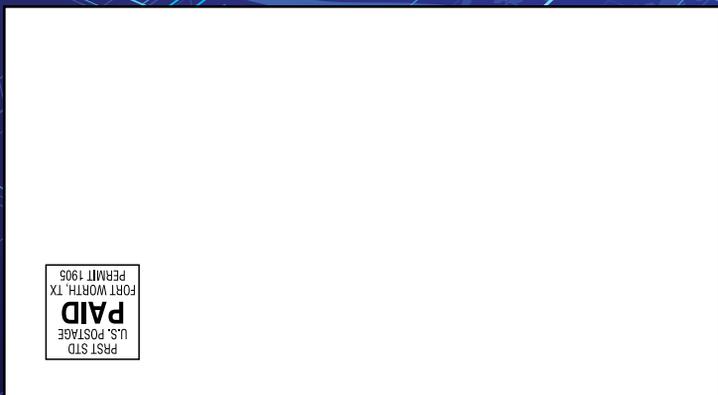


# THE TEXAS INVESTIGATOR





# The Legal Corner



## Keep Your Friends Close, and Your Enemies on Facebook.

Al Pacino's character in the Godfather 2 utters the line to his colleague and soon to be turncoat, "In this room [my father] taught me to keep your friends close, but your enemies closer." Not bad advice, particularly in our business. Many times, we are hired to do just that. Find out what the "enemy" is doing in litigation. But, in the age of Facebook, Snapchat, Twitter, and Instagram, when do you get too close? Can the law prohibit you from getting too friendly? The answer is yes.

Frequently, I am asked the question "Can I friend my Subject on Facebook?" First off, for those less than familiar with Facebook or technology or what the rest of us have been doing over the last several years, friend has apparently become a verb. I don't know how that happened. But it did. If you have problems with that, this article won't help you. Coming out of the bunker will help.

In 2009, the Philadelphia Bar Association published an ethical opinion regarding whether a lawyer or his investigator could "friend" a witness to obtain information that was on the Facebook page. See Philadelphia Bar Association, Professional Guidance Committee Opinion No. 2009-02 (March 2009). The committee found that by "friending" the witness, the lawyer or his agent was essentially engaging in deception which violated a section 8.4(c) of the Philadelphia Lawyer's Ethics Rules. That section is part of the Model Rules of Professional Conduct which has been largely adopted by all states including Texas and has always been part of the catch all rules.

I know what you are thinking. But wait, I'm an investigator, not a lawyer. Why should I care about lawyer's ethics? I'm surprised they have ethics in the first place. Well, you should care. Mainly because your actions as an agent of a lawyer is an extension of the lawyer. Lawyers are generally responsible for the conduct of their investigators. See Texas Rules of Professional Conduct, Rule 5.03. Violation by you of the rules may potentially subject your client's lawyer to discipline. Not a great way to make friends. In addition, if the evidence was obtained in violation of the rules the court may allow it or may qualify it. Finally, although you are not bound by those rules, you will be judged by them. We live in a lawyer's realm and your failure to follow their rules will be the basis to blame you for all ills.

The ethics opinion was that the lawyer or his agent had engaged in deception by "friending" a witness not for the purposes of friendship but, rather for the purposes obtaining information. The committee didn't get that Facebook friends aren't real friends. They are people who we have agreed to occasionally look at each other's cat posts and avoid any meaningful two-way conversation regarding politics.

The following year, the New York Bar Association followed with another ethics opinion which answered the question of whether you could "friend" a party in litigation. See New York Bar Association, Committee on Professional Ethics Opinion #843 (Sep. 10, 2010). That decision reached the same result that a lawyer or his agent could not "friend" the party under the same deception theory and the rationale that a lawyer could not make direct contact with an unrepresented person under Rule 4.2. That rule is known by many investigators as the "no contact" rule. Although that makes sense in the efforts to interview someone who has a lawyer, it makes little sense when you are "friending" someone not for communication purposes but, to see what food they cooked themselves on the backyard grill.

Since then, many bar associations have now held that their rules of professional conduct prohibit lawyers from engaging in deceptive behavior or misrepresentations to third parties in cyberspace. In addition, all the opinions uphold a lawyer or his investigator's ability to scrape and use any public information that exists on the public part of the page. The only issue is the active "fake friending" of the witness. That is where the ethics rules prohibit contact.

So, we can't "fake friend." Can an investigator ask someone to do it? No, the opinions are clear that directing a third party to do it for you is as bad as the act itself. However, there is some authority for an investigator to ask an unrepresented third party (i.e. friend of the Subject) to provide private postings or communications that the third party has access to. See *Palmieri v. USA*, F. Supp. 3d, No. CV 12-1403 (JDB) (D.D.C. Nov. 3, 2014). In the preceding case, the court upheld a revocation of a security clearance where a friend provided Facebook information on the party to law enforcement who had no warrant. Generally, when a party posts, emails or sends something to a third party they lose their expectation of privacy in the content. See *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001). It might be worth your time to ask a friend to willingly give over that information.

So, friends, a friendly reminder on the fake friending of a forbidden friend while friendly focusing on Facebook...Don't do it.

Say that five times fast.

*By Wes Bearden, Esq.*