

Do you really want to send that ‘friend’ request?

by

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The Internet is a useful tool, which can greatly enhance a lawyer’s research ability, since with a few keystrokes, a person can locate information regarding almost anything. One Internet activity that has become widespread is the use of social networking sites. Not only can one potentially “friend” her favorite author, she also is often able to reconnect with her best friend from third grade or an employer looking for a particular skill set.

For lawyers, social networking also provides a potential platform to discover information about a witness or an opposing party. If the opposing party’s or witness’ social networking site is open to the public, then viewing whatever information the person has posted is fair game for lawyers or investigators. If the opposing party’s or witness’ site is not open to public view, however, the temptation may exist to “friend,” link to or connect with the opposing party or witness. This temptation should be resisted as failure to resist the temptation can lead to several possible violations of the Minnesota Rules of Professional Conduct (MRPC).

In general, if the purpose of a lawyer or her non-lawyer assistant asking to be allowed to access an opposing party’s or a witness’ social network page is to gain information regarding the opposing party or witness that may be helpful to the requesting lawyer’s client, then sending a friend request to a represented opposing party or a witness may run afoul of Rule 4.2, MRPC. Rule 4.2 forbids a lawyer from communicating regarding the subject of the representation with a person who is known to be represented by another lawyer without the other lawyer’s consent. A friend request itself is a communication and the purpose for the request, to discover information helpful to the requesting attorney’s client, is about the subject of representation.

Even if the opposing party or witness is unrepresented, the request for access may violate Rule 4.3, MRPC. Rule 4.3 requires a lawyer to clearly indicate to an unrepresented person the requesting lawyer’s role and lack of impartiality. Furthermore, the requesting lawyer cannot “state or imply that the lawyer is disinterested” and must clearly state any adversity that may exist. A simple request to friend, link to or connect with a person does not supply the required information.

A more troubling scenario is the use of deceit, such as a fictitious identity, to gain access to a social networking page. Besides possibly violating the networking site's terms of use and, in some instances, potentially violating a criminal statute, a lawyer's use of a fictitious identity to gain access to another's social networking site violates Rule 8.4(c), MRPC. Rule 8.4(c) makes it clear that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The requesting lawyer who is falsely representing herself/himself as someone else to obtain information to assist their client engages in conduct that is deceptive and violates the rule.

A final word of caution: do not have others do what you are forbidden from doing. Rule 5.3, MRPC, requires a lawyer to ensure that nonlawyer assistants comply with the Rules of Professional Conduct. Having the secretary, paralegal, investigator or others at a lawyer's direction make the request to friend, link to or connect with an opposing party or witness, does not alleviate the potential problems outlined above and it potentially subjects the lawyer to another rule violation.

So, do you really want to send that "friend" request?