; educates lawyers about "best practices" concerning the preservation and collection of social media information for use in litigation and investigations and its discoverability; monitors legislative developments; and seeks to develop appropriate corporate and data privacy policies. The committee will also promote the work of the section and inform the bar about emerging legal developments through the section's recently established @NYSBAComFed Twitter handle. The committee wants to be the leading source in New York state for CLE relating to social media, and plans to conduct seminars and webinars on the use of social media.

Q: How large is the committee and what are the backgrounds of its members?

A: I am a general commercial litigator representing clients in state and federal court in actions seeking damages ranging from hundreds of thousands of dollars to tens of millions of dollars. My cochair, Ignatius Grande, has a technology background, teaches e-discovery at St. John's Law School, and advises large corporations on e-discovery and the use of social media. Our committee includes, among others, a retired judge, a court referee, plaintiffs and defendants attorneys from small and large law firms, solo practitioners, specialized e-discovery attorneys, government attorneys, technologists and law professors. In fact, the solo practice of one of our members is to help litigators get social media, text messages and web evidence admitted into court. We pride ourselves on our diverse backgrounds, making us unique for a bar group. It is this diversity that allows us to hear all sides of an issue when seeking to advise on and educate lawyers on social media policy. The committee has about 50 members and is growing.

Q: What activities has the committee sponsored?

A: Despite the committee's brief existence, we drafted a memorandum in opposition to proposed New York State legislation that sought to prohibit an employer or educational institution from requesting an employee or student's password in order to access a person's social media account. While the proposed legislation had laudable goals that need to be addressed, as then drafted, it did not properly balance the need for access to an employee or student's social media account with an individual's right to privacy. In its report, the committee suggested that the Legislature use a more refined eye and give further consideration to certain provisions in order to craft an effective law that would best balance the competing interests of all affected persons. The proposed legislation was subsequently put on hold.

The committee sponsored a CLE earlier this year called "How Social Media Is Changing the Practice of Law." The CLE consisted of two panels entitled "The Growing Litigation Challenges of Social Media" and "Social Media and Criminal and Civil Investigations." Top jurists, corporate counsel, practitioners, prosecutors, and technologists spoke on these cutting-edge topics.

The panels focused on the critical issue of preservation and collection of social media information for use in litigation and investigations, and the types of available social media information that can be mined so that counsel can ethically and zealously represent a cli-

ent in a civil or criminal matter. The audience learned that the government actually uses social media to profile criminals and to predict their next moves. Also addressed at the CLE program was one type of social media evidence that is often overlooked: "geolocational" information, which would reveal where a person was located at the time he or she sent a social media communication.

The committee will be putting together a program at the annual meeting of the section on Jan. 29, on social media ethics. The program, which I will be moderating, will feature a panel made up of nationally recognized judges and practitioners who have written and spoken on social media ethics.

Q: Do you find that many lawyers are unaware of the benefits and pitfalls of social media, either for their own practices or their clients' activities?

A: When I was a member of the New York City Bar's Committee on Professional and Judicial Ethics, perhaps 20 percent of the "hotline" calls I received asked questions concerning whether proposed social media marketing programs were ethically permissible. That was a couple of years ago and interest in using social media has only grown. From a litigation perspective, one pitfall often overlooked, is that social media pages and postings are subject to "litigation holds" and preservation obligations, just like emails.

I think the direct benefits of using social media are somewhat amorphous. Large firm attorneys use blogs to promote their names and practices, and I am not sure how much actual business social media exposure brings in for them. However, social media exposure and using social media to market can have real tangible benefits to the smaller firm. While using social media is cheaper than more traditional advertising, in actual attorney time, it can be expensive. An attorney has to devote substantial time to blogging and tweeting and keeping those who follow him or her current on significant legal or business developments so that the follower will continue to read that lawyer's postings and to potentially retain him or her.

Q: Are lawyers knowledgeable about the ethical implications of using social media? Are there a lot of such implications?

A: Lawyers are just learning that use of social media raises ethical issues that they may never have thought of. I doubt that many lawyers appreciate that when you access a person's social media site or page, some sites notify the owner that the site was viewed and provide the social media identity of the person doing the reviewing. This is particularly troublesome if the page viewed is that of a represented party or of a juror during deliberations. Another issue that most lawyers probably have not thought through is the ethical implication of providing legal advice on a public social media website, which might cause the creation of an attorney-client relationship and result in the disclosure of privileged legal advice or client information provided for the purpose of obtaining the advice. Unsolicited invitations to view a lawyer's social media page, unless exceptions apply, must comply with the rules governing attorney advertising and solicitation.

Q: Have courts and bar associations become active in regulating the use of social media?

A: Seeing that judicial opinions often do not provide the needed guidance to lawyers on perplexing social media ethical issues, the various bar associations of our state have recently issued ethics opinions that have provided real guidance. The opinions have covered such areas as whether a lawyer may "friend" a witness, whether an attorney may conduct social media investigations of prospective jurors, whether an attorney may give advice to "take down" a social media posting that has negative implications to a client, and whether there are limitations on an attorney's use of social media postings provided by a client from someone's "restricted" social media web page. From the marketing perspective, one recent ethics opinion addresses the limitations of how an attorney may respond to a person's request for legal advice transmitted over social media.

Q: Can you cite some court decisions that have been particularly influential?

A: New York State decisions in the past two years have been doing an excellent job in setting the ground rules for defendants seeking the

production of social media postings in personal injury cases, which are predominant among the social media cases being litigated in New York. Commercial litigators would be smart to learn from the personal injury defense bar that an opposing party's social media sites and postings should always be reviewed and their production requested in order to obtain relevant information. Parties must expect in camera reviews of social media postings, where defendants are frequently overreaching and plaintiffs are fighting to prevent the production of postings that may undercut their damage claims in the same way that surveillance tapes have sometimes done in the past. Perhaps the most interesting social media cases in New York have been the series of decisions issued by the Criminal Court relating to the production of tweets in an Occupy Wall Street prosecution. The significant legal issue there was whether the tweeter had standing to object to the production of his tweets. The court ruled he did not, but rather only Twitter had standing to object to a subpoena issued by the Manhattan District Attorneys' Office.

Q: Is there a need for more social media regulation?

A: There is a need for regulation of social media, but it cannot be based on a "knee-jerk" reaction to a horrific event that hits the papers. It all comes down to weighing an individual's right to say or post on social media what he or she wants, who and how someone then uses such communications, and a legislature's determination of whether such use should have civil or criminal consequences. For instance, legislation concerning access by an employer or a school to a person's social media account by requiring disclosure of a password or condoning "shoulder surfing" needs to balance an individual's right to privacy with an employer's or school's legitimate right to access a person's "private" thoughts under specified situations. However, such laws, for instance, need to take into account FINRA rules that require a brokerage firm to be able to supervise its brokers' social media communications.

An example of legislation attempting to address foolhardy social media postings is the recently passed law in California that would require website operators to erase postings when asked by a minor. The intent of this law is to offer minors a second chance after they post something and later regret it. On the regulatory front, employment lawyers need to be cognizant of the National Labor Relations Board's recent move to bring actions against employers for terminating employees based on their social media postings.

Q: What can a law firm gain through an active social media program?

A: An effective social media program broadens the reach of a law firm to an audience that a firm website or traditional advertising cannot truly capture. Social media communications are more easily "pushed" into clients' minds to keep them informed of important legal developments. An effective social media program will help keep the law firm's name on the "tip of the client's tongue."

Q: What advice do you give to a client that wants to enhance its use of social media?

A: I would suggest that a client needs to devote a specific creative person to expanding the client's use of social media and then to devote sufficient resources to maintain that program. Stale social media postings actually may cause more harm than good. Out-dated social media can hurt a client's image. However, because social media communications can have serious legal implications in certain regulated businesses, such as the securities, banking, and food and drug industries, counsel needs to be involved in vetting what is posted.

Q: Why is it important for firms and clients to have a social media presence?

A: Social media is just another form of advertising. Just as advertising is used to grow a business and then to retain customers or clients and to create name recognition and burnish one's reputation, social media performs the same function.

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