Bloomberg BNA

ABA/BNA
Lawyers' Manual on Professional Conduct™

Social Media

Ghost of Snapchat Past: Pairing Social Media Legal Ethics with New and Future Functionalities

By Daniel Lust

Parents seem to have an *uncanny* ability to jump on fads at the very top of the coolness bell curve. The social media realm provides a good example of this phenomenon, i.e., as soon as little Johnny sees mom's friend request, he's off and running to the next big thing. For litigators and state bar associations alike, the little Johnnies of the world have caused quite the ethical dilemma. This is because little Johnny is constantly looking for something that hasn't yet reached mom's mahjong circle and that will present an even higher technological barrier than its predecessors.

Developers' keen awareness of this game of cause-and-effect seems to have played a large role in the progression of the social media era. Platforms that fail to innovate (MySpace) swiftly become relics while those that reign supreme in the social arena (Facebook) do so through constant evolution via the creation and/or purchase of unique and novel technologies.

Daniel Lust is an associate in Wilson Elser's White Plains office. He focuses his practice on complex tort and general liability matters. Dan can be reached at Daniel.lust@wilsonelser.com.

And then there's Snapchat: with an added level of complexity thanks to its unique user interface, ephemeral functionality, and incorporation of augmented reality and wearable devices, it serves as a perfect haven for little Johnny.

Spooked by these complexities, litigators have been slow to flock to new technology for their social media investigations. And ethical guidance has likewise been slow to adapt to new forms of social media. It is clear that some fine-tuning must promptly take place to ensure that ethical guidance accounts for these new technologies and, moreover, to better prepare for those yet to come.

The most obvious need for reformation falls within the juxtaposition of an attorney's right to access ''public'' social media information and the rules against impermissible social ''communications.'' This growing new technology problem is most apparent when viewed through the Snapchat lens.

Social Media Catch-22. Across the country, ethical guidance essentially is uniform in allowing attorneys to view the ''public pages'' of another party's social networking website to obtain impeachment material for use in litigation. DC Bar, Formal Op. 371 (2017); Colorado Bar Ass'n Ethics Comm., Formal Op. 127 (2015); and Pennsylvania Bar Ass'n Ethics Comm., Formal Op. 2014-300. This conduct is allowed so long as a ''communication'' does not occur between the attorney and the other user. *Id.*; New York County Formal Ethics Op. 2012-2 (2012). In the early days of the social media boom theses rules were crystal clear. What was considered ''public'' depended on one's individual privacy setting, or lack thereof. Similarly, what was considered a ''communication'' was straightforward, *e.g.*, a direct message, a post on a wall, a friend request.

Enter Snapchat (and that pesky little ghost). Now, rigid application of our old black-and-white definitions of ''public'' and ''communication'' results in a troubling catch-22 scenario for litigators. Simply put, it would be impossible for a lawyer to view *any content* a juror or

 ISSN 0740-4050

opposing party posts on Snapchat, even public pages, without committing an ethical violation.

But how did we get here? Let's blame mom and dad . . . in the role of the iconic Ebenezer Scrooge.

After reportedly rejecting Facebook's attempted $3 billion acquisition in 2013, Snapchat's initial public offering on March 1, 2017, valued the company at $23.8 billion. Though Facebook maintains an overwhelming edge in terms of its overall users, Snapchat has a key advantage over Facebook with respect to our little Johnny – it's not Facebook. In so doing, Snapchat has remained just hostile enough to stay on the correct side of our coolness bell curve.

Conventional platforms such as Facebook, Instagram, LinkedIn and Twitter offer publicly accessible landing pages for each user's profile. The amount of content visible on these landing pages provides a clear picture of that user's privacy setting and resulting expectation of privacy. *Breton v. City of New York*, No. 160836/2013, NYSECF Doc. No. 164 (N.Y. Sup. Ct. N.Y. Cty. May 16, 2016); *Higgins v. Koch Dev.*, No. 3:11-cv-00081-RLY-WGH, 2013 BL 230548 (S.D. Ind. July 5, 2013); *Keller v. Nat'l Farmers Union Prop. & Cas. Co.*, No. CV 12-72-M-DLC-JCL, 2013 BL 611 (D. Mont. Jan. 2, 2013).

Curiously, this feature does not exist on Snapchat. Though users can be located by their unique username, there is no outward-facing feature that provides an indication of the user's applicable privacy setting and, therefore, their expectation of privacy remains unknown. In this regard, it is noteworthy that some argue that users have no expectation of privacy even when they are not designated as public. *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. Suffolk Cty. 2010) (''[S]he consented to the fact that her personal information would be shared with others, notwithstanding her privacy setting. Indeed that is the very nature and purpose of these social networking sites else they would cease to exist.'').

In addition, the process of accessing a user's content is yet another way Snapchat differentiates itself. There is no traditional friend request where *mutuality* exists through an option to approve or deny the request. Instead, one's Snapchat postings can be viewed only by those who *unilaterally* ''add'' that user. Once this ''adding'' occurs, the owner of the added account automatically receives a notification that he or she has been ''added'' by a certain user. No such privacy settings even exist on Snapchat to create the recognizable bilateral connection. As such, a unilateral ''add'' becomes the only way one can view another's content, even when that content is *fully public*. See *Social Media Investigations: Digging Deep, or Just Scratching the Surface*, N.Y. Law J., Oct. 3, 2016.

The New Technology Problem. Herein lays our pivotal issue: Snapchat is dominated by users who are 24 and younger, with just 2 percent of overall traffic coming from those 55 and older. Meanwhile, Facebook has perhaps the ''oldest'' audience of any social media platform. *How Snapchat Demographics Are Surprisingly Shifting In 2016*, mediakix.com, Mar. 15, 2017.

Those unfamiliar with the intricacies of Snapchat (but familiar with Facebook) are likely to hear the word ''add'' and equate it to adding someone as a friend on Facebook—an action that ethics panels regard as impermissible contact when directed at an opposing party or juror. District of Columbia Ethics Op. 371 (2017); New Hampshire Ethics Op. 2012-13/05; San Diego Ethics Op. 2011-2. Our little Johnny is not typically well represented on committees tasked with evaluating ethical violations, e.g., improper social communications with a represented party or juror. Accordingly, ethics panels' presumed lack of intimate knowledge of the platform would tend to have a chilling effect on litigators' likelihood to investigate Snapchat in the first instance.

The same analysis can be applied to the ''Live'' features on both Facebook and Instagram, which, similarly, have not been addressed by ethics committees around the country. The Live feature allows users to broadcast live video to their network. Note that this live feed can be accessed by the ''public'' if that user has set his or her privacy settings accordingly. A notification is sent to this user any time someone watches the video. Yet, guidance clearly prohibits any communication with a represented party via social media. Once again, we reach the same catch-22 impasse—if an automatic notification does indeed constitute a communication, there would be no way to ethically view a fully public video.

Unfortunately, as of today not a single ethics opinion has expressly identified the Snapchat or Live red flags. To tailor proper guidance with respect to these issues, ethics panels must adopt the mindset that not all notifications are created equal.

The closest guidance on point are those opinions that address LinkedIn's page-view notification. ABA Formal Ethics Op. 14-466 (2014). For those unfamiliar with LinkedIn: depending on a user's privacy settings, an automatic notification is sent to a user whenever someone views their page. This notification provides details as to the viewing user's identity. The ABA concluded that this feature of LinkedIn was not a communication as applied to a juror, stating in pertinent part:

> This Committee concludes that a lawyer who uses a shared ESM (electronic social media) platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.

In this sense, viewing a LinkedIn page is akin to the Snapchat ''add'' since it is a unilateral activity that automatically results in a notification being sent to the user whose content is viewed. As the ABA opinion suggests, this ''adding'' feature should indeed be viewed as a communication, but one that is decidedly *permissible*. This is based on the fact that this communication occurs between the ESM service, Snapchat, and the other individual and does not involve the viewing party, i.e., the attorney, whatsoever.

If the ''adding'' function of Snapchat were ruled per se unethical, there would be no way to view an adverse party's otherwise publicly available content. This result must be avoided since it would prevent attorneys from viewing materials in which the adverse party has no legitimate expectation of privacy and, moreover, would contradict the ABA's opinion on passive notifications and those opinions that give attorneys the right to access any and all ''public'' pages. ABA, Formal Op. 14-466.

  MOPC ISSN 0740-4050

Modernizing Ethical Guidance. In a vacuum, the acts of adding another on Snapchat to determine if one is indeed ''public'' or simply viewing one's public live content should not and cannot be disallowed on their face. Closer inspection is required. These are not of the same character as clear and direct social communications, e.g., direct messages. Yet, based solely on a technical function of the respective platforms, these otherwise innocuous acts become essentially poisoned by a notification automatically generated by the ESM platform after the fact, and thereby transformed into an *impermissible* communication. One would think these are not the types of ''communications'' that ethical guidance was even designed to protect against.

If you ''add'' your favorite celebrity on Snapchat or simply watch their live video, would you think that you've just had an intimate ''communication'' with them? So why should a non-celebrity who *explicitly designates* their postings as ''public'' be treated any differently? After all, their expectation of privacy would similarly be nonexistent in this scenario.

While applauded by user bases, this rapid innovation continues to present problems for those trying to craft effective ethical guidance. Fastening a comprehensive framework to such a nebulous field is a near impossible task. Yet, bar associations nationwide are encouraged to play the role of sheriff and stay one step ahead of little Johnny (and the *next* pesky little ghost). If they do not, social media litigation may very well turn into the Wild West, with attorneys forced to navigate a barrage of new technologies without a proper code of conduct to guide them.

To contact the editor responsible for this story: S. Ethan Bowers at sbowers@bna.com