With Friends Like These…

by Bruce S. Rosen

Wondering if a matrimonial client's spouse is captured on video in all his or her drunken glory? On the prowl for evidence showing a plaintiff's personal injury claims to be bogus and unsure about how to get around privacy settings on their social media sites? Listen up. Although New Jersey courts have not yet chimed in on this cutting-edge issue, the initial returns are in from other states and, mindful of New Jersey's usually tougher-than-the-norm ethics rules, a conservative approach and common sense should be a guide.

A recent survey by the American Academy of Matrimonial Lawyers (AAML) revealed that 59 percent of the nation's top divorce attorneys have seen an increase in the number of cases using evidence taken from dating websites during the past three years. Match.com was cited by 64 percent of the respondents as a primary source, while 57 percent noted the relationship status listed by users as the most common piece of evidence.[1] Previously, in 2010, another AAML survey showed that 81 percent of its members had used or faced evidence from social networking sites, primarily Facebook.[2]

The question is: What information is fair game, both ethically and legally? Although social networking sites are designed to share information, they often have elective privacy walls that can restrict sharing to a chosen few, if the user is very careful. Counsel need to be mindful of what information is accessible to everyone and resist the temptation to sneak into that potential treasure trove of evidence behind a privacy wall.

In a handful of nearby jurisdictions, the law on this issue appears to be reaching a critical mass. What is public is public; if counsel, like anyone else, can see that picture of the supposedly disabled plaintiff skiing or dancing posted on Facebook, MySpace, Instagram, Match.com or one of the dozens of other social networking sites, go for it.[3] However, if it is suspected a far more lively and duplicitous plaintiff lives in an area reserved for 'friends' only, play it safe and obtain copies of the pages through a combination of subpoena and/or court motion and order.

As it stands now, an attorney's self-help does not help, and it might result in loads of trouble. Just ask the partner and associate who worked for Rivkin Radler's Hackensack office. In 2012, the two were charged by the New Jersey Office of Attorney Ethics (OAE) with having directed or given tacit approval to have their paralegal 'friend' a represented adversary-plaintiff on Facebook.

The plaintiff was 18 when he alleges he was hit by a police cruiser while doing push-ups in a firehouse driveway, requiring multiple surgeries to fix a broken femur. At first his profile was public; it was then switched to semi-private, requiring an affirmative acceptance of a friend in order to gain access. Once the friend request was made and accepted, it opened the gates to photos and videos unavailable to individuals *not* designated as friends, materials the attorneys interpreted as evidence the plaintiff was exaggerating the seriousness of his injuries. Like many young people, the plaintiff did not screen his friend invitations, and accepted the paralegal's invitation without inquiring who she was (it is also likely the plaintiff did not change his settings until being told to do so by his attorney).

The action to friend the plaintiff, made deliberately or not (the Rivkin Radler attorneys deny they directed the paralegal to actually friend the plaintiff) also did not have the intended result: According to a *New Jersey Law Journal* account of the case, not only did the judge refuse to allow the Facebook evidence because it was beyond the discovery deadline, but the case settled for $400,000 soon after, in Feb. 2010, and the

plaintiff's counsel then filed a complaint against the two lawyers with the OAE.

On Nov. 29, 2011, the OAE filed a formal complaint alleging the paralegal accessed the plaintiff's Facebook account at the direction of the Rivkin Radler lawyers. To compound the attorneys' misery, the OAE complaint also claimed the supposed smoking gun evidence actually predated the accident and the case. The case has remained mired in a procedural thicket, with the attorneys challenging the ability of the OAE to prosecute the case after a district ethics committee declined to docket the grievance.

Yet even while these jurisdictional issues are being resolved, and even if they are resolved in favor of the respondents, there are lessons to be learned from the case now. While at first glance the attorney's actions may appear to reflect the pitfalls of new technology (indeed, the lawyers professed ignorance of Facebook's rules, although one had an account), the OAE's allegations are much more basic: The lawyers were charged with numerous Rules of Professional Conduct (RPC) violations, including RPC 4.2 (communication with person represented by counsel), RPC 5.3(a), (b), and (c) (failure to supervise a non-lawyer assistant), RPC 8.4(c) (conduct involving dishonesty and violations of ethics rules through others' actions), and RPC 8.4(d) (conduct prejudicial to the administration of justice). The more-senior attorney was also charged with RPC 5.1(b) and (c), which imposes ethical obligations on supervising lawyers.

This was not new ground when the OAE made these charges. In March 2009, the Philadelphia Bar Association's Professional Guidance Committee was asked whether a lawyer could have a third party friend a hostile witness, using their real name, but "not revealing that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely to provide the information contained on the page to counsel for possible use against the witness." In its response, the committee cited Rule 5.3(c) (responsibility of a lawyer for ordering or ratifying conduct of another that violates the RPCs), Rule 8.4 (professional misconduct), and Rule 4.1 (truthfulness in statements to others), while considering the possibility that Rule 4.2 might apply if the witness were represented by counsel.[4]

The bar ethics opinion concluded the planned activity was deceptive: "the inquirer could simply test [whether the witness would otherwise permit access to him] by simply asking the witness forthrightly for access," and just because the deception may not be necessary did not mean it was less deceptive. Moreover, the committee specifically rejected the inquirer's analogy to friending as the same as videotaping a plaintiff's public activities, which may be permissible. "The photographer does not have to enter a private area to make the video," the committee said.[5]

In Sept. 2010, the New York State Bar Association's Committee on Professional Ethics was asked a simpler question: Was it even permissible to look at an adversary party's Facebook page *without* friending the party?

It is permissible, said the committee, as long as the lawyer does not friend the other party or direct a third person to do so, which would implicate Rules 8.4, 4.1 and 5.3(b)(1),[6] the same provisions cited by the Philadelphia committee.

That same month, the Association of the New York City Bar's Committee on Professional Ethics issued its own guidance (2010-2), advising that lawyers *may* contact an unrepresented person through a social media website to access their web page to use the information in litigation, but they need to use only truthful information to obtain access, including their real name.[7] The New York committee said that, unlike the real world, where a lawyer's visit to a doorstep might result in the door being shut in his or her face, in the virtual world of social networking, many are far more willing to allow strangers in as friends and it is too easy to create false profiles. Thus, one may never know who their friends really are. Deception of any kind has no place, the committee advised, also citing Rules 4.1, 8.4(c) and possibly 5.3 (distinguishing such requests where the witness was represented). Thus,

> [r]ather than engage in trickery, lawyers can—and should—seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as truthful "friending" of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. 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.[8]

The following year, in May 2011, the San Diego County Bar Association Legal Ethics Committee was faced with a similar issue regarding Rule 4.2, which states in part:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter...unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented.[9]

In Opinion 2011-2, the San Diego committee considered a scenario where a plaintiff's attorney in a wrongful discharge action friends other "high ranking" employees similar to his client to see if they made disparaging remarks about their employer on their Facebook pages, where they may be more candid than in depositions. The lawyer used his real name.[10] Is this kosher?

On the surface, the San Diego committee appeared to disagree with the New York committee's advice that an honest friending of an unrepresented witness was permissible, and ascribed the difference to the New York State courts' declared encouragement of informal discovery. Nevertheless, the San Diego committee said that if these friended employees are seen as part of a control group for the company, the friending by the attorney is at least an indirect contact with a represented party. The San Diego committee considered Facebook communication with a represented party indirect contact since, 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 that simply reads "[Name] wants to be friends with you on Facebook." Accordingly, the committee said,

> [t]he harder question is whether the statement Facebook uses to alert the represented party to the attorney's friend request is a communication "about the subject of the representation." We believe the context in which that statement is made and the attorney's motive in making it matter. Given what results when a friend result is accepted, a statement from Facebook to the would-be friend could just as accurately read "[Name] wants to have access to the information you are sharing on your Facebook page." If the communication to the represented party is motivated by the quest for information about the subject of the representation, the communication with the represented party is about the subject matter of that representation.[11]

The San Diego committee then noted that while California had not adopted the duty not to deceive in American Bar Association (ABA) Model Rule 4.1, it believed there was such a common law duty and the breach of that duty may subject an attorney to liability for fraud. The San Diego committee further said the New York committee's ruling might be different if the party was—as the San Diego committee assumed—part of a control group considered represented by corporate counsel.[12]

The San Diego committee's warning was clear:

> Represented parties shouldn't have friends like that and no one—represented or not, party or non-party—should be misled into accepting such a friendship. In our view this strikes the right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented.[13]

Even so, the easiest way for litigators to obtain private social media materials is to subpoena them from parties or nonparties. However, subpoenaing Facebook and other social media is difficult without the consent of the person whose profile is at issue. The Stored Communications Act prohibits Facebook from revealing the contents of the social media account, even under a court order.[14] Therefore, focus should be on obtaining that consent, or perhaps asking a court to order a party to provide that consent. This, of course, assumes the relevance of the information and overcoming the difficulties in authenticating the information for use at trial.

For those attorneys tempted to advise a client to simply delete all or parts of a social media page, beware. In March 2013, U.S. Magistrate Judge Steven Mannion ruled that a personal injury plaintiff had a duty to preserve his Facebook account at the time it was deactivated and deleted, ruling that an adverse inference should be added to jury instructions.[15]

While Judge Mannion declined to order legal fees, ruling that it was not purposeful, in sharp contrast a Virginia court's order for more than $700,000 in legal fees was upheld against a lawyer and his client. In *Lester v. Allied Concrete*, a wrongful death case, a lawyer instructed his paralegal to tell the client to delete his Facebook page, and they then proceeded to try to cover it up.[16] The trial judge cut the plaintiff's $10.6 million award in half and imposed the sanctions.

So important is the role played by social media in the world that attorneys arguably have a duty to investigate the public activities of an adversary. In fact, the American Bar Association's Ethics 20/20 Commission has approved a change in Model Rule 1.1 that would require attorneys to "stay current on the benefits and risks associated with technology."

But even the technology-challenged among us should understand that the concepts in the RPCs can apply to online contacts with adversaries or witnesses, whether the contact comes in the form of a personal visit, a letter, a telephone call, email message, or an offer to friend on Facebook. Although application of ethics rules to new technology may not always be crystal clear, the concepts remain the same. While New Jersey courts and ethics authorities have not spoken specifically on these issues, the best advice is to avoid contact with witnesses or parties. ⚖

Endnotes

1. www.aaml.org/about-the-academy/press/press-releases/divorce/dating-websites-providing-more-divorce-evidence-says.
2. http://usatoday30.usatoday.com/tech/news/2010-06-29-facebook-divorce_N.htm.
3. *See, e.g., Patterson v. Turner Const. Corp*, 88 A.D.3d 617, 931 N.Y.S.2d 311 (App. Div. 1st Dept. 2011); *Tomkins v. Detroit Metro Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012).
4. The Philadelphia Bar Association, Professional Guidance Committee, Opinion 2009-02 (March 2009).
5. *Ibid.*
6. New York State Bar Association, Committee on Professional Ethics, Opinion #843 (Sept. 10, 2010).
7. The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2010-2: *Obtaining Evidence From Social Networking Websites* (2010).
8. *Ibid.*
9. Model Rules of Prof'l Conduct R. 4.2.
10. San Diego County Bar Association, SDCBA Legal Ethics Opinion 2011-2 (May 24, 2011).
11. *Ibid.*
12. *Ibid.*
13. *Ibid.*
14. 18 U.S.C. §§2701-2712.
15. Gallagher, M.P., *Party's Deletion of Facebook Page Found to Be Spoliation of Evidence*, ___N.J.L.J.___ (March 27, 2013).
16. *Lester v. Allied Concrete* (Charlottesville, Va. Cir. Ct. Jan. 10, 2013) (www.courts.state.va.us/opinions/opnscvwp/1120074.pdf).

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