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## Facebook: State bar opinions address information gathering

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*You represent the mother in a child custody dispute that will most likely wind up in litigation. You recently interviewed a daycare provider who may be an adverse witness in the matter.*

*You believe that there may be some very useful information on the daycare provider's personal Facebook page that you may be able to use to impeach her testimony at trial, but you would need to "friend" her to gain access to them. You believe that she freely gives the friend status to almost anyone who requests it, but that she would most likely not grant it to you.*

*Can you ask your paralegal, whose name the daycare provider would not recognize, to contact the provider in order to friend her without revealing his affiliation with you so that you can gain access to her personal Facebook page?*

### Analysis

Recent ethics opinions from the New York State, New York City and Philadelphia Bar Associations ethics committees have addressed this and related issues.

#### **Philadelphia Opinion 2009-02**

Philadelphia Opinion [2009-02](#) addressed a situation where a lawyer, during a deposition of a non-party adverse witness, learned that the witness had a Facebook page that the lawyer believed contained information he could use to impeach her testimony if the matter went to trial. The lawyer believed that this information would most likely be available on the "personal pages" portion of the witness' Facebook page. Access to these pages is granted only to those people who have "friended" the Facebook page owner. In order to obtain the "friend" status, an individual must request it, and the Facebook owner must grant it.

Under the facts presented to the Philadelphia committee, the lawyer asked whether he could have a third person whose name the witness would not recognize contact the witness through her Facebook page and request that she friend him. The lawyer believes that the witness freely grants the friend status to anyone who requests it. The third person would not misrepresent who he was, but he would not reveal his affiliation with the lawyer or that his reason for friending the witness was to allow the lawyer access to the witness' personal Facebook page.

The committee found this to be objectionable for several reasons. First,

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under Rule [5.3 Responsibilities Regarding Nonlawyer Assistants](#), the lawyer would have an obligation to ensure that those who worked under his supervision acted in accordance with the lawyer's professional obligations. Here, the applicable rules would include [8.4\(c\) Misconduct](#) that prohibits a lawyer from engaging in conduct involving dishonesty, fraud deceit or misrepresentation and [4.1 Truthfulness in Statements to Others](#) that prohibits a lawyer from making a false statement of material fact to a third person. Subpart (a) of Rule 8.4 is also implicated since it prevents a lawyer from violating the rules "...or to do so through the acts of another..."

The committee stated that the lawyer's use of the third party who would not reveal his affiliation with the lawyer and the real reason for the friending request was deceptive and would violate Rules 8.4 and 4.1. Rule 4.1 would be implicated since the third party's failure to disclose his affiliation with the lawyer would constitute the omission of a "highly material fact," that if known to the witness, may have led to the denial of the friend status request. Furthermore, the fact that the Facebook page owner would probably grant the friend status to anyone did not change the committee's view:

...Turning to the ethical substance of the inquiry, the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages 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. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

... The possibility or even the certainty that the witness would permit access to her pages to a person not associated with the inquirer who provided no more identifying information than would be provided by the third person associated with the lawyer does not change the Committee's conclusion. Even if, by allowing virtually all would-be "friends" onto her FaceBook and MySpace pages, the witness is exposing herself to risks like that in this case, excusing the deceit on that basis would be improper. Deception is deception, regardless of the victim's wariness in her interactions on the internet and susceptibility to being deceived. The fact that access to the pages may readily be obtained by others who either are or are not deceiving the witness, and that the witness is perhaps insufficiently wary of deceit by unknown internet users, does not mean that deception at the direction of the inquirer is ethical. - Philadelphia Opinion 2009-02

The Philadelphia committee also considered whether the lawyer's conduct would also violate Rule [4.3 Dealing With Unrepresented Person](#) but decided that the rule was not directly implicated, since in its view, the purpose of the rule was to prevent misunderstandings when the

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person the lawyer is dealing with knows that he is dealing with a lawyer, but is under a misapprehension about the lawyer's role in the matter. Here, since the predominating issue is deception, the committee felt that Rule 8.4(c) was the appropriate rule.

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### ***Association of the Bar of the New York Opinion 2010-2***

New York City Bar Opinion [2010-2](#) (2010) addressed a slightly different scenario than that addressed by the Philadelphia committee. The question presented to the New York City Bar Committee was whether a lawyer or his agent could use deception or "trickery" to gain access to a non-party's personal social network pages. Under the facts considered by Philadelphia committee, the lawyer's agent would truthfully identify himself in order to gain access, but would not reveal his affiliation with the lawyer.

The New York City Bar committee noted that it would be relatively easy to gain access to personal pages through deception:

...Using publicly-available information, an attorney or her investigator could easily create a false Facebook profile listing schools, hobbies, interests, or other background information likely to be of interest to a targeted witness. After creating the profile, the attorney or investigator could use it to make a "friend request" falsely portraying the attorney or investigator as the witness's long lost classmate, prospective employer, or friend of a friend. Many casual social network users might accept such a "friend request" or even one less tailored to the background and interests of the witness.... In each of these instances, the "virtual" inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions. The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to "open the door" to strangers, social networking users often do just that with a click of the mouse.

The opinion stated that while a lawyer or the lawyer's agent may not use deception to friend the owner of the Facebook page, he can nonetheless request friend status, so long as he identifies himself using his real name and profile:

...we conclude that an attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request. While there are ethical boundaries to such "friending," in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. - New York City Bar Opinion 2010-2 (2010).

The New York City Bar Committee stated that rather than use deception to gain access to such information, lawyers should use legitimate discovery methods such as truthfully friending unrepresented persons or the more formal discovery devices such as subpoenas.

### ***New York State Bar Association Opinion 843***

New York State Bar Association Opinion [843](#) (2010) addressed the question of whether a lawyer could access the public portions of another party's public Facebook or MySpace page in order to obtain information about that party for use in subsequent litigation. The committee concluded that the lawyer could do so, since this information is publicly available in much the same way as materials are available on a publicly available website.

...Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so. - New York State Bar Opinion 843

The committee noted that if the party was represented, a lawyer's attempt to friend the party could potentially violate Rule [4.2](#) *Communication With Person Represented by Counsel*. If the party were not represented, Rule [4.3](#) *Dealing With Unrepresented Person* could also be implicated.

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### ***Authorities re lawyer's use of dissemblance***

Both the New York City and Philadelphia bar opinions made note of the fact that there is some controversy regarding a lawyer's use of dissemblance to gain access to information, citing to New York County Lawyers Association Opinion [737](#) (2007), which "approved the use of deception, but limited such use to investigation of civil right or intellectual property right violations where the lawyer believes a violation is taking place or is imminent, other means are not available to obtain evidence and rights of third parties are not violated," and New York City Bar Opinion [2003-02](#), which permitted the surreptitious recording of telephone conversations "to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping..."

The Philadelphia opinion cited that other authorities do not permit deception under any circumstances including *People v. Paultier* 47 P.3d 1175 (Colo 2002) and *In re Gatti* 8 P3d 966 (Ore 2000).

After the *Gatti* decision, Oregon amended its version of Rule 8.4 (The Oregon Rules of Professional Conduct are located [here](#)) to permit a lawyer's use of dissemblance under certain circumstances. The rule states:

(a) It is professional misconduct for a lawyer to:

(1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;...

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;

...(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the

lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

Iowa has adopted a similar version of Rule 8.4. See paragraph 6 of the Comment to the Rule (The Iowa Rules of Professional Conduct are located [here](#)).

The New York City Bar opinion stated that any such exceptions to the prohibitions against a lawyer using deception to obtain evidence would be inapplicable to social networking websites since non-deceptive means of communication, either through subpoenas or non deceptive friending, is available to obtain such information.

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