



ETHICS: ENHANCING LITIGATION STRATEGY WITH CYBER / DEEP WEB INVESTIGATIONS

Deirdre Wheatley-Liss
Porzio Bromberg & Newman (Morristown, NJ)
973.889.4278 | drwheatleyliss@pbnlaw.com

Enhancing Litigation Strategy with Cyber/Deep Web Investigations: What Witnesses Don't Want You To Know

Deirdre Wheatley-Liss

Ethics Rules require counsel to be knowledgeable about technology and to understand all of the various places where electronic media may be located. Yet counsel must be cautious and refrain from engaging in certain types of conduct when ferreting out discovery that may be critical to the success of your case. In the broadest context, public information found on the Surface Web is fair game, whereas utilizing deception to secure discovery is forbidden. But in the Deep Web context, how far can you go in representing clients?

The Internet is a Mysterious Iceberg

What most people consider the “internet” is only a small fraction of cyberspace. When an average attorney does an internet search, she is looking at web-based content that can be found via major search engines, such as Google, Bing, and Yahoo - unaware that her “detailed internet search” only scratches the “Surface Web.” The Surface Web is merely the tip of the iceberg. Hidden below the Surface Web is the “Deep Web”, which is estimated to be 400 to 500 times larger than the Surface Web. Unlike the Surface Web, however, the Deep Web is not indexed, and Google will not navigate you there—its uncharted territory. Yet this vast unindexed repository of data may well hold the key to your litigation. The question is: How do you ethically identify and retrieve this data?

A definitional point - the “Deep Web” and “Dark Web” are

often used interchangeably but are not the same thing. The Dark Web is where the more infamous, usually criminal, internet activities take place. You may be familiar with Silk Road, weapons, drugs, and trafficking site shut down by the FBI in 2013. Not only are Dark Web sites not indexed by search engines, but you need to use special software, such as The Onion Browser (“TOR”) to anonymize your IP address to reach these sites. The Deep Web is much larger than the Dark Web and simply refers to sites not referenced by search engines, be they innocuous or nefarious.

Ethical Parameters

Attorneys must have a general understanding of how the Surface Web, Deep Web and Dark Web function. ABA Model Rules of Professional Conduct 1.1 (Competence) states “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Importantly, being up-to-date on technology is required to be deemed “competent.” Comment 8 to Rule 1.1 states “[t]o maintain the requisite knowledge and skill, a lawyer must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”

When looking for information on any part of the Internet, attorneys cannot misrepresent themselves in their investigations. ABA Model Rules of Professional Conduct 8.4 (Misconduct) states: “It is professional misconduct for a lawyer to ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

Ethical obligations extend to staff members on the attorney's team. ABA Model Rules of Professional Conduct 5.3 (Responsibilities Regarding Nonlawyer Assistants) states "With respect to a non-lawyer employed or retained by or associated with a lawyer:... (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."¹

Public Information on the Surface Web is Fair Game

As long as the attorney is not "hiding" who they are in searching the Surface Web, publically available information found on it may be used as evidence including information found on websites and social media. The subject of the search can be unrepresented or represented, and it does not matter who posts the information so long as it resides on a public domain or media source. Quite simply, a person cannot have a reasonable expectation of privacy over information that is freely put in the public domain. See e.g. *Dexter v. Dexter*, 2007 WL 1532084 (Ohio App. May 25, 2007); *Beye v. Horizon Blue Cross Blue Shield*, 2007 WL 7393489 (D.N.J. Dec. 14, 2007); *Moreno v. Hanford Sentinel, Inc.*, 91 Cal. Rptr.3d 858 (Cal. App. April 2, 2009); *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Sept. 21, 2010); *EEOC v. Simply Storage Management, LLC*, 270 F.R.D. 430 (S.D. Ind. May 11, 2010); *Zimmerman v. Weis Markets, Inc.*, 2011 WL 2065410 (Pa. C.P. Northumberland Co. May 19, 2011); *Reid v. Ingerman Smith LLP*, 2012 WL 6720752 (E.D.N.Y. Dec. 27, 2012).

For example - Percy Plaintiff claims a workplace shoulder injury. Percy has a public Facebook account. If Percy posts photographs or videos of him throwing his nieces in the air in the pool that can be used as evidence of the severity of his injury or lack thereof.

With reference to the Deep Web, just because it is not "indexed" by the major search engines does not mean it is not "searchable" or available in the public domain. The policy rationale that people lack a reasonable expectation of privacy on information freely put in the public domain (i.e., no limitations or protections from public viewing) should apply equally to information found on the Deep

Web. Although there is a risk that your adversary will argue that information found on the Deep Web is per se private, counsel should be able to overcome this argument by educating the Court on the difference between the Surface Web and Deep Web, and that the lack of "indexing" does not equate to private. The fact that Google or Bing does not "list" a publicly available website does not – and should not – create a reasonable expectation of privacy over the site.

Contacting an Unrepresented Party to See Private Information is Fair Game

As long as the attorney discloses her full name, provides her correct profile, and accurately responds to any requests for additional information, she can ask an unrepresented party to see non-public portions of the Surface Web and gain access. Just keep in mind that depending on the state, the attorney may also have to disclose the purpose for the request or identify the names of the parties and nature of the pending litigation.

States vary when looking at the question of if it is "deceitful" and a violation of RPC 8.4 to "friend" or otherwise ask permission to access information that is not readily available due to privacy settings or other gateway mechanisms. In New York, so long as the attorney uses her real name and profile in sending the "friend" or access request, no "deception" has occurred. NYCBA, Formal Op. 2010-2 (2010). Other states have a higher bar where the attorney must also identify in the "friend" request the purpose and intention of the request to avoid being "deceitful". Massachusetts', San Diego's and Philadelphia's Bar Associations have all issued ethics opinions that require the lawyer to disclose the purpose of her request. Massachusetts Bar Ass'n Comm. On Prof Ethics Op. 2014-5 (2014); San Diego County Bar Ass'n Legal Ethics Comm., Op 2011-2 (2011); Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2009-2 (2009). New Hampshire requires the attorney to also inform the person of the lawyer's involvement in a potential litigation by introducing the lawyer as a lawyer and specifically identifying the client and the subject of the litigation. N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

For example - Percy Plaintiff claims a workplace shoulder injury. Percy has a private Facebook account, but it identifies Sondra as his sister. Depending upon the state's ethical rules, a paralegal at Antonia Attorney's office may be permitted to "friend" Sondra to see what is posted on her Facebook account provided Antonia complied with the disclosure requirements of the applicable state.

The same rules apply to a Deep Web search. If the

¹ The Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association, updated April 29, 2019, is an excellent deeper resource on the ethical parameters.

searcher needs permission from the webmaster of the Deep Web site to enter that site, the searcher must provide their name as well as the law firm name, and where required under state ethics rules, a description of the purpose for the request.

Contacting a Represented Party to see Private Information is a No-No

If the party is represented by counsel, contact with that party is barred, including requests to access non-public areas of the person's website or social media even after full disclosure. This restriction likewise extends to the Deep Web. If the webmaster in the example above is represented, she cannot be contacted without express consent of her counsel. This restriction also extends to any agents the lawyer uses, such as a staff member or investigator, and potentially the client herself depending on the jurisdiction.

What if you don't know the party has representation? Both the Oregon and San Diego Bar Associations have opined that unless there is actual knowledge that a person is represented by counsel a request to "friend" or access that person's non-public information is permissible. Or. State Bar Comm. On Legal Ethics, Formal Op. 2013-189 (2013); San Diego County Bar Ass'n Legal Ethics Comm., Op 2011-2 (2011).

How to Find Information the Deep Web

The Deep Web is searchable, just not using your more well-known search engines like Google or Bing. Specialized search engines have been specifically designed for Deep Web searches that translate Deep Web content to more commonly used browser pages. These specialized search engines include The WWW Virtual Library, Freebase, and TechDeepWeb. In addition, there are more advanced tools that not only search these

sites, but that leave no trail of your searches. While the use of these invisible tools may sound like a good way to search the Deep Web, the fact that these tools do not leave a trail of internet breadcrumbs does not relieve counsel or her agents with complying with their ethical obligations--they apply equally to Surface Web and Deep Web investigations. Further, counsel must be cognizant of the need to authenticate any data, to prove it belongs to the person you claim it does and that the data is fair and reliable for consideration by the court.

A high dose of caution and paranoia is needed when searching the Deep Web because these sites aren't indexed, they also aren't identified as potential sources of malicious phishing and/or malware attacks. Google isn't shielding you with its army of anti-malware when you dive into the Deep Web. Some practical considerations include using a single-purpose machine not connected to your network. Instead, use a VPN (Virtual Private Network) that will mask your physical IP address.

Best Practices to Incorporate Deep Web Searches into the Litigation Process

The recommended best practice is to retain the services of a Deep Web researcher with the skills and expertise to identify and cull valuable information, but who also has the technical know-how to avoid malicious sites and an understanding of the ethical constraints imposed upon such an expert. Further, your engagement letter with this researcher should specifically identify the ethical parameters of what the researcher can and cannot do to find information based on the jurisdiction in question. The expert's work product should include a summary of the process used to secure the data that can later be used to demonstrate that Deep Web data was "public" or that the appropriate disclosures were made and permissions granted for any search of "non-public" information belonging to an unrepresented party.

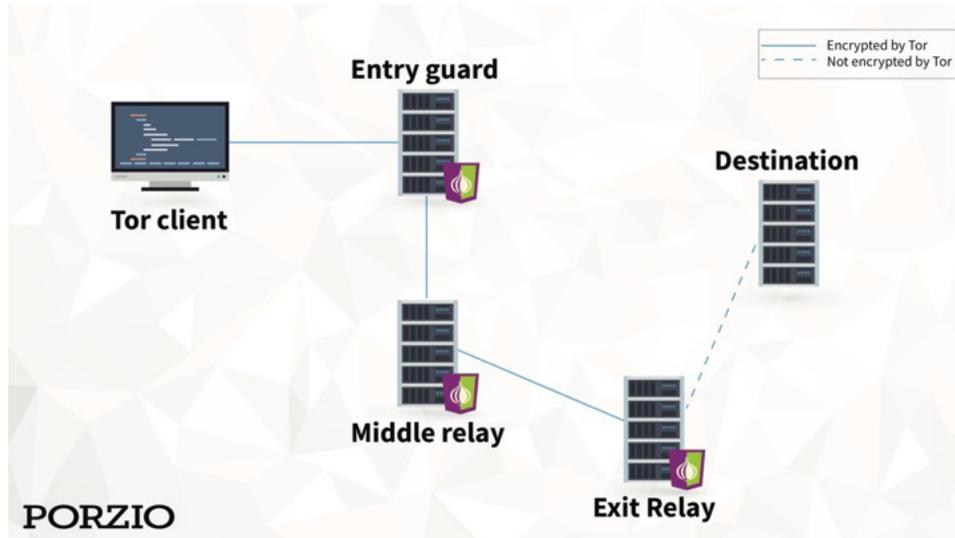


Enhancing Litigation Strategy with
Cyber/Deep Web Investigations:
What Witnesses Don't
Want You to Know

Deirdre R. Wheatley-Liss
Principal

PORZIO
BROMBERG & NEWMAN P.C.





Professional Conduct 1.1
Competence

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

PORZIO

A graphic of an iceberg with a blue gradient background. The top part of the iceberg is above the water line, and the bottom part is below. The text is positioned to the right of the iceberg.

Professional Conduct 1.1
Technical Competence

"[t]o maintain the requisite knowledge and skill, a lawyer must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

PORZIO

A graphic of an iceberg with a blue gradient background. The top part of the iceberg is above the water line, and the bottom part is below. The text is positioned to the right of the iceberg.

Professional Conduct 8.4
Misconduct

"It is professional misconduct for a lawyer to ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

PORZIO

A graphic of an iceberg with a blue gradient, floating in dark blue water. The top part of the iceberg is above the water line, and the bottom part is below. The background is a solid dark blue.

Professional Conduct 5.3

Responsibilities Regarding Nonlawyer Assistants

"With respect to a nonlawyer employed or retained by or associated with a lawyer:...

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer."

PORZIO

A graphic of an iceberg with a blue gradient, floating in dark blue water. The top part of the iceberg is above the water line, and the bottom part is below. The background is a solid dark blue.

Is Public Information Fair Game?

Is an Unrepresented Party's Non-Public Information Fair Game?

Is a Represented Party's Non-Public Information Fair Game?

PORZIO





DEIRDRE R. WHEATLEY-LISS

Principal

PORZIO BROMBERG & NEWMAN (Morristown, NJ)

973.889.4278 | drwheatleyliss@pbnlaw.com

Deirdre R. Wheatley-Liss divides her practice between representation of business owners and their businesses, counselling individuals and families, and advising non-profit entities.

Business Owners and Business Representation - Ms. Wheatley-Liss counsels business owners on legal and structural issues related to start-up, financing, growth and exit strategy. As a tax attorney, she always keeps an eye on minimizing a business owner's "silent partner" – the IRS. She also advises on director and officer (D&O) liability issues, including business succession and break-ups. By creating the most efficient organizational structures and contractual arrangements during the infancy and growth of a business she has helped clients keep hundreds of thousands of dollars in their pockets upon the sale of the mature business. To educate both the public and the legal community about issues relating to business ownerships, Ms. Wheatley-Liss is a frequent lecturer to professionals and the public on topics related to start-up, intellectual property, employee and independent contractor issues, wealth transfer, tax minimization, business succession planning and cybersecurity.

Data Privacy and Cybersecurity - Ms. Wheatley-Liss helps organizations to meet regulatory requirements by assessing current data privacy and cybersecurity policies against best practice frameworks. Deirdre provides counseling pertaining to policies and pre-incident planning, in order to minimize loss in the case of a potential breach. She is a frequent lecturer on best practices and corporate governance as related to privilege and cybersecurity.

Practice

- Asset Protection
- Bankruptcy and Financial Restructuring
- Business Disputes and Counseling
- Business Divorce
- Charitable Planning
- Corporate, Commercial and Business Law
- Data Privacy and Cybersecurity
- Dispute Resolution
- Elder Law
- Estate Planning
- Executive Wealth Management
- Guardianship
- Guardianship Litigation
- Mergers and Acquisitions
- Privately-owned Business Planning
- Probate and Trust and Estate Administration
- Trusts and Estates
- Trusts and Estates Litigation
- Wealth Preservation

Education

- New York University, New York, New York, LL.M in Taxation, 2000
- Boston College School of Law, Newton, Massachusetts, J.D., 1995
- Johns Hopkins University, Baltimore, Maryland, B.A., with honors, 1992

