



30 Bank Street  
PO Box 350  
New Britain  
CT 06050-0350  
*06051 for 30 Bank Street*  
P: (860) 223-4400  
F: (860) 223-4488

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#### INFORMAL OPINION 2011-4

### **Hiring Private Investigator to “Friend” Opposing Party On Social Networking Site**

You describe hearing a lawyer explain his or her practice of engaging a private investigator to use a social networking site to “friend” adverse parties in litigation for purpose of providing the lawyer with information regarding the adverse parties that the lawyer may later use against the adverse parties in the litigation.<sup>1</sup> You ask whether this practice violates the Rules of Professional Conduct. In the Committee’s opinion, it does.

Your question implicates Rules 4.1, 4.2, 4.3, 5.3 and 8.4 and the interplay among them.

#### **Rule 4.2; Communications with Represented Parties**

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<sup>1</sup> The Committee assumes, based on the scenario you describe, that the adverse parties’ social networking pages are not public, and that the investigator must “friend” the users in order to gain access to information on the users’ pages. The Committee does not address in this opinion whether a lawyer’s access to an adverse party’s public social networking page violates the rules of professional conduct. The Committee notes, however, that the New York State Bar Association Committee on Professional Ethics has addressed this issue in the context of New York’s Rules of Professional Conduct in Opinion 843 dated September 10, 2010.

The Committee first considers the hypothetical case where a lawyer directly (as opposed to through an investigator) seeks to “friend” an adverse party represented in litigation. Rule 4.2 prohibits the lawyer from communicating with a party, whom the lawyer knows to be represented in a matter, about the subject of the representation, without consent. In order to “friend” a social network user, the lawyer would need to communicate with the social network user essentially seeking permission from the user to gain access to the user’s non-public information and communications. This initial communication from the investigator is referred to, at least on Facebook, as a “friend request.” If the lawyer were to send a friend request to an adverse party, the friend request would be a “communication” with the adverse party for the purpose of developing information for use against the adverse party in the litigation. If the lawyer were successful in friending the adverse party, the lawyer would receive communications from the party that might be relevant to the litigation. These direct communications with a represented party to and from the lawyer representing the opposing party would violate Rule 4.2.

Rule 5.3(3) provides that a lawyer “shall be responsible for the conduct” of a non-lawyer retained by the lawyer that “would be a violation of the Rules of Professional conduct if engaged in by the lawyer if: (a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct . . . .” The scenario you present makes clear that the lawyer hiring the investigator understands that the investigator will seek to obtain information from the adverse party through one or more social networking sites. Hence, Rule 5.3 makes the lawyer “responsible” for the investigator’s conduct. Rule 8.4 provides, in part, that “it is professional misconduct for a lawyer to: (1) violate or attempt to violate the Rules of Professional Conduct knowingly assist or induce another to do so, or do so through the acts of another.” Because the lawyer would be prohibited by Rule 4.2 from communicating directly with the adverse represented party through social

networking sites, the lawyer is also prohibited by Rule 8.2 from doing so “through the acts of” an investigator hired by the lawyer. If the adverse party is not represented, a lawyer’s or investigator’s attempts to “friend” the adverse party do not violate Rule 4.2, but are nevertheless prohibited for other reasons as described below.

#### **Rule 4.3 Dealing with an Unrepresented Person**

Rule 4.3 provides that "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." A lawyer's "friend" request, even if made through an investigator violates the lawyer's obligation to refrain from stating or implying that the lawyer is disinterested. Moreover, the use of the investigator suggests that the lawyer *intends* that the adverse party misunderstand the lawyer's role in the matter.

#### **Rule 4.1; Truthfulness In Statements to Others**

Rule 4.1 provides, in part “In the course of representing a client a lawyer shall not knowingly (1) make false statement of material fact or law to a third person.” As stated above, Rules 5.3(3) and 8.4(1) prohibit a lawyer from violating the Rules of Professional Conduct by employing a third party to act in a manner in which the lawyer him- or herself would be prohibited from acting.

The investigator’s friend request to the social network user presumably omits the material facts (1) that the investigator has been hired by the lawyer; (2) to gain access to the user’s non-public information; (3) for purposes of using the information against the user in litigation. A friend request that omits these material facts is intended to give the user the false impression that

the investigator is interested in becoming “friends” with the user for reasons unrelated to the litigation. The lawyer and investigator no doubt hope that the user is unwary enough to allow the investigator access to the user’s non-public information and communications for the purpose of gaining an advantage over the user in litigation. The Committee concludes that a friend request that omits the material facts that the investigator has been: (1) hired by the lawyer; (2) to gain access to the user’s non-public information; (3) for purposes of using the information against the user in litigation amounts to an intentional “false statement of material fact” prohibited under Rule 4.1

#### **Rule 8.4; Dishonesty, Deceit, and Misrepresentation**

Rule 8.4(3) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation. Again, as stated above, Rules 5.3(3) and 8.4(1) prohibit a lawyer from violating the Rules of Professional Conduct by employing a third party to act in a manner in which the lawyer him or herself would be prohibited from acting. In the Committee’s view, an investigator’s attempts, on behalf of a lawyer, to “friend” an adverse party in litigation is dishonest, deceptive, and misrepresents the intentions of the investigator and the lawyer.

An investigator is not the adverse party’s “friend” under many people’s definition of the word. Posing as a “friend” is, by itself, dishonest, deceptive, and misrepresents the investigator’s role. Further, the “friend” request sent by the investigator presumably omits the material facts: (1) that the investigator has been hired by the lawyer; (2) to gain access to the user’s non-public information; (3) for purposes of using the information against the user in litigation. Concealing these facts is also dishonest, deceptive, and misrepresents the purpose behind the friend request. Accordingly, in the Committee’s opinion, the investigator’s conduct, attributable to the lawyer by way of Rules 5.3(3) and 8.4(1), violates Rule 8.4(3).

In conclusion, in the Committee's opinion, under the facts presented, a lawyer may not hire an investigator to "friend" an adverse party in litigation. to develop evidence to be used against that party.

THE COMMITTEE ON PROFESSIONAL ETHICS

By \_\_\_\_\_  
Wick R. Chambers, Chair