ETHICS HOTLINER
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What Are "Friends" For?

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Picture the following: A savvy trial lawyer is busily preparing the defense of a high-profile personal injury case. She has attempted to investigate the plaintiff's post-injury conduct - including on-site surveillance - but has come up empty-handed. Though the plaintiff has a Facebook Web page, his privacy settings let the lawyer see only basic information. But then the lawyer gets a brainstorm: She asks a colleague to send the plaintiff a "friend" request on Facebook, hoping the plaintiff will accept so she can then use that point of entry to view his personal information.

Gone are the days when attorneys simply "Googled" people's names in a Web search to learn about them. Using Facebook, LinkedIn, Twitter, and other social networking portals has made it easier than ever to research other people in cyberspace - especially if the other people have a habit of accepting every friend request they receive. To be sure, the tactic of "false friending" is clever enough. But does it violate the Rules of Professional Conduct? How far can you go?

Duty of Candor

In an age when lawyers use the Internet to research everyone from clients to prospective jurors to potential witnesses, social networking sites are a tempting vehicle for obtaining private information. Bar associations have recognized that it is ethical for lawyers to search social networking sites for damaging information they might use against their opponents in lawsuits. (See N.Y. State Bar Ass'n, Comm. on Prof. Ethics, Op. 843 (2010) (available at www.nysba.org).)

But the crucial issue is *how* attorneys access this data. Many lawyers have sought ethical advice about whether they can access a person's private information by posing as someone else and sending a friend request, or by having a third party do so. The growing consensus is that in most cases, this type of deceptive activity violates a lawyer's duty of candor.

In one case, the Philadelphia Bar Association concluded that a lawyer who had a third person attempt to friend a witness on Facebook and MySpace websites in order to gain access to personal information, violated rule 8.4(c) of the ABA-approved Rules of Professional Conduct by engaging in deceptive conduct. Such conduct would also violate rule 4.1(a) ("Truthfulness in Statements to Others") as a false statement of material fact made to the witness. (See Phila. Bar Ass'n Prof. Guidance Committee Op. 2009-02 (2009) (available at www.philadelphiabar.org).)

Yet the Philadelphia opinion noted that the issue of social network access was (and is) controversial, citing a New York City bar association ethics panel opinion approving the limited use of deceptive investigatory tactics to scrutinize civil rights or intellectual property violations that were imminent or actually taking place, in the absence of other methods of obtaining evidence. (See Opinion 2009-02 at p. 4; New York County Lawyers Ass'n Formal Op. 737 (2007) (available at www.nycla.org).)

Other New York ethics authorities draw a tighter line on "false friending," finding such strategies unethical. (See New York City Bar Ass'n Formal Op. 2010-2 (2010)(available at www.abcny.org).)

California Rules

In California, lawyers are governed by the standards embedded in the state's Rules of Professional Conduct. A willful failure to comply with these rules could subject a lawyer to State Bar discipline (Rule 1-100(A)). Rule 5-200 states that in presenting a matter to a tribunal, a lawyer shall employ such means "only as are consistent with truth," and shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law. Rule 5-200 also says that a lawyer shall not "intentionally misquote to a tribunal the language of a book, statute, or decision"; nor may an attorney, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. (See Cal. Rules Prof. Conduct, Rule 5-200 (A)-(D).)

The statutes governing law practice echo the same theme, mandating that it is the duty of an attorney to "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Cal. Bus. & Prof. Code Â§ 6068(d).) No lawyer should take these words lightly, for a violation of these commands is cause for suspension or disbarment. (Cal. Bus. & Prof. Code § 6103.)

As for candor, California lawyers must conduct themselves honestly whether they are in the courtroom or not. (See Cal. Bus. & Prof. Code § 6106.) Section 6106 arguably governs a lawyer's activities and statements on social networking sites, as it states that "the commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." Further, the Business and Professions Code imposes misdemeanor criminal liability on a lawyer who engages in or consents to any deceit or collusion "with intent to deceive the court or any party." (Cal. Bus. & Prof. Code § 6128(a).)

Local California bar associations are beginning to weigh in on the ethics of social networking - with respect to judges, jurors, and adverse parties. The San Diego County Bar Association has observed that friending a represented party violates California Rule of Professional Conduct 2-100. (See San Diego County Bar Ass'n, Legal Ethics Op. 2011-2 (available at www.sdcba.org).) Its opinion cites the above-mentioned New York and Philadelphia opinions and notes in passing that the context in which a friend request is made, and the attorney's motive in sending it, are relevant to the ethics inquiry. But the conclusion is clear: "[T]the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have 'friends' like that and no one - represented or not, party or non-party - should be misled into accepting such a friendship." (San Diego Op. 2011-2 at p. 13.)

Friending Judges

It may seem impressive for a lawyer's Facebook page to show a number of local judges as "friends." However, a judge must consider serious issues before accepting a counsel's friend request to connect via Facebook. The request can be transmitted easily enough, but any judge who thinks about accepting the invitation must abide by California's Judicial Canons of Ethics.

California is among just a handful of states that have publicly issued ethics opinions on this issue. (See Cal. Judges Ass'n Judicial Ethics Comm., Op. 66 (available at www.caljudges.org).) The California opinion provides a concise discussion of judges' involvement in online social networking communities. Recognizing the realities of modern online communication, the opinion states that a judge may indeed

participate in an online social networking community, and that his or her online social network may include lawyers who might appear before him or her. The opinion states, however, that a judge's online social network may not include lawyers who have cases pending before the judge.

In fact, there is no per se prohibition against judges' online interaction with lawyers who may appear before them. (Cal. Jud. Ethics Comm. Op. 66 at p. 6.) The opinion notes the similarity between online social interaction and the type of in-person social interaction permitted through participation in organizations such as the American Inns of Court, which is designed to promote professionalism and civility, and other social or civic organizations. Online interactions are of course subject to the same rules that apply to any other interactions, in the sense that they cannot elicit the appearance of bias or undue influence in violation of the Canons of Judicial Ethics. In particular, Canon 2A requires that judges must "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." In addition, Canon 2B prohibits a judge from conveying or permitting anyone else to convey "the impression that any individual is in a special position to influence the judge," and Canon 4B(1) prohibits extrajudicial activities that would "cast reasonable doubt on the judge's capacity to act impartially."

The California opinion cites as a critical issue the potential for the appearance of impropriety, noting that modern litigation often involves cyberspace-savvy litigators who investigate their opposition - as well as the court - online. Facebook is presented as an example of an online social network where one's online "friends" are easily discovered. The opinion presents several factors to examine in determining whether online interactions between judges and lawyers might create the appearance of impropriety: (1) the nature of the social networking site (the more personal the site, the greater the potential for the appearance of impropriety), (2) how many "friends" the judge has on his or her page (the more friends, the lower the likelihood of the appearance of impropriety), (3) the judge's practice in deciding whom to include in his or her online social network (the more inclusive the judge's site, the less likely the appearance of impropriety), and (4) how regularly the specific attorney appears before the judge. (See Cal. Jud. Ethics Comm. Op. 66 at p. 8.)

Discussing Friendship

In every case where a judge is an online "friend" with one of the attorneys, the California opinion requires a disclosure. This requirement arises from the unique nature of online social networks, where the connection is obvious but the nature of the connection may not be readily discernable. The opinion makes clear that a judge may *not* include a lawyer in his or her social networking site if the lawyer has a case pending before the judge. If this scenario arises, the judge is required to disclose the online connection and "unfriend" the attorney. The opinion explains that an ongoing connection via an online social network in such a circumstance would create the impression that the attorney holds a special position of influence due to the easy communicative access provided on the social networking site.

So how is all of this going to sound in court? Perhaps it will follow along these lines: "Counsel, I must disclose that the plaintiffs lawyer and I are Facebook friends, but as soon as I was assigned this case I unfriended him." If such a statement sounds corny, perhaps judges will be deterred from accepting lawyers' friend requests to begin with.

Ex Parte Communication?

Some people have become so familiar with the stream-of-consciousness type of contact used on sites like Facebook and Twitter that they forget the fact that their friends and contacts may include judges and jurors hearing their current cases. Communicating with judges electronically raises a host of problems,

even if the lawyer includes opposing counsel in the transmission. Many judges print out all such email correspondence and file it with the clerk to keep a record of communications. Social media websites elevate this collection effort to an entirely new - and more onerous - level. Bloggers, frequent Facebook users, and Twitterers sometimes can't resist the temptation to keep up a seamless play-by-play report of their day in court, sometimes posting these messages to recipients they shouldn't be communicating with during the pendency of the case - including judges and jurors who happen to be included on their "friends" lists.

Such communication has the potential to violate rule 5-300, which governs contact with officials. The rule states in part that a lawyer may not communicate, directly or indirectly, with a judicial officer or a judge about the merits of a pending contested matter except: in open court; with the consent of all other counsel; in the presence of all other counsel; or in writing, provided a copy is furnished to the other attorneys in the case. (Cal. Rules Prof. Conduct, rule 5-300(B)(1)(4).) Clearly, an ex parte message to a judge on a social networking site appears to violate this rule if the content concerns the merits of a pending case.

Perhaps the most alarming aspect is that lawyers and judges confess that this scenario comes up frequently. Some lawyers and judges who are actual friends in the real-world legal community have become so comfortable with social networking sites that they fail to recognize the potential impropriety of making flippant online comments about their cases. Sometimes they see other lawyers and judges communicating this way and think it must be acceptable if other (often well-respected) members of the local bar are doing the same thing.

Jurors, Too

A similar California rule prohibits contact with jurors. Rule 5-320 bars a lawyer connected with a case from having any contact, direct or indirect, with anyone the lawyer knows to be a resident of the venue from which the jury on the case will be selected. (Cal. Rules Prof. Conduct, Rule 5-320(A).) Most lawyers know this portion of the rule instinctively, but many are nonetheless unfamiliar with paragraph (C), which states that even lawyers *not* connected with the case are barred from communicating directly or indirectly about it with jurors. (CRPC 5-320(C).) For purposes of this rule, a juror includes any person who is empanelled as well as anyone who has been excused or discharged from the relevant jury pool. What does this mean for everyday practice? If you know someone called up for jury duty - even on a case you have no connection with - don't communicate with them about the case.

Sending friend requests to long-lost high school classmates is one thing, but using them as a tool for online sleuthing or attempting to gain undue influence is quite another. And although social networking sites are a great way to keep in touch with family and friends, when such sites encroach on the practice of law, a working knowledge of the applicable legal and ethical rules becomes critical. Awareness of the issues that may arise in the online arena will permit attorneys to intelligently use social networking sites to communicate effectively - and ethically.

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