In the case of criminal defense counsel . . . the obligation to investigate may have a constitutional as well as an ethical dimension. In light of these obligations, counsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.

- New Hampshire Bar Association, Ethics Committee Advisory Opinion #2012-13/05 (June 20, 2013)

As online social networking continues to increase in popularity, many attorneys are using Facebook, Twitter, and similar websites as resources for informal discovery and investigation. Statements that a victim or witness makes online can provide fertile ground for cross-examination at trial, or could even be used to secure dismissal of a criminal charge. Likewise, a prospective juror's online posts may reveal possible bias that an attorney could explore on *voir dire*, and a seated juror's posts could result in dismissal of the juror, a mistrial, or even post-conviction relief.

An attorney who uses social-networking websites for investigative purposes may encounter difficult ethical questions regarding how the attorney gains access to the witness's or juror's online profiles or postings. This essay will explore the various ethical dilemmas that arise with investigative social networking, and will determine what tactics are likely permitted or prohibited under the North Carolina Revised Rules of Professional Conduct.

I. Social Networking and "Friending"

Most popular social-networking websites use the same basic format. On Facebook, for example, each member (be it a person, organization, business, or other entity) creates a personalized homepage or profile page. On the member's profile page, the member may display biographical data, upload pictures and videos, and post comments about any subject of interest. The member may network with other members through a process called " friending," in which one member will send another member a request to be that person's online "friend." If the request is accepted, the two members will be linked as "friends" in the Facebook network, and can then post and exchange comments on each other's profile pages. This type of request-based networking is a common feature of Facebook (" friending"), Twitter ("following"), Instagram ("following"), LinkedIn (" connecting"), YouTube ("subscribing"), and other popular social networks.

A member may leave her profile page open to the general online public, allowing anyone to access her information. Alternatively, a member may use customized privacy settings to control who has access to her profile page and other information she posts online. Some members may restrict access entirely to those within the member's own network; others may allow outsiders access to certain areas of their profiles, while reserving other areas for "friends" only.
II. Ethical Dilemmas with Investigative Social Networking

One major concern with investigative social networking is that it may involve direct attorney-to-witness or attorney-to-juror communication. Further, attorneys may not be able to access a person's online profile page without using tactics that might be considered deceitful or dishonest.

The North Carolina State Bar has not yet issued a formal ethics opinion addressing the use of online social networking to investigate witnesses and jurors. Recent opinions from bar organizations in other jurisdictions, however, do provide valuable insight into the types of conduct that might be permitted or prohibited under our state ethics rules. These opinions address or implicate at least six principal areas of concern:

A. May an Attorney View a Witness’s or Juror’s Public Profile Page?

An attorney may discover that a juror or witness has a profile page that is open to the public, or to all members of the social network. May the attorney access these types of pages to learn information about the juror or witness?

Bar organizations unanimously agree that an attorney may access a social-networking website to view a public profile. The New York State Bar Association has observed, for example, that “[o]btaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media.”\(^1\) Similarly, the Oregon State Bar has concluded that viewing an adverse party’s public postings “is no different from reading a magazine article or purchasing a book written by that adversary,”\(^2\) and therefore does not implicate Rule 4.2(a), which prohibits communication with a represented party. This reasoning would also apply to viewing a juror’s public profile; Rule 3.5(a)(2) is not implicated because there is no “communication” with a juror or prospective juror.

Does it make a difference if the person’s postings are publicly available within the social network, but access to the network itself is restricted? The Oregon State Bar found that where a social network charges an access or subscription fee, the postings within the network are still considered public, and an attorney may pay the fee to access the network. Both the Oregon State Bar and the New York State Bar have warned, however, that Rule 8.4(c) – which prohibits dishonesty and misrepresentation – would preclude an attorney from making a fraudulent statement to gain access to the network (for example, by posing as a doctor in order to access a social network whose membership is restricted to medical professionals).


B. May an Attorney “Friend” a Witness Using a Fake Profile?

When an attorney tries to access a witness’s profile page, the attorney may find that the witness only allows access to her “friends” in the social network. The attorney wants to send a “friend request” to the witness to gain access the profile, but is worried that the witness will deny the request if she knows it is coming from an attorney. May the attorney create a false profile portraying himself as a different or fictional person, and then “friend” the witness using the fake profile?

Bar organizations unanimously agree that such conduct would violate two separate ethical rules. First, by portraying himself as a different person, the attorney would violate Rule 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. The attorney would also violate Rule 4.1, which prohibits an attorney from making a false statement of material fact to a third person. The Philadelphia Bar Association has explained that a fake access request “omits a highly material fact, namely, that the [person] who asks to be allowed access to the witness’s pages is doing so only because he or she is intent on obtaining information . . . for use in a lawsuit to impeach the testimony of the witness.”

C. May an Attorney “Friend” a Witness Using a Real Profile?

The answer to this question first depends on whether the witness is represented by an attorney. Under Rule 4.2(a), an attorney may not communicate with a represented witness about the subject matter of the representation unless the attorney first obtains consent from the witness’s attorney. Bar organizations unanimously agree that a “friend request” would be the type of communication prohibited by Rule 4.2(a).

What is not so clear, however, is whether an attorney may “friend” an unrepresented witness using the attorney’s real profile, and what type of disclosure the attorney must make at the time of the access request. Some bar organizations have generally approved of this tactic with minimal guidance or discussion. The New York City Bar Association has actively encouraged the truthful friending of unrepresented persons as a means to conduct informal discovery. That organization went so far as to 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.”

Other bar organizations, however, have placed much tighter restrictions on these types of access requests. The San Diego County Bar has warned that even a truthful friend request violates

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Rule 4.1 if the request is truthful in-name-only and does not disclose the purpose of the request.\(^5\) The New Hampshire Bar Association has held that the access request must correctly identify the attorney, the client, and the matter in litigation; otherwise the request is deceitful in violation of Rule 8.4(c), and is also unethical because it implies disinterest, in violation of Rule 4.3(b).

The North Carolina State Bar has, at times, informally advised attorneys that a truthful friend request may violate Rule 4.3(b) if the request implies disinterest. Therefore, an access request from “Dan Blau, Attorney at Law, representing Mr. X in case number 14 CRS 123456” is more likely to comply with Rule 4.3(b) than a request from “Dan Blau, Attorney at Law,” and is certainly better than a request from “Dan Blau.” This is especially true if the attorney’s profile, while real, does not actually identify him as being an attorney. Because of the uncertainty in this area, any attorney wishing to “friend” an unrepresented witness using his real profile should seek guidance from the North Carolina State Bar prior to doing so.

D. May an Attorney “Friend” a Juror Using Either a Real or Fake Profile?

Rule 3.5(a)(2) prohibits an attorney from having _ex parte_ communications with a juror or prospective juror. Assuming that an access request would be considered a “communication,” Rule 3.5(a)(2) would prohibit an attorney from sending a “friend request” to a juror, whether or not the attorney sends the request from a real profile or a fake profile. In this vein, the Kentucky Bar Association has explicitly warned that rules of professional conduct, statutes, and court rules prohibiting improper contact with jurors “would apply in the social network context as well.”\(^6\)

E. May an Attorney “Friend” a Juror or Witness through a Third Party?

Rule 5.3(c)(1) provides that an attorney will be held responsible for a nonlawyer’s actions if the nonlawyer engages in conduct that violates the Rules of Professional Conduct, and the lawyer either orders or ratifies the conduct. Similarly, Rule 8.4(a) prohibits an attorney from violating the ethical rules “through the acts of another.” Therefore, the answer to the above question depends on whether the attorney herself may “friend” the juror or witness without running afoul of the ethics rules.

In the Philadelphia case, an attorney wanted access to a witness’s Facebook profile. He proposed to ask a third party to send a “friend request” to the witness. The request would come from the third party’s real profile, but would not disclose the fact that he was affiliated with an attorney. The Philadelphia Bar Association ruled that the third party’s actions would be deceptive under Rules 4.1 and 8.4(c) because the access request would omit a material fact: that the third party’s reason for seeking access was to find impeachment information and share it with an attorney. Further, because the third party’s conduct would violate the ethics rules, the attorney would also be responsible for

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the conduct under Rules 5.3(c)(1) and 8.4(a).\footnote{Id. at n.3.}

At least two bar organizations, however, have distinguished situations where the third-party requestor is the attorney’s own client. According to the New Hampshire Bar Association and the San Diego County Bar, the client may “friend” the witness and provide any information he obtains to his attorney so long as the client sends the access request from his true profile.\footnote{New Hampshire Bar Association Ethics Committee, Advisory Opinion 2012-13/05 (June 20, 2013), available at http://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_05.asp., and id. at n.5.}

\section*{F. May an Attorney Obtain a Witness’s Information through a Third Party who is Already “Friends” with the Witness?}

Suppose an attorney discovers that an adverse witness has a private profile page where she may have posted comments about the attorney’s client. The attorney is not friends with the adverse witness through the social network, but knows that his neighbor is, and that the neighbor has access to the witness’s profile page. May the attorney ask the neighbor to print out material from the witness’s profile and provide it to the attorney?

Although bar organizations have offered minimal guidance in this area, this type of investigative tactic is probably permissible. The initial “friend request” that gave the neighbor access to the witness’s profile did not involve any deceit or misrepresentation, and was not made for a purpose related to the subject matter of the litigation. Therefore, the neighbor’s conduct probably would not come within Rules 4.1 or 8.4(c), and the attorney would not be in violation of Rule 8.4(a). The New Hampshire Bar Association has agreed, noting that in this context, “there was no deception by the lawyer. The witness chose to reveal information to someone who was not acting on behalf of the lawyer. The witness took the risk that the third party might repeat the information to others.”\footnote{Id. at n.8.}

\section*{III. Unintended Communications and Additional Concerns}

Many of the answers to these questions depend on whether the attorney’s action constitutes a "communication" within the meaning of the ethics rules. Bar organizations seem to agree that viewing a person's online profile is not a communication, but asking the person directly for access to their profile is a communication.

As the number and diversity of social networks increases, however, it may not always be clear whether an attorney has "communicated" with a person to access their online profile. On the professional social network LinkedIn, for example, members may receive an auto-generated message from the network when an outsider has viewed the public portions of their profile, even if the outsider does not take the additional step of sending a request to access the entire profile. Is this considered a communication? If so, is the attorney responsible for the communication, even if she did not know that a communication took place? There is very little guidance in this area. Even if
these types of indirect communications are permissible, an attorney should take steps to learn about how a social network operates prior to using it for investigative purposes. It could create an uncomfortable and potentially damaging situation if, for example, a juror becomes aware that an attorney has searched for information about him online.

Finally, it is important to note that if an attorney believes a witness has private information on a social network, and the attorney cannot access that information without violating the ethics rules, there are alternative ways to access the information. As the New York City Bar Association has suggested, attorneys could "us[e] formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page," including the witness, her online friends, or even the social network itself. "Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line."\(^{10}\)

IV. Conclusion

Social-networking websites can be a valuable source of information for attorneys who want to investigate witnesses or jurors. Attorneys may – and should – seek out substantive, impeachment, and bias evidence using jurors' and witness's public profile pages. However, an attorney conducting a social-media investigation must refrain from using deception to gain access to a person's private information, and may never contact a juror, prospective juror, or represented party or witness. An attorney may communicate with an unrepresented person to gain access to the person's profile, but only if the attorney takes necessary steps to avoid appearing disinterested in the case. If an attorney wants to use any of these investigative tactics with the help of a third party, the attorney should first determine whether the tactic would be permissible if undertaken by the attorney herself.

Finally, because online social networking is a growing and dynamic area of technological advancement, and because few formal ethics opinion exist providing guidance in this area, an attorney should seek advice from the North Carolina State Bar prior to engaging in any investigative conduct that might reasonably be prohibited under the Revised Rules of Professional Conduct.

\(^{10}\) Id. at n.4.