

LAWYER

THE HILLSBOROUGH COUNTY BAR ASSOCIATION
TAMPA, FLORIDA | MAY 2014 | VOL. 24, NO. 6





With the continued rise in the use of social media, lawyers have turned to social media such as Facebook, LinkedIn, and Twitter to investigate witnesses, parties, and jurors. Although using these forums to obtain information to support a client's claims seems harmless, lawyers must tread lightly so they comply with the rules on professional conduct. The Florida Bar has yet to issue any opinions on the use of social media as an investigative tool. However, there are numerous ethics opinions in other jurisdictions that provide helpful guidance on professional conduct rules similar to Florida's.

Several ethics opinions have held that obtaining publicly available information from social media does not violate any rule on professional conduct.¹ However, the circumstances change when lawyers send "friend" requests or requests for information via social networks. Lawyers must use caution when engaging in such practices to ensure they do so ethically. For example, sending a friend request to an adverse party or a witness could violate Florida Rule of Professional Conduct 4-4.2, which prohibits lawyers from communicating with represented parties.²

Likewise, asking a non-lawyer or third party to send a friend request or contacting witnesses or parties

via social networking could also violate Rules 4-4.2 and 4-5.3. Case in point, in August 2012, two New Jersey attorneys were charged with numerous ethical violations when their paralegal friended a represented opposing party. Directing a client to make contact on social media networks could raise ethical concerns as well.³ Thus, it is important that lawyers do not direct a non-lawyer or third party to do what the lawyer cannot do.

Friending a witness or unrepresented party without disclosing the purpose of the friend request or doing so through misrepresentation or deception also can violate the rules of professional conduct regarding misconduct and dishonesty (Rule 4-8.4).⁴ This can be true even where the lawyer discloses his or her identity but does not disclose the purpose of the contact. Nor can a lawyer log into someone else's social media account under the guise of the account holder to try to communicate with parties or witnesses.⁵

When it comes to jurors, a lawyer might feel compelled to investigate jurors using social media. In fact, the rules on competence (Rule 4-1.1) and diligence (Rule 4-1.3) imply that a lawyer may be negligent if he or she did not use available methods, such as social media, to investigate jurors.⁶ Nevertheless, complying with the ethical rules should be paramount. At least two bar associations have



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held that it would violate the rules regarding communication with jurors and misconduct for a lawyer to send a friend request to a juror through social media.⁷ A juror learning that an attorney viewed or attempted to connect on LinkedIn or followed the juror's Twitter account could also violate the professional rules of conduct.⁸

¹ See N.Y. State Bar Assn. Comm. Prof. Ethics, Op. 843 (Sept. 10, 2010).

² See N.Y. State Bar Assn. Comm. Prof. Ethics, Op. 843; see also SDCBA Legal Ethics Op. 2011-2.

³ See N.H. Bar Assn. Ethics Comm. Advisory Op. 2012-13/05 (June 2013).

⁴ See Philadelphia Bar Assn. Prof. Guidance Comm., Op. 2009-02 (March 2009); but see Assn. of the Bar of the City of New York Comm. on Prof. Ethics, Formal Op. 2010-2 (Sept. 2010).

⁵ See N.H. Bar Assn. Ethics Comm. Advisory Op. 2012-13/05 (June 2013).

⁶ See N.Y. State Bar Assn. Formal Op. 2012-2.

⁷ See NYC Bar Assn. Comm. on Prof. Ethics Formal Op. 2012-2 (June 4, 2012); NYC Lawyers Assn. Committee on Prof. Ethics Formal Op. 743 (May 18, 2011).

⁸ See NYC Bar Assn. Committee on Prof. Ethics Formal Op. 2012-2 (June 4, 2012).



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