A lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer’s practice. “Relevant technology” includes social media. . . . [C]ounsel 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.

If the client’s postings could be relevant and material to the client’s legal matter, competent representation includes advising the client of the legal ramifications of existing postings, future postings, and third party comments.


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. A prospective juror's online posts may reveal possible bias that an attorney could explore on voir dire, and a seated juror's posts during trial could result in dismissal of the juror, a mistrial, or even post-conviction relief. So too, a defendant’s own social-media activity may have a profound effect on his or her case.

Attorneys may encounter difficult ethical questions regarding how they use social media to represent their clients. Ethical concerns typically arise in two main areas: (1) how to use social media to find evidence and other information about witnesses or jurors; and (2) how to advise clients about their own use of social media, especially when a client’s own postings contain evidence of crime. 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.

PART 1: SOCIAL-MEDIA INVESTIGATIONS

I. Social Networking and "Friending"

Most popular social-networking websites use a similar 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 connect with other members of the social network 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 any other information she posts online. Some members may restrict access entirely to those within the member's own network of friends; 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 this page to learn information about the juror or witness or to search for evidence?

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

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¹ New York State Bar Association Committee on Professional Ethics, Opinion 843 (Sep. 10, 2010).
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.³ 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 network⁴ (for example, by posing as a doctor in order to access a social network whose membership is restricted to medical professionals). The New York City Bar Association agrees, holding that Rule 8.4(c) prohibits “misrepresenting the attorney’s associations or membership in a network or group in order to access a juror’s information.”⁵

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 fake profile portraying himself as a different person or a 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.”⁶

Rules 4.1 and 8.4(c) apply with great force in this context because “it may be easier to deceive an individual in the virtual world than in the real world.”⁷ The Colorado State Bar has also concluded that use of a fake profile to friend an unrepresented person may also violate Rule 4.3(b), because “assuming a false identity in seeking access to information from a restricted portion of a social media website in a client matter may imply to the person from whom information is sought that the lawyer is a disinterested person.”⁸

³ Id. at 2.
⁴ Id. at 1, 2.
⁷ New York City Bar Association, Formal Opinion 2010-2 (Sep. 2010).
⁸ Colorado Bar Association, Formal Opinion 127 (Sep. 2015).
C. May an Attorney “Friend” a Witness Using a Real Profile?

The answer to this question depends, in part, 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).

Bar organizations are sharply divided, however, on whether an attorney may “friend” an unrepresented witness using the attorney’s real profile. Although all bar organizations permit this practice, many require the attorney to make certain disclosures to the recipient in order to avoid the appearance of disinterest under Rule 4.3(b). The Colorado State Bar, for example, requires an attorney to disclose his name, the identity of his client, the reason for his request, and the general nature of the matter about which he is seeking information.9 Likewise, the San Diego County Bar requires that the attorney disclose the purpose of the friend request,10 and the New Hampshire Bar Association requires that the attorney disclose his involvement in the case. Otherwise, not only does the bare friend request imply disinterest, it is also deceitful, in violation of Rule 8.4(c).11

Other bar organizations, however, have expressly approved of truthful, in-name-only friend requests. The New York City Bar Association, for example, has actively encouraged the truthful friending of unrepresented persons as a means to conduct informal discovery, and has concluded that an attorney need not “disclos[e] the reasons for making the request.”12 The Oregon State Bar has agreed, noting that:

A simple request to access non-public information does not imply that [the lawyer] is “disinterested” in the pending legal matter. On the contrary, it suggests that [the lawyer] is interested in the person’s social networking information, although for an unidentified purpose.

Similarly, [the lawyer]’s request for access to non-public information does not in and of itself make a representation about the [l]awyer’s role. . . . [The recipient]’s failure to inquire further about the identity or purpose of unknown access requestors is not the equivalent of misunderstanding [the lawyer]’s role in the matter.13

That organization has also warned, however, that “if the holder of the account asks for additional information to identify [the lawyer], or if [the lawyer] has some other reason to believe that the

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9 Id. at 8.
11 New Hampshire Bar Association Ethics Committee, Advisory Opinion 2012-13/05 (June 20, 2013).
12 Id. at 7.
person misunderstands her role, [the lawyer] must provide the additional information or withdraw the request.”

Although there is no formal ethics opinion on point in North Carolina, our State Bar has informally advised this author 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 Christopher Client on felony assault charge in Wake County case 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 just “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 communicating ex parte with a juror or prospective juror. Bar organizations have unanimously concluded that a friend request qualifies as a “communication,” and therefore Rule 3.5(a)(2) prohibits an attorney from friending a juror, even from the attorney’s real 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.” The New York County Lawyers’ Association has extended this prohibition to other types of social-media interactions that do not require a specific friend request or acceptance; for example, following a juror’s Twitter feed.

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

Rule 5.3(c)(1) provides that an attorney is 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 this question depends on whether the attorney herself may “friend” the juror or witness without running afoul of the ethics rules.

In one 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

14 Id.
16 New York County Lawyers’ Association Committee on Professional Ethics, Formal Opinion No. 743 (May 18, 2011).
the third party’s conduct would violate the ethics rules, the attorney would also be responsible for the conduct under Rules 5.3(c)(1) and 8.4(a).  

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 real profile.

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 a case. 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 him?

The few bar organizations that have reviewed this tactic have found it 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 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 noted 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.”

The Colorado State Bar, though in agreement, did warn that obtaining restricted content from a third party is only permitted so long as the third party does not make any new requests that the attorney could not make, or engage in any deceptive conduct to access new restricted content.

III. Unintended Communications and Additional Concerns

Based on the above discussion, it is clear that the bounds of an attorney’s conduct often depends on whether the attorney “communicates” with a third-party on social media within the meaning of Rules 3.5 and 4.2. There is a consensus that viewing a person's online profile is not a communication, but asking the person directly for access to their profile is a communication. However, some social-media interactions are not so easily categorized. As the number and diversity of social networks increases, it will not always be clear whether an attorney has "communicated" with a person to access their online profile.

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17 Id. at 6.
18 Id. at 10, 11.
19 Id. at 11.
20 Id. at 8.
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 when such a message is not sent automatically, the account holder can still obtain a list of people who have viewed their profile. Similarly, on Twitter, the social network itself sends an auto-generated message to a user when a new person begins following their account. Are these considered communications? If so, is the attorney responsible for the communication, even if she did not send the communication herself? What if she did not intend or even know that the communication would take place?

There is very little guidance in this area. The New York County Lawyers’ Association has warned that “[i]f a juror becomes aware of an attorney’s efforts to see the juror’s profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror’s conduct with respect to the trial.” The Colorado State Bar is more permissive, concluding that “in such circumstances, the lawyer is not communicating with the juror. Rather, the social media service is communicating with the juror based on a technical feature of the particular social media.” Because each social-media network functions differently, and because of the lack of guidance in this area, attorneys would do well to heed the advice of the New York City Bar Association in this area:

[If] the juror receives an automated message . . . the attorney has arguably “communicated” with the juror. The transmission of the information that the attorney viewed the juror’s page is a communication that may be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent . . .

Although the text of [Rule 3.5] would appear to make any “communication” – even one made inadvertently or unknowingly – a violation, the Committee takes no position on whether such an inadvertent communication would in fact be a violation of the Rules. Rather, the Committee believes it is incumbent upon the attorney to understand the functionality of any social media service she intends to use for juror research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution . . . and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of Rule 3.5.

Finally, it is important to note that if an attorney believes a witness has private information

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21 *Id.* at 16.
22 *Id.* at 8.
23 *Id.* at 5.
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,"\(^\text{24}\) including the witness, her online friends, or even the social network itself.

### PART 2: CLIENT USE OF SOCIAL MEDIA

In addition to using social media as an investigative tool, an attorney may also encounter situations where he or she may need to advise a client on the client’s own use of social media. Indeed, as noted above, the North Carolina State Bar has explicitly stated that one component of providing competent representation is “advising the client of the legal ramifications of existing postings, future postings, and third party comments.”\(^\text{25}\) Formal guidance in this area, however, is sparse. Further, the few ethics opinions that do exist are typically “limited to conduct of attorneys in connection with civil matters,” and “[a]ttorneys involved in criminal cases may have different ethical responsibilities.”\(^\text{26}\) The main question that arises in the criminal context is how to manage incriminating content that may exist on your client’s profile.

#### I. Evidence on Client’s Social-Media Page

Suppose you represent a new client on a charge of selling marijuana. As a routine part of your representation, you peruse your client’s Facebook page. You find that his privacy settings are not restricted, and you discover a picture of him smoking marijuana and posing with stacks of twenty-dollar bills. The discovery packet from the State does not include those pictures; however, you believe the prosecutor may check the client’s Facebook page in the future should the case go to trial. Can you advise your client to delete the content from his page so that the prosecutor will not be able to find it?

The North Carolina State Bar has answered this question by first noting that under Rule 3.4(a), “a lawyer may not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value.”\(^\text{27}\) It is important to note that Rule 3.4(a) does not prohibit all obstruction, alteration, destruction, or concealment, but only unlawful obstruction, alteration, destruction, or concealment. How, then, can an attorney determine what is permitted and what is not permitted? The Bar advises that an attorney should examine the law on preservation of information, spoliation of evidence, and obstruction of justice to determine whether removing

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\(^\text{24}\) Id. at 7.
\(^\text{26}\) New York County Lawyers’ Association Ethics Opinion 745 (July 2, 2013).
\(^\text{27}\) Id. at 25.
existing postings would be a violation of the law. If removing postings does not constitute spoliation and is not otherwise illegal . . . the lawyer may instruct the client to remove existing postings on social media.\textsuperscript{28}

Making this determination, of course, is easier said than done. North Carolina statutory law prohibits the destruction of biological evidence held by the State, \textit{see} N.C. Gen. Stat. § 15A-268(i), as well as breaking or entering a building, vehicle, file, cabinet, drawer, or any other enclosure for the purpose of altering or destroying evidence relevant to a criminal offense or court proceeding. \textit{See} N.C. Gen. Stat. § 14-221.1. Neither of these statutes would seem to apply to deleting electronic data from a social-media profile. The common-law offense of Obstruction of Justice, however, prohibits “any act that prevents, obstructs, impedes, or hinders public or legal justice.”\textsuperscript{29} This vague offense has been held to apply to situations such as interfering with a grand jury, paying money to a victim to secure a dismissal of a criminal charge, and interfering with police processing duties,\textsuperscript{30} but so far as this author is aware, not specifically to destruction of evidence.

In the civil context, where reciprocal discovery rules are broad, bar organizations typically suggest that an attorney may advise or direct that a client remove or delete harmful material on social media, so long as the attorney takes steps to preserve the evidence should it become discoverable in the future. The Florida State Bar, for example, has directed that if information is removed from a social-media profile, “the social media information or data must be preserved if the information or data is known by the [attorney] or reasonably should be known by the [attorney] to be relevant to [a] reasonably foreseeable proceeding.”\textsuperscript{31} The Philadelphia Bar Association agrees, concluding that a lawyer may “instruct a client to delete information that may be damaging from the client’s page, but must take appropriate action to preserve the information in the event it should prove to be relevant and discoverable.”\textsuperscript{32}

In the criminal context, of course, discovery rules are quite different. The type of reciprocal discovery that a criminal defendant must provide under N.C. Gen. Stat. § 15A-905 is limited to notice of expert testimony, defenses, and witness lists, along with documents and test results that the defendant intends to introduce into evidence at trial. The State does not have a general right to demand incriminating evidence from the defendant, as that would conflict with the defendant’s constitutional right against self-incrimination. Since incriminating evidence on a client’s social-media page is unlikely to become discoverable in a criminal case, may a client delete the problematic postings without taking steps to preserve the evidence in a different form? Or, could this be considered obstruction of justice?

\textsuperscript{28} \textit{Id.} at 25.
\textsuperscript{30} \textit{See} generally \textit{id.}
\textsuperscript{31} Florida Bar Professional Ethics Opinion 14-1 (June 25, 2015).
\textsuperscript{32} Philadelphia Bar Association, Opinion 2014-5 (July 2014).
Although there may be some ambiguity in the criminal context, it seems reasonably clear that the best way to avoid any spoliation or obstruction-of-justice issues is to simply preserve the deleted evidence so that it can be produced in the future, if so ordered by a court. Although the North Carolina State Bar has previously indicated that an attorney should return physical evidence of a crime to the source after inspecting the evidence, it has stated in the social-media context that “[t]he attorney may take possession of printed or digital images of the client’s postings made for purposes of preservation.”

II. Restricting Access to Social Media

In some situations, a client may not want to simply delete a post or picture, or the attorney may advise against it. At the same time, however, neither the client nor the attorney want the material to be publicly available for a prosecutor to view. May the attorney advise her client to change his privacy settings so the post can only be seen by the client’s connections in the network, rather than the general public?

Every bar organization to consider this issue has concluded that it is permissible for an attorney to advise a client to use the highest possible privacy settings on social media. The Philadelphia Bar Association, for example, concludes that changing privacy settings does not violate Rule 3.4(a) because there is no unlawful destruction of the evidence. While it is true that “it may be more cumbersome for an opposing party to access the information” with higher privacy settings, “changing a client’s settings does not violate the [ethics rules].” The North Carolina State Bar also permits the changing of privacy settings so long as “doing so is not a violation of law or court order.” Even using higher privacy settings, however, it is good to remember that the State may always try to obtain a search warrant or subpoena the information directly from the social network itself, if the State has sufficient cause to believe that evidence of a crime exists on the defendant’s profile.

CONCLUSION

Social-media websites are a valuable source of information for attorneys who want to investigate witnesses or jurors. Attorneys may — and should — use social media to research jurors and to find substantive or impeachment evidence from witnesses. 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

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34 Id. at 25.
35 Id. at 32.
36 Id. at 25.
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.

An attorney should also be sure to monitor her client’s own social-media use to ensure there is no evidence of criminal activity present on the client’s profile page. If such evidence does exist, effective representation requires that an attorney advise the client about the possibility of changing his privacy settings or otherwise deleting the problematic material, so long as the evidence is preserved in some format for future use, and so long as doing so would not violate any law or court order.

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.