



# UPDATE

## When Words Matter

October 9-12, 2012  
St. Paul, MN

When Words Matter is a four-day national conference hosted each year in a state that has implemented the ChildFirst™ Forensic Interview Training Program. The conference brings together nationally recognized experts from different areas of the child protection field for this informative and innovative conference. Visit [www.ncptc.org](http://www.ncptc.org) for more information.

## Justice For All: Investigation and Prosecution of Child Abuse

Houghton, Michigan (Sept. 4-6)\*  
Muscatine, Iowa (Sept. 11-13)\*  
Riverton, Wyoming (Oct. 9-11)\*  
Yankton, South Dakota (Oct. 23-25)\*  
Defiance, Ohio (Nov. 13-15)

\*These conferences will include a pre-conference for tribal child abuse professionals or have presentations for child abuse professionals working in Indian country integrated into the full conference agenda.

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## “Will You Be My Friend?” Ethical Concerns for Prosecutors and Social Media

*Ethics is knowing the difference between what you have a right to do and what is right to do.*

— Potter Stewart, Associate Justice, United States Supreme Court

By Robert H. Giles<sup>1</sup> and Jason I. Allen<sup>2</sup>

The proliferation of social media outlets offers almost everyone the opportunity to be heard and to hear what may be said. When the online social networking phenomena started in the late 1990s it was hard to imagine that it would soon become a preferred communication method for millions of people across the globe and spawn businesses valued in the billions of dollars.

Social media platforms, from Facebook to Twitter to YouTube to Foursquare, give users the ability to communicate, share photographs, share videos, and play video games with friends and strangers alike. Because social media has become an overwhelming part of our lives, it has also become a useful tool for law enforcement and prosecutors in their search for evidence that may corroborate a case. From information posted on a defendant's Facebook page establishing his culpability in a pair of murders<sup>3</sup> to Twitter postings demonstrating that a defendant knows he is breaking the law,<sup>4</sup> social media can provide evidence that is instrumental to a successful prosecution. However, using social media also brings with it ethical issues that can cause problems for prosecutors. This article will discuss the ethical dilemmas associated with the use of social media and the risks they pose to prosecutors, investigators, judges and juries.

### Building the Case

Social media facilitates two major tasks of a prosecutor: develop corroborating evidence and gather information on potential witnesses. The use of social media outlets to aid in proving a crime or bolstering evidence that results in a conviction is steadily growing. Stories of defendants posting pictures demonstrating gang membership<sup>5</sup> and drug possession<sup>6</sup> have become commonplace. Suspects also implicate themselves in robberies and assaults with comments they post.<sup>7</sup> Particularly brazen offenders ignore no-contact orders or terms of parole or probation, providing everything needed for a conviction.<sup>8</sup>

In some instances, victims have been able to identify incriminating evidence and deliver it to the authorities.<sup>9</sup> When evidence lands in a prosecutor's inbox, unsolicited, from the public, that evidence may be used for investigative purposes but it might not be admissible in court. The issue with such evidence becomes authentication, requiring a discussion of “distinctive characteristics”<sup>10</sup> and a separate article.<sup>11</sup> What is relevant to ethical considerations is how prosecutors obtain evidence from social media when they must seek out and find the information on their own and what steps are required to access the information.

Depending on the specific platform and suspect, sought-after information may be publicly available. Some examples of publicly available online social media sources are unprotected Facebook pages, Twitter feeds, blogs, and non-password protected websites. In such instances judges and bar associations generally agree that investigators and prosecutors are within their ethical boundaries when they access such information. Seen in a recent New York ruling, tweets to the public are distinct from private messages, and carry no reasonable expectation of privacy.<sup>12</sup> Similarly, an Oregon Bar Association opinion suggests that while prohibited real world contact is equally prohibited in the cyber world, acceptable real world contact is equally acceptable – such as reading publicly available information that an opposing party has posted on its website.<sup>13</sup> Nearly a decade after the Oregon decision, the New York State Committee on Professional Ethics specifically assented to lawyers searching through publicly available information on social networks.<sup>14</sup>

A prosecutor may risk crossing an ethical line, thereby risking the admissibility of evidence, the case as a whole, and his/her reputation, if s/he seeks information the defendant, a witness, or a juror has not publicly displayed. The American Bar Association's Model Rules of Professional Conduct state that "[i]t is professional misconduct for a lawyer to: [. . .] (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."<sup>15</sup> However, the National District Attorneys Association's National Prosecution Standards (NPS) give prosecutors more leeway when seeking to discover information found in a non-public on-line forum. Those rules state that "[a] prosecutor performing his or her duty to investigate criminal activity should neither be intimidated nor discouraged from communicating with a defendant or suspect in the absence of his or her counsel when the communication is authorized by law or court rule or order."<sup>16</sup> The NPS even allow for a prosecutor to ". . .advise or authorize a law enforcement officer to engage in undercover communications with an uncharged, represented suspect in the absence of the suspect's counsel, *provided such a communication is authorized by law or court order.*"<sup>17</sup> However, it is important to remember that prosecutors are bound by the canons of ethics employed by their state and may find that the National Prosecution Standards will not protect their actions in such an environment.

Information on personal websites may be restricted, such that it can only be viewed by friends (users of the same website to whom the individual grants access), a specified subset of friends, friends of friends, or those within a certain network (a company, school, or city). Assuming that the prosecutor is not already friends with the suspect and that the suspect has selected some level of non-public privacy setting, investigators could be limited in their efforts to collect evidence. The tech-savvy prosecutor and investigator may find several ways to access the information but should proceed with extreme caution.

In the same decision that allows lawyers to retrieve publicly available information from social media, the New York State Bar Association's Committee on Professional Ethics (CPE) forbade lawyers from "friending" another party themselves or having a third party friend the target.<sup>18</sup> The CPE concluded that "friending" an opposing party would run afoul of rules prohibiting deceptive conduct or false statements.<sup>19</sup> While the CPE's opinion states a blanket ban on "friending" an opposing party in pending

litigation, its logic does not necessarily prohibit an open and honest "friending." "Friending," on the other hand, is a form of contact, and lawyers must take care when contacting opposing parties.

The Philadelphia Bar Association's Professional Guidance Committee (PGC) had the opportunity in 2009 to consider a similar issue, and in fact the CPE decision relied on the PGC decision.<sup>20</sup> A lawyer in Philadelphia had a third party "friend" an opposing witness to gain access to that witness's online profiles. The PGC found that this conduct violated two rules, forbidding "engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation" and "knowingly mak[ing] a false statement of fact or law to a third person[.]" The PGC took issue with this third party friending because it "omitted a highly material fact, namely, that the third party who ask[ed] to be allowed access [wa]s doing so only because he or she [wa]s intent on obtaining information and sharing it with a lawyer to impeach the testimony of the witness."<sup>21</sup>

These decisions are clear that prosecutors ethically cannot "friend" an opposing witness or party in an ongoing case. However, two additional possibilities remain unaddressed. The first is adding one's own profile to the witnesses' or defendant's geographic network. If the target profile is restricted from the general public, the profile may still be visible to everyone within the witness' or defendant's network. The second possibility is sending a "friend" request to a potential witness or defendant. Both tactics may be subject to potential ethical violations. While the NPS clearly allow prosecutors to approve the use of subterfuge by investigators to gain access to the protected parts of an individual's online social media, the NPS requires a court order or law that allows the action. The prosecutor who takes this action themselves can find that they have run afoul of the canons of ethics for their jurisdiction.

In addition to potential ethical violations and sanctions, a prosecutor who advises law enforcement on investigative practices potentially opens the door to losing their prosecutorial immunity to 42 U.S.C. § 1983 civil law suits.<sup>22</sup> In *Mink v. Knox*, a prosecutor in Colorado reviewed and signed off on a search warrant pursuant to state law. The United States Circuit Court for the 10th Circuit found that the prosecutor was entitled to qualified immunity and not absolute immunity because the warrant lacked probable cause and particularity.<sup>23</sup> The Mink Court found that when a prosecutor causes a search warrant to be issued that infringes on an individual's 4th Amendment rights they are entitled only to the protection of qualified immunity.<sup>24</sup>

### **Jury Concerns**

Social media is beginning to play a larger role with juries as well. Two potential issues can arise: attorneys researching jurors, and jurors using social media to transmit case-related material. The latter contains immense potential pitfalls, if only because an attorney cannot control the actions of a juror. The former can be dealt with more easily.

Lawyers are forbidden from communicating with jurors, except during the voir dire process.<sup>25</sup> Similar to case law and bar opinions regarding witnesses and defendants, lawyers cannot and should not friend jurors to access hidden information. However, accessing publicly available information, just as with defendants, is acceptable.

The CPE has provided an opinion that confuses the issue somewhat. While concluding that public Facebook or MySpace profiles are fair for use, the opinion added that following a juror's Twitter feed may rise to contact.<sup>26</sup> This delineation is odd, because following a Twitter feed does not necessarily require any action by the juror – distinguishing either from “friending” – and information on Twitter has specifically been found to be public.

The reality of using social media to uncover information is limited by factors like caseload and time. Prosecutors are often lucky to discover the names of potential jurors as they walk into the courtroom to begin the jury selection process and therefore do not have the time and/or the resources to conduct depth research into the social media use of jurors. However, on those rare occasions where prosecutors have the adequate time and resources to research jurors using online social media outlets, care must take care to limit acquisition of information to publicly accessible means.

Jurors' use of social media is certain to create problems for all parties to a case. Jurors either posting information about a case or conducting prohibited research about a case is a recipe for mistrial. Two recent cases that came out of the Superior Court of New Jersey, Bergen County illustrate the problems associated with a juror's use of social media during a trial.<sup>27</sup> In both cases, jurors used social media (Wikipedia and/or Google) to uncover information about their case that had not been presented at trial; the trials ended in mistrial and with the jurors facing criminal contempt proceedings.<sup>28</sup> Other cases from across the United States exemplify how jurors use their online social media outlets to discuss their jury service, the evidence heard during trial, and offer pre-deliberation opinions as to the guilt or innocence of the defendant.<sup>29</sup> Such situations demonstrate the often-futile efforts of the court and the parties to keep social media from invading their cases. It is imperative that judges use jury instructions that clearly lay out the prohibitions against the use of social media and extra-judicial research.<sup>30</sup> However, absent measures like sequestration and removal of jurors' access to the Internet, policing and preventing jurors' access and use of social media remains difficult if not impossible.

## Judicial Concerns

The appearance of impropriety by a judge and prosecutors must be avoided to keep the public's faith in the justice system. Depending on the jurisdiction, this may mean that a prosecutor and a judge cannot be “friends” in an online social network. Jurisdictions have varied as to whether it is proper for a judge to have “friendships” with those attorneys who will appear as litigants in their court. According to a 2010 publication from the United States Judicial Committee on Code of Conduct, courts should take into consideration the following when using online social media:

- “Confidentiality
- Avoiding impropriety in all conduct
- Not lending the prestige of office
- Not distracting from the dignity of the court or reflecting adversely on the court
- Not demonstrating special access to the court or favoritism
- Not commenting on pending matters
- Remaining within restrictions of fundraising

- Not engaging in prohibited political activity
- Avoiding association with certain social issues that may be litigated or with organizations that frequently litigate.”<sup>31</sup>

States such as Massachusetts, Florida and California have found that the bounds of judicial ethics are violated by judges who are “friends” with parties and litigators who appear before them.<sup>32</sup> On the other hand, New York, South Carolina, Ohio and Kentucky have recognized that online social media relationships do not equate to unfair influence and allow judges to be “friends” with litigants who appear in their court.<sup>33</sup> The underlying premise of these ethical decisions focuses on the appearance of favoritism and the desire to prevent that impression.

## Prosecutors on Social Media Networks

Prosecutors who maintain membership in an online social media account must exercise caution in what they post. They should always refrain from posting any information regarding ongoing cases. The prosecutor and law enforcement should follow the oft-quoted maxim: “do not put anything online – regardless of the perceived security – unless you would be alright with that information appearing on the front page of the newspaper.” While prosecutors may still use social media networks, they should refrain from posting information about cases, opposing counsel and the court. A lack of discretion may result in embarrassment<sup>34</sup> or even disbarment.<sup>35</sup>

## Conclusion

Online social media outlets can offer law enforcement and prosecutors a treasure trove of information and evidence to secure convictions. Social media and technology also presents many potential pitfalls to the successful conclusion of any case, from the improper gathering of information to the impermissible use by jurors.

Prosecutors should strive in every case to use technology, including social media, to corroborate the truth. However, prosecutors and law enforcement must maintain a healthy respect for the ethical boundaries that regulate the capture and utilization of this information.

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- 2 Staff Attorney - National District Attorneys Association's National Center for Prosecution of Child Abuse.
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Justice For All offers evidence-based, victim-centered strategies for child abuse professionals on all aspects of the investigation and prosecution of child sexual abuse, physical abuse, neglect and homicide. This multi-disciplinary training is open to prosecutors, law enforcement officers, medical and mental health professionals, forensic interviewers, victim advocates, child protective services, social workers and other allied professionals. A parallel session offered specifically for medical providers at a local hospital/medical facility is offered in conjunction with each of these training conferences. Technical assistance for front-line professionals is also available at each of these training events with faculty allocated to address specific questions or issues arising from participant's cases. For more information, contact Jason Allen at [jallen@ndaa.org](mailto:jallen@ndaa.org) or 703-549-9222

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