

Virginia Rule 8.4(c) prohibits the “dishonesty, fraud, deceit or misrepresentation” required to pretextually “friend” someone online only to garner information useful to a client or harmful to the opposition. And, under Rule 8.4(a) a lawyer cannot use another person to circumvent the Rules, so paralegals and investigators must also be careful how much they dig online.

The Philadelphia Bar Association’s ethics committee declared unethical a lawyer’s plan to collect information about an adverse litigation witness by hiring an investigator to gain access to the witness’s personal online social networking profiles (Philadelphia Bar Ass’n Professional Guidance Comm., Op. 2009-02, March 2009).

Employing a third party to befriend an adversarial witness through an online social network in order to obtain access to the witness’s personal pages clearly constitutes unethical deception, the committee said, because the plan involves concealing “the highly material fact” that any information collected from those pages would later be used to impeach the witness. The committee concluded that the proposed course of conduct would violate Pennsylvania Rules of Professional Conduct 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), 4.1(a) (knowingly making false statements of material fact to third person) and 8.4(a) (violating Rules through acts of another). And, the attorney was held accountable for the investigator’s conduct under Rule 5.3(c)(1), which makes lawyers responsible for behavior the lawyer “orders” or “ratifies.”

Furthermore, when communicating with any person online, whether under a friendly pretext or after appropriate disclosures, attorneys should also bear in mind the dictates of Rules 4.2 and 4.3 for dealing with those represented by counsel or with unrepresented persons.

G. Law Firm Policies Regarding Social Media:

Developments in the online world heighten the importance of implementing internal law firm policies governing members' use of social media. The growing popularity of Quora—an online Q&A website frequented by attorneys—offers one example of how developments in social media present ethics risks for lawyers and firms. Quora is an increasingly popular question-and-answer website that went public in June 2010 and has become a hub for dispensing online legal advice.

Law firms would be well advised to develop internal policies governing members' use of social media, according to panelists who spoke at a law firm general counsel's forum during the 2012 Aon Law Firm Symposium, held here Oct. 10-12. Stacy L. Brainin, general counsel of Haynes & Boone in Dallas, warned attendees that there are “clear liability issues” attached to attorneys' internet usage. She added, however, that the professional imperative of engaging with social media makes it less feasible to simply prohibit potentially risky online activities. “It is something we all have to deal with, so the best thing to do is identify the risks and establish policies that can protect your firm,” Brainin said.

Brainin cited statistics from a 2012 ABA technology survey which showed that: