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Legal Ethics and The Social Network

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It comes as no surprise that social networking sites can be sources of valuable evidence in litigation. One can easily imagine an attorney clicking through a witness' MySpace photo album with an eye towards attacking her credibility at trial or reading a Twitter feed, hoping for an update that could successfully dispute damages. As tempting as it may be to "Facebook stalk" the opposition, lawyers in New York recently received guidance on the ethical limits of this practice. Last month, both the New York State Bar Association and the New York City Bar Association issued opinions that outline the appropriate scope of obtaining evidence from social networking websites.

Both opinions address the question of how a lawyer may view and access the social network pages of an adverse party in pending litigation, ultimately concluding that New York attorneys are allowed to scour social network pages for incriminating evidence as long as those pages are public. According to the New York State Committee on Professional Ethics, "Obtaining information about a party available in a [public] Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted." NY Comm. on Prof'l Ethics, Op. 843 (9/10/10). Typically, social network websites have privacy controls that allow users to choose who may view their profiles. A page is "public" if it is available to all members in the applicable network. So, if a witness has failed to customize the privacy settings on her Facebook page, that page may be "public" and thus fair game for attorneys seeking evidence.

The New York opinions also make clear that an attorney may not deceptively "friend" a potential witness in order to thwart privacy settings and gain access to more robust information. This very issue was dealt with by the Philadelphia Bar Association's Professional Guidance Committee in 2009. In that opinion, the committee considered a situation in which a lawyer had a third party send a friend request to an adverse witness in order to search for impeaching evidence on the witness' otherwise private Facebook and MySpace pages. See Phil. Prof'l Guidance Comm., Op. 2009-02 (March 2009). The committee ultimately held that this furtive "friending" would violate Pennsylvania Professional Conduct Rules 4.1 and 8.4(c). Rule 8.4(c) provides that it is professional misconduct for a lawyer to. "engage in conduct involving dishonesty, fraud, deceit or

misrepresentation." Rule 4.1 states: "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." The Philadelphia committee determined that the third- party "friending" was violative of these rules in that it "omitted a highly material fact, namely, that the third party who asks to be allowed access is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness." Phil. Prof'l Guidance Comm., Op. 2009-02 (March 2009) New York's professional responsibility rules mirror Pennsylvania's and, according to both the city and state bar associations, would also be violated by deceptive friending of this sort. See NY Comm. on Prof'l Ethics, Op. 843 (9/10/10); NYC Comm. on Prof'l Ethics, Formal Op. 2010-2.

But what if an attorney uses his real name to "friend" openly and honestly? According to the New York opinions, this may implicate yet another pair of ethical rules. If a lawyer attempts to "friend" a represented party in a pending litigation, then the lawyer's conduct is governed by Rule 4.2, which prohibits a lawyer from communicating with a represented party about the subject of the representation absent prior consent from the represented party's lawyer. N.Y. Prof'l Conduct R. 4.2. If a lawyer "friends" an unrepresented party, then her conduct is governed by Rule 4.3 which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party's interests are likely to conflict with those of the lawyer's client. N.Y. Prof'l Conduct R. 4.3.

The applicability of these rules in the virtual world takes care of the potentially problematic fact that it is easier to deceive an individual online than it would be face to face. As the New York City Bar Association acknowledges:

> If a stranger made an unsolicited face-to-face request to a potential witness for permission to enter a witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth, and review the witness's personal diary, the witness almost certainly would slam the door shut and perhaps even call the police. . . In contrast, in the 'virtual world,' the same stranger is more likely to be able to gain admission to an individual's personal webpage and have unfettered access to most, if not all, of the foregoing information." NYC Comm. on Prof'l Ethics, Formal Op. 2010-2.

Ultimately, these opinions make it clear that a lawyer (or an agent, such as investigator, working for a lawyer) may not "friend" an individual under false pretenses to obtain information from a social networking website.