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Obligations to Third Persons

**Lawyer May Not Make 'Friend' Request
To Discover Private Facts for Client's Suit**

A lawyer may not ethically send a "friend" request to an opponent or a potential witness with the goal of getting inside information for a client's matter, the San Diego County bar's ethics committee advised May 24 (San Diego County Bar Legal Ethics Comm., Op. 2011-2, 5/24/11).

The committee concluded that a friend request intended to elicit information from a represented party about the subject matter of the client's representation amounts to an improper ex parte contact, no matter how the request is worded or transmitted.

More broadly, the opinion declares it deceitful and therefore improper for a lawyer to send a friend request to potential witnesses without disclosing the purpose of the request, regardless of whether the witnesses are represented by counsel.

Hey There

The opinion addresses a hypothetical situation in which the plaintiff's counsel in a wrongful discharge action sends a friend request to two high-ranking company employees whom the client has identified as being dissatisfied with their employer.

The opinion notes that when a Facebook user clicks on the "Add as Friend" button next to a person's name without adding a personal message, Facebook sends a message to the would-be friend saying that "[Name] wants to be friends with you on Facebook." If the friend request is accepted, the user can then look around the person's Facebook page.

As an initial matter, the committee said that the term "high-ranking employee" suggests that the employees in question are part of the represented corporate party for purposes of California Rule of Professional Conduct 2-100, which prohibits lawyers from communicating with a represented party without the consent of the party's lawyer.

At a minimum, the lawyer should probe the client about the employees' functions before treating them as unrepresented, the committee advised.

Motive Is Key

The panel had no trouble concluding that a friend request to a represented party nominally generated by Facebook is at least an indirect ex parte communication for purposes of Rule 2-100.

A harder question, the committee said, is whether the statement Facebook uses to alert the recipient to the attorney's friend request is a communication "about the subject of the representation" within the meaning of the rule.

The answer is yes if the attorney's motive in initiating the friend request is to obtain private information for use in the client's matter, the committee decided, citing a recent federal district court case that applied Rule 2-100 and ABA Model Rule 4.2. A lawyer's friend request made to obtain information for use in litigation undermines the purpose of Rule 2-100, it reasoned.

The committee said a friend request to a represented party is "about the subject of the litigation" under Rule 2-100 even though the Facebook message itself does not refer to the issues in the litigation or involve vigorous questioning. The motive for the friend request establishes its connection to the subject matter of the representation, the panel explained.

Restricted Area

Friending a represented opponent is not the same as accessing the opponent's public website, the committee added. The very reason for the lawyer's friend request, it said, is to access restricted information that presumably will be less filtered than information on an open website. Nothing prevents a lawyer from accessing a represented party's public Facebook page, the opinion makes clear.

The same conclusion was reached, the committee pointed out, in New York State Ethics Op. 843, 26 Law. Man. Prof. Conduct 607 (2010). That opinion indicated that although lawyers are not permitted to dig up dirt on people by deceptively friending them, attorneys are free to scout around on the internet for impeachment ammunition that is freely available to anyone on the web.

"[T]he attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request."

San Diego County Ethics Op. 2011-2

It makes no difference, the San Diego County committee found, that the attorney-client privilege may not protect what a party posts on a Facebook page. The rule barring ex parte contact with a represented person is designed to avoid disrupting the trust needed for an attorney-client relationship, and that trust is eviscerated when a party is lured into clandestine communication with opposing counsel through the unwitting acceptance of an ex parte friend request, it said.

The committee denied that a lawyer's friend request is acceptable under *United States v. Carona*, 630 F.3d 917, 27 Law. Man. Prof. Conduct 38 (9th Cir. 2011), which held that prosecutors did not violate Rule 2-100 when they gave a cooperating witness phony court documents to help elicit incriminating statements from the target of a corruption probe. There was no direct contact with the represented criminal defendant in that case, the committee pointed out.

The opinion emphasizes that it does not address the evidentiary or disciplinary consequences of a lawyer's friend request made to get access to Facebook ruminations. "The conclusion we reach is limited to prohibiting attorneys from gaining access to this information by asking a represented party to give him entry to the represented party's restricted chat room, so to speak, without the consent of the party's attorney," the committee stated.

Don't Deceive

The committee also concluded that "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."

The committee acknowledged New York City Formal Ethics Op. 2010-2 (2010), which advised that a lawyer may use her real name and profile to send a friend request to obtain information from an unrepresented person's social networking website.

But the committee instead endorsed Philadelphia Ethics Op. 2009-2 (2009), which concluded that it is deceptive for a lawyer to use a third person to friend a nonparty witness in order to access her private Facebook or MySpace pages in search of information with which to impeach her at trial.

No one should have "friends" like that or be misled into accepting such a friendship, the committee said.

Full text at <http://www.sdcba.org/lecopinion2011-2>.

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