



A Question of Ethics

BY PETER KIEFER

I Found It on Facebook

It is trite to say that we live in an age where electronic information abounds, where the Web now serves as a vast “market place and town square.” The judicial branch is just beginning to deal with the enormous advantages and pitfalls of the Web, particularly the social networking sites. The NACM Code of Conduct for Court Professionals only touches on uses of the Web. An ad hoc (and unscientific) poll of fellow court professionals revealed that just about half of those asked have researched names on the Web as part of the hiring process. Clearly new information opportunities bring new questions and new ethical obligations.

The Scenario

Edward, the court administrator of a large metropolitan trial court, is hiring a new assistant court administrator. Going through the standard human resources solicitation and vetting process, he ends up with 10 candidates from which he chooses to interview five. He has a list of standard interview questions that he asks and ends up with three candidates who look like good prospects. He starts to call references for background checks. Although he never mentions it, he also goes online and searches each finalist’s name on the Web, checking Facebook and MySpace. He finds very little of interest for two candidates besides the standard résumés and connections to other professionals. Ray, the third candidate, has a Facebook page with standard fare, but Edward also finds Ray’s name associated with other Facebook pages. A friend’s page has photos of what looks like a younger image of Ray enjoying himself at some wild spring break party. The party must have taken place about seven years ago while Ray was still in college. Although Ray is not pictured prominently in any of the photos, he is clearly visible enjoying himself (often with beer in hand) watching others dance and cavort. Edward decides to exclude Ray from the final selection process using

the rationale on the paperwork that “others more closely match the job specifications and courts needs.”

The Respondents

To discuss the various aspects of Web social information are Janet Cornell, court administrator for the Scottsdale Municipal Court in Scottsdale, Arizona; Jeffrey Amram, court administrator for the Clark County Superior Court in Vancouver, Washington; Jessica Cortes, deputy court administrator for the Flagstaff Municipal Court in Flagstaff, Arizona; and Jessica Nicolette from the Bremerton Municipal Court in Bremerton, Washington.

The Questions

Is it appropriate for Edward to search these candidates’ names on the Web?

Jeff Amram, Janet Cornell, Jessica Nicolette, and Jessica Cortes all considered searching names on the Web both ethical and appropriate. Janet noted that Facebook information is in the public domain. Jeff commented, “Some might say that if Edward does not check all sources available to him, he is not doing the best job he could do. Facebook is ubiquitous, free, and as reliable as anything else on the Web, i.e., let the user beware!”

Jessica Nicolette also acknowledged the public nature of social networking sites but drew the line at researching sites outside of Ray’s control. “I do believe the content of such social networking accounts enables a potential employer to interview the applicant on a more intimate and personal level. I do not however, believe Edward’s decision to not hire Ray was appropriate or ethical strictly on the basis that he found dated pictures of Ray at a party.” Jessica thought Edward should have limited his consideration to only Ray’s site.

Although Jessica Cortes agreed that it is ethical to research candidates on social networking websites, she does not believe it is ethical to use that information to exclude a candidate.

“If Edward would like to use information gained from social networking websites to pare down the applicants, the appropriate way of dealing with the situation would be to hold a second interview for the three remaining candidates where Edward would have the opportunity to ask specific questions relating to the social networking websites and then allow each candidate to respond.”

Would it have been more acceptable if Edward had each candidate sign a waiver or at least warned them that he might search the Web?

To Janet Cornell, Jessica Nicolette, and Jessica Cortes, either a disclaimer on the job posting or a release from a job candidate is more professional but not necessary. Janet warned about accepting Web information without additional scrutiny. “[Edward] should conduct a conversation with Ray, to indicate he has located the information, provide Ray the opportunity to comment or clarify, and perhaps advise Ray that the information will be included in all the items under consideration for the job appointment.”

Jeff suggested that a better question for Edward would have been to ask the candidates if they were aware of information about them on these sites. “If a candidate says he or she is not so aware, they should be dropped from consideration because they are either completely unaware of the world around them — and therefore unsuitable for employment — or have been living on a deserted island for the past 15 years, which also raises questions about their suitability for the job.”

Could Edward pay money to have a Web background research site research a candidate?

In Janet and Jessica Nicolette’s opinions, paying for background research on candidates could be appropriate and ethical. Janet added support, saying, “Edward needs to consider the best use of the process and the cost implication; paid background checks may be best used for the top policy positions, that is, positions that are visible as organizational policy leaders. The best practice would be to provide the disclaimer or explanation on the job posting to alert the candidates that a background check will be conducted. Other policy decisions to be made include: What is the manager prepared to do if something of concern surfaces? What items will cause concern to the hiring authority? Or, what are the criteria for disqualification? These could be included as part of the instructional documents included with the job posting.”

Although Jeff thought it was probably ethical, particularly if the court does a substantial amount of recruiting, it raises questions about the relevance of some of the information that might turn up. “For example, are real estate transactions or credit ratings relevant to the candidate’s ability to perform in this job? How about a divorce or other court-generated information?”

Jessica Cortes said that it would be unethical for Edward to pay to research just one candidate, although it would be ethical to pay to research all three of the candidates, providing that it is part of the interview process and all candidates were notified. The issue is consistency; it is imperative to treat each candidate in the same fashion.

Should Edward consider Ray's Facebook page if it contains only positive comments, even if having such a page was not a requirement?

Jessica Nicolette absolutely believed Edward should consider Ray's Facebook page so Edward could gain a deeper understanding of Ray's professional character and achievements. She thought that having a page with rave reviews would be just one more asset for Ray. "No bearing should be placed on the fact that other candidates did not have a Facebook page because most information gained from the social networking site should also be available on the applicant's resume."

Jessica Cortes and Jeff both said Edward should not consider it unless consideration was consistent across the board. Jessica said that by not including the social networking element in the interview process and not applying it consistently, it is unethical to use the information in Edward's decision-making process regardless of whether or not the information reflects the candidate in a positive or negative manner.

Janet said the main thing that Edward or any hiring authority needs to keep in mind is that it is the whole package of the applicant under review, not a single incident. Of course a single incident of great magnitude may need to have greater weight during hiring deliberations.

Should Edward be honest about the real reason why Ray was excluded?

Jessica Cortes thought Edward should not have disqualified Ray from the selection process to begin with, so at this point Edward should 1) contact human resources, 2) explain that he wrongly disqualified a qualified candidate, and 3) request a second interview with the three candidates. Edward could ask follow-up questions regarding social networking websites. "This course of action will afford Ray, as well as the other candidates, an opportunity to explain the contents of any

social networking websites which may come into question during the interview process."

Jeff thought Edward was not being all that disingenuous regarding why he excluded Ray, since he thought Ray was not as good a "fit" as the others. "This is, in fact, hardly different than if Edward happened to speak with an acquaintance of Ray who painted a similar picture of Ray (as a drinker, carouser) after which Edward took Ray off the list."

Janet did think that Edward was being a bit dishonest by not advising Ray that Edward had identified information that caused concern. "Perhaps a better method of dealing with this would be for Edward to have a personal conversation, perhaps a phone call, with Ray to advise of the information located on the Web, and to inform Ray why that caused concern to Edward." Janet concluded that if Ray did something some seven years ago, it may not be appropriate to give it too much credence.

Jessica Nicolette thought Edward should be honest about why he chose not to hire Ray, although he may open himself up to liability for hiring discrimination. "It is never good practice to be dishonest, as issues of dishonesty always have a way of resurfacing and, in the end, tarnishing the person's credibility and professionalism."

My thanks again to Jeff Amram, Janet Cornell, Jessica Nicolette, and Jessica Cortes for their insights on the new nexus between Web information and our duty to vet candidates for the judicial branch. If you have an ethical issue you would like to discuss, or if you have comments on this scenario or any of the past scenarios, please contact me at pkiefer@superiorcourt.maricopa.gov.

ABOUT THE AUTHOR

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