



Nick Akerman

(212) 415-9217 ▪ akerman.nick@dorsey.com

Nick is a partner in the New York office of Dorsey & Whitney.

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Is It Permissible for a Lawyer to Befriend a Witness on Facebook In Order to Gather Information for a Lawsuit?

Ever worry that what you do on a social networking site could be used against you in a court of law? While no one is recommending that Facebook provide users with its own version of the Miranda rights, two Bar Associations have recently considered this issue in the context of lawyers using information from social networking sites to gather impeachment material to use against witnesses in civil lawsuits.

On September 10, 2010, the New York State Bar Association, Committee on Professional Ethics, followed the March 2009 opinion of the Philadelphia Professional Guidance Committee in ruling that it is improper for a lawyer to befriend an adverse witness on Facebook for the purpose of obtaining potential impeachment material to use at a deposition. Both legal ethical bodies “determined that the proposed ‘friending’ by a third party would constitute deception in violation of Rules [of Professional Conduct] 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would omit a material fact (i.e. that the third party would be seeking access to the witness’s social networking pages solely to obtain information for the lawyer to use in the pending lawsuit).” New York State Bar Assoc. Op. 843 (9/1//10).

The New York State Committee, however, dealt with the additional issue of whether a lawyer may simply view and access the publicly available Facebook and My Space pages of a party in a pending litigation in order to gather possible impeachment material for use in litigation. The Committee concluded “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.”

The Committee explained that New York’s Rule 8.4 [of Professional Conduct prohibiting deceptive conduct by a lawyer] would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in another way (including, for example, employing deception to become a member of the network).” Thus, “[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, or through a subscription research service such as Nexis or Factiva.” These ethical opinions notwithstanding, the lesson to the public is to be aware that whatever you post on a social networking site can come back to haunt you in unexpected ways.