Pretexting and Discovery of Social Media

By Michael Downey

“They’re at it again,” Paradox’s voice exploded on the telephone, jarring Ethox back from pondering judicial canons.

“Kaye’s lawyers are asking Jay all sorts of questions about his social networking sites. It is not going well.”

“What are you talking about?” Ethox interrupted.

“Oh, sorry. Paradox here. I’m defending Jay’s deposition in the Jay-Kaye Partnership dispute,” Paradox explained. “We are on break. Kaye’s lawyers have been tracking Jay through his Facebook and Twitter accounts for months. Both accounts have passwords. Can they view the sites?”

“There is probably no applicable privilege. But Kaye’s lawyers may have violated ethics rules,” Ethox responded. “How did they get access?”

“Well, Jay tells me he friended Kaye on Facebook when they were partners. Jay lets all his Facebook friends—including Kaye—access everything on his site. And Jay never blocked Kaye once they started fighting.”

“Then it was probably ethical for Kaye to access everything on Jay’s Facebook page and share it with his lawyers. They also could have made sure you included social media materials when you responded to discovery, but the informal discovery also works where Kaye’s access was authorized.”

“I had not thought of social media when preparing discovery responses.”

“I suspected so, but we can deal with that later,” Ethox continued. “Since Jay had previously authorized Kaye to see the site and never revoked that authorization, the authorization is probably still valid. So Kaye could access Jay’s Facebook page.”

“Well, that doesn’t explain access to Jay’s Twitter account. Jay keeps his tweets private. And he blocked Kaye when they started fighting. Jay even rejected a follower request from one of Kaye’s lawyers. But they still obtained access. Jay doesn’t know how, but he thinks it may have been a request from a supposed high school classmate. Jay’s class was pretty small, and he did not remember the sender, but he granted the request to avoid appearing rude.”

“Well, if Kaye’s lawyers did have someone send a misleading request to gain access, this would probably violate ABA Model Rules 4.1 and 8.4(c). Rule 4.1 prohibits a lawyer from making a false statement of material fact to a third person. Rule 8.4(c) prohibits a lawyer from engaging in conduct that involves dishonesty, fraud, deceit, or misrepresentation. Authorities indicate these rules prohibit misleading friend requests.”

“We doubt a lawyer sent the request.”

“That may not matter,” Ethox explained. “Rule 8.4(a) prohibits lawyers from violating the rules themselves or through the actions of another. And Kaye’s lawyers would be responsible for nonlawyer investigators and the like under Rule 5.3. So, if Kaye’s lawyers directed someone else to send the misleading request, they will likely still be responsible.”
“Is there any law on this?”

“Yes. Realize such requests are judged on a continuum. At one end, it is almost certainly ethical for a lawyer to send a request saying, ‘Hey, I am a lawyer and want your information to investigate you. Will you grant me access?’ At the other end, it is almost certainly unethical for a lawyer to use misrepresentations—like falsely claiming to be a classmate—to gain access to password-protected information.

“The middle is more gray and fact dependent. For example, if Kaye’s lawyer—expecting Jay would recognize the lawyer and reject a request—asked someone Jay would not recognize to send the request, like a secretary or investigator, this may be OK if the secretary or investigator made no active misrepresentations. New York City Bar Association Opinion 2010-2 indicates this is probably OK. But other authorities—such as Philadelphia Bar Opinion 2009-02 and San Diego County Bar Association Legal Ethics Opinion 2011-2—indicate there is an unethical, material omission if the sender is requesting access only to gain information for a lawsuit but does not warn the recipient.

“That is not all,” Ethox continued. “Did Kaye’s lawyers know we represented Jay when the request was sent? If so, the request may violate Rule 4.2, which prohibits a lawyer (when representing a client) from communicating with another lawyer’s client about the subject matter of the representation. Applying California law, San Diego County Bar Association Ethics Opinion 2011-2 supports that, since such a request is to obtain information for a lawsuit, it will likely constitute a communication about the representation. This may provide further grounds for discipline or disqualification.”

“Well, I guess I have a lot to discuss with Kaye’s lawyers,” said Paradox, sounding relieved.

“Absolutely. Now, let’s talk about how to handle those deposition questions.”

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