

## SDCBA Legal Ethics Opinion 2011-2

(Adopted by the San Diego County Bar Legal Ethics Committee May 24, 2011.)

### I. FACTUAL SCENARIO

Attorney is representing Client, a plaintiff former employee in a wrongful discharge action. While the matter is in its early stages, Attorney has by now received former employer's answer to the complaint and therefore knows that the former employer is represented by counsel and who that counsel is. Attorney obtained from Client a list of all of Client's former employer's employees. Attorney sends out a "friending"<sup>1</sup> request to two high-ranking company employees whom Client has identified as being dissatisfied with the employer and therefore likely to make disparaging comments about the employer on their social media page. The friend request gives only Attorney's name. Attorney is concerned that those employees, out of concern for their jobs, may not be as forthcoming with their opinions in depositions and intends to use any relevant information he obtains from these social media sites to advance the interests of Client in the litigation.

### II. QUESTION PRESENTED

Has Attorney violated his ethical obligations under the California Rules of Professional Conduct, the State Bar Act, or case law addressing the ethical obligations of attorneys?

### III. DISCUSSION

#### A. Applicability of Rule 2-100

California Rule of Professional Conduct 2-100 says, in pertinent part: "(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer. (B) [A] "party" includes: (1) An officer, director, or managing agent of a corporation . . . or (2) an . . . employee of a . . . corporation . . . if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." "Rule 2-100 is intended to control communication between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule." (Rule 2-100 Discussion Note.)

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<sup>1</sup> Quotation marks are dropped in the balance of this opinion for this now widely used verb form of the term "friend" in the context of Facebook.

Similarly, ABA Model Rule 4.2 says: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” Comment 7 to ABA Model Rule 4.2 adds: “In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.”

1. Are the High-ranking Employees Represented Parties?

The threshold question is whether the high-ranking employees of the represented corporate adversary are “parties” for purposes of this rule.

In *Snider v. Superior Court* (2003) 113 Cal.App.4<sup>th</sup> 1187 (2003), a trade secrets action, the Court of Appeal reversed an order disqualifying counsel for the defendant-former sales manager for ex parte contact with plaintiff-event management company’s current sales manager and productions director. The contacted employees were not “managing agents” for purposes of the rule because neither “exercise[d] substantial discretionary authority over decisions that determine organizational policy.” Supervisory status and the power to enforce corporate policy are not enough. (*Id.* at 1209.) There also was no evidence that either employee had authority from the company to speak concerning the dispute or that their actions could bind or be imputed to the company concerning the subject matter of the litigation. (*Id.* at 1211.)

The term “high-ranking employee” suggests that these employees “exercise substantial discretionary authority over decisions that determine organizational policy” and therefore should be treated as part of the represented corporate party for purposes of Rule 2-100. At minimum, the attorney should probe his client closely about the functions these employees actually perform for the company-adversary before treating those high-ranking employees as unrepresented persons.

2. Does a Friend request Constitute Unethical Ex Parte Contact with the High-Ranking Employees?

Assuming these employees are represented for purposes of Rule 2-100, the critical next question is whether a friend request is a direct or indirect communication by the attorney to the represented party “about the subject of the representation.” 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 reads: “[Name] wants to be friends with you on Facebook.” The requester may edit this form request to friend to include additional information, such as information about how the requester knows the recipient or why the request is being made. The recipient, in turn, may send a message to the requester asking for further information about him or her before deciding whether to accept the sender as a friend.

A friend request nominally generated by Facebook and not the attorney is at least an indirect ex parte communication with a represented party for purposes of Rule 2-100(A). The 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 request is accepted, the 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.

This becomes clearer when the request to friend, with all it entails, is transferred from the virtual world to the real world. Imagine that instead of making a friend request by computer, opposing counsel instead says to a represented party in person and outside of the presence of his attorney: "Please give me access to your Facebook page so I can learn more about you." That statement on its face is no more "about the subject of the representation" than the robo-message generated by Facebook. But what the attorney is hoping the other person will say in response to that facially innocuous prompt is "Yes, you may have access to my Facebook page. Welcome to my world. These are my interests, my likes and dislikes, and this is what I have been doing and thinking recently."

A recent federal trial court ruling addressing Rule 2-100 supports this textual analysis. In *U.S. v. Sierra Pacific Industries* (E.D. Cal. 2010) 2010 WL 4778051, the question before the District Court was whether counsel for a corporation in an action brought by the government alleging corporate responsibility for a forest fire violated Rule 2-100 when counsel, while attending a Forest Service sponsored field trip to a fuel reduction project site that was open to the public, questioned Forest Service employees about fuel breaks, fire severity, and the contract provisions the Forest Service requires for fire prevention in timber sale projects without disclosing to the employees that he was seeking the information for use in the pending litigation and that he was representing a party opposing the government in the litigation. The Court concluded that counsel had violated the Rule and its reasoning is instructive. It was undisputed that defense counsel communicated directly with the Forest Service employees, knew they were represented by counsel, and did not have the consent of opposing counsel to question them. (2010 WL 4778051, \*5.) Defense counsel claimed, however, that his questioning of the Forest Service employees fell within the exception found in Rule 2-100(C)(1), permitting "[c]ommunications with a public officer. . .," and within his First Amendment right to petition the government for redress of grievances because he indisputably had the right to attend the publicly open Forest Service excursion.

While acknowledging defense counsel's First Amendment right to attend the tour (*id.* at \*5), the Court found no evidence that defense counsel's questioning of the litigation related questioning of the employees, who had no "authority to change a policy or grant some specific request for redress that [counsel] was presenting," was an exercise of his right to petition the government for redress of grievances. (*Id.* at \*6.) "Rather, the facts show and the court finds that he was *attempting to obtain information for use in the litigation* that should have been pursued through counsel and through the Federal Rules of Civil Procedure governing discovery." (*Ibid.*, emphasis added.) Defense counsel's interviews of the Forest Service employees on matters his corporate client considered part of the litigation without notice to, or the consent of, government counsel "strikes at . . .

the very policy purpose for the no contact rule.” (*Ibid.*) In other words, counsel’s motive for making the contact with the represented party was at the heart of why the contact was prohibited by Rule 2-100, that is, he was “attempting to obtain information for use in the litigation,” a motive shared by the attorney making a friend request to a represented party opponent.

The Court further concluded that, while the ABA Model Rule analog to California Rule of Professional Conduct 2-100 was not controlling, defense counsel’s ex parte contacts violated that rule as well. “Unconsented questioning of an opposing party’s employees on matters that counsel has reason to believe are at issue in the pending litigation is barred under ABA Rule 4.2 *unless the sole purpose of the communication is to exercise a constitutional right of access to officials having the authority to act upon or decide the policy matter being presented. In addition, advance notice to the government’s counsel is required.*” (*Id.* at \*7, emphasis added.) Thus, under both the California Rule of Professional Conduct and the ABA Model Rule addressing ex parte communication with a represented party, the purpose of the attorney’s ex parte communication is at the heart of the offense.

The Discussion Note for Rule 2-100 opens with a statement that the rule is designed to control communication between an attorney and an opposing party. The purpose of the rule is undermined by the contemplated friend request and there is no statutory scheme or case law that overrides the rule in this context. The same Discussion Note recognizes that nothing under Rule 2-100 prevents the parties themselves from communicating about the subject matter of the representation and “nothing in the rule precludes the attorney from advising the client that such a communication can be made.” (Discussion Note to Rule 2-100). But direct communication with an attorney is different.

### 3. Response to Objections

- a) Objection 1: The friend request is not about the subject of the representation because the request does not refer to the issues raised by the representation.

It may be argued that a friend request cannot be “about the subject of the representation” because it makes no reference to the issues in the representation. Indeed, the friend request makes no reference to anything at all other than the name of the sender. Such a request is a far cry from the vigorous ex parte questioning to which the government employees were subjected by opposing counsel in *U.S. v. Sierra Pacific Industries*.<sup>2</sup>

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<sup>2</sup> *Sierra Pacific Industries* also is factually distinguishable from the scenario addressed here because it involved ex parte communication with a represented *government* party opponent rather than a private employer. But that distinction made it harder to establish a Rule 2-100 violation, not easier. That is because a finding of a violation of the rule had to overcome the attorney’s constitutional right to petition government representatives. Those rights are not implicated where an attorney makes ex parte contact with a private represented party in an analogous setting, such as a corporate – or residential – open house.

The answer to this objection is that as a matter of logic and language, the subject of the representation need not be directly referenced in the query for the query to be “about,” or concerning, the subject of the representation. The extensive ex parte questioning of the represented party in *Sierra Pacific Industries* is different in degree, not in kind, from an ex parte friend request to a represented opposing party. It is not uncommon in the course of litigation or transactional negotiations for open-ended, generic questions to impel the other side to disclose information that is richly relevant to the matter. The motive for an otherwise anodyne inquiry establishes its connection to the subject matter of the representation.

It is important to underscore at this point that a communication “about the subject of the representation” has a broader scope than a communication relevant to the issues in the representation, which determines admissibility at trial. (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4<sup>th</sup> 1384, 1392.) In litigation, discovery is permitted “regarding any matter, not privileged, that is relevant to the subject matter of the pending matter. . . .” (Cal. Code Civ. Proc. § 2017.010.) Discovery casts a wide net. “For discovery purposes, information should be regarded as ‘relevant to the subject matter’ if it might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof.” (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2010), 8C-1, ¶8:66.1, emphasis in the original, citations omitted.) The breadth of the attorney’s duty to avoid ex parte communication with a represented party about the subject of a representation extends at least as far as the breadth of the attorney’s right to seek formal discovery from a represented party about the subject of litigation. Information uncovered in the immediate aftermath of a represented party’s response to a friend request at least “might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof.” (*Ibid.*) Similar considerations are transferable to the transactional context, even though the rules governing discovery are replaced by the professional norms governing due diligence.

In *Midwest Motor Sports v. Arctic Cat Sales, Inc.* (8<sup>th</sup> Cir. 2003) 347 F.3d 693, Franchisee A of South Dakota sued Franchisor of Minnesota for wrongfully terminating its franchise and for installing Franchisee B, also named as a defendant, in Franchisee A’s place. A “critical portion” of this litigation was Franchisee A’s expert’s opinion that Franchisee A had sustained one million dollars in damages as a result of the termination. (*Id.* at 697.) Franchisor’s attorney sent a private investigator into both Franchisee A’s and Franchisee B’s showroom to speak to, and surreptitiously tape record, their employees about their sales volumes and sales practices. Among others to whom the investigator spoke and tape-recorded was Franchisee B’s president.

The Eighth Circuit affirmed the trial court’s order issuing evidentiary sanctions against Franchisor for engaging in unethical ex parte contact with represented parties. The Court held that the investigator’s inquiry about Franchisee B’s sales volumes of Franchisor’s machines was impermissible ex parte communication about the subject of the representation for purposes of Model Rule 4.2, adopted by South Dakota. “Because every [Franchisor machine] sold by [Franchisee B] was a machine not sold by

[Franchisee A], the damages estimate [by Franchisee A's expert] could have been challenged in part by how much [Franchisor machine] business [Franchisee B] was actually doing.” (*Id.* at 697-698.) It was enough to offend the rule that the inquiry was designed to elicit information about the subject of the representation; it was not necessary that the inquiry directly refer to that subject.

Similarly, in the hypothetical case that frames the issue in this opinion, defense counsel may be expected to ask plaintiff former employee general questions in a deposition about her recent activities to obtain evidence relevant to whether plaintiff failed to mitigate her damages. (BAJI 10.16.) That is the same information, among other things, counsel may hope to obtain by asking the represented party to friend him and give him access to her recent postings. An open-ended inquiry to a represented party in a deposition seeking information about the matter in the presence of opposing counsel is qualitatively no different from an open-ended inquiry to a represented party in cyberspace seeking information about the matter outside the presence of opposing counsel. Yet one is sanctioned and the other, as *Midwest Motors* demonstrated, is sanctionable.

b) Objection 2: Friending an represented opposing party is the same as accessing the public website of an opposing party

The second objection to this analysis is that there is no difference between an attorney who makes a friend request to an opposing party and an attorney suing a corporation who accesses the corporation's website or who hires an investigator to uncover information about a party adversary from online and other sources of information.

Not so. The very reason an attorney must make a friend request here is because obtaining the information on the Facebook page, to which a user may restrict access, is unavailable without first obtaining permission from the person posting the information on his social media page. It is that restricted access that leads an attorney to believe that the information will be less filtered than information a user, such as a corporation but not limited to one, may post in contexts to which access is unlimited. Nothing blocks an attorney from accessing a represented party's public Facebook page. Such access requires no communication to, or permission from, the represented party, even though the attorney's motive for reviewing the page is the same as his motive in making a friend request. Without *ex parte* communication with the represented party, an attorney's motivated action to uncover information about a represented party does not offend Rule 2-100. But to obtain access to *restricted* information on a Facebook page, the attorney must make a request to a represented party outside of the actual or virtual presence of defense counsel. And for purposes of Rule 2-100, that motivated communication with the represented party makes all the difference.<sup>3</sup>

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<sup>3</sup> The Oregon Bar reached the same conclusion, but with limited analysis. Oregon State Bar Formal Opinion No. 2005-164 concluded that a lawyer's *ex parte* communications

The New York State Bar Association recently has reached the same conclusion. (NYSBA Ethics Opinion 843 (2010).) The Bar concluded that New York’s prohibition on attorney ex parte contact with a represented person does not prohibit an attorney from viewing and accessing the social media page of an adverse party to secure information about the party for use in the lawsuit as long as “the lawyer does not ‘friend’ the party and instead relies on public pages posted by the party that are accessible to all members in the network.” That, said the New York Bar, is “because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining 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, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer’s client in litigation as long as the party’s profile is available to all members in the network and the lawyer neither “friends” the other party nor directs someone else to do so.”

- c) Objection 3: The attorney-client privilege does not protect anything a party posts on a Facebook page, even a page accessible to only a limited circle of people.

The third objection to this analysis may be that nothing that a represented party says on Facebook is protected by the attorney-client privilege. No matter how narrow the Facebook user’s circle, those communications reach beyond “those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the [Facebook user’s] lawyer is consulted. . . .” (Evid. Code §952, defining “confidential communication between client and lawyer.” Cf. *Lenz v. Universal Music Corp.* (N.D. Cal. 2010) 2010 WL 4789099, holding that plaintiff waived the attorney-client privilege over communications with her attorney related to her motivation for bringing the lawsuit by e-mailing a friend that her counsel was very interested in “getting their teeth” into the opposing party, a major music company.)

That observation may be true as far as it goes<sup>4</sup>, but it overlooks the distinct, though overlapping purposes served by the attorney-client privilege, on the one hand, and the

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with represented adversary via adversary’s website would be ethically prohibited. “[W]ritten communications via the Internet are directly analogous to written communications via traditional mail or messenger service and thus are subject to prohibition pursuant to” Oregon’s rule against ex parte contact with a represented *person*. If the lawyer knows that the person with whom he is communicating is a represented person, “the Internet communication would be prohibited.” (*Id.* at pp. 453-454.)

<sup>4</sup> There are limits to how far this goes in the corporate context where the attorney-client privilege belongs to, and may be waived by, only the corporation itself and not by any individual employee. According to section 128 and Comment c of the Restatement

prohibition on ex parte communication with a represented party, on the other. The privilege is designed to encourage parties to share freely with their counsel information needed to further the purpose of the representation by protecting attorney-client communications from disclosure. “[T]he public policy fostered by the privilege seeks to insure the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.” (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, citation and internal quotation marks omitted.)

The rule barring ex parte communication with a represented party is designed to avoid disrupting the trust essential to the attorney-client relationship. “The rule against communicating with a represented party without the consent of that party’s counsel shields a party’s substantive interests against encroachment by opposing counsel and safeguards the relationship between the party and her attorney. . . . [T]he trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition.” (*U.S. v. Lopez*, 9<sup>th</sup> Cir. 1993) 4 F.3d 1455, 1459.) The same could be said where a client is lured into clandestine communication with opposing counsel through the unwitting acceptance of an ex parte friend request.

- d) Objection 4: A recent Ninth Circuit ruling appears to hold that Rule 2-100 is not violated by engaging in deceptive tactics to obtain damaging information from a represented party.

Fourth and finally, objectors may argue that the Ninth Circuit recently has ruled that Rule 2-100 does not prohibit outright deception to obtain information from a source. Surely, then, the same rule does not prohibit a friend request which states only truthful information, even if it does not disclose the reason for the request. The basis for this final contention is *U.S. v. Carona* (9<sup>th</sup> Cir. 2011) 630 F.3d 917, 2011 WL 32581. In that case, the question before the Court of Appeals was whether a prosecutor violated Rule 2-100 by providing fake subpoena attachments to a cooperating witness to elicit pre-indictment, non-custodial incriminating statements during a conversation with defendant, a former county sheriff accused of political corruption whose counsel had notified the government that he was representing the former sheriff in the matter. “There was no direct communications here between the prosecutors and [the defendant]. The indirect communications did not resemble an interrogation. Nor did the use of fake subpoena attachments make the informant the alter ego of the prosecutor.” (*Id.* at \*5.) The Court ruled that, even if the conduct did violate Rule 2-100, the district court did not abuse its discretion in not suppressing the statements, on the ground that state bar discipline was available to address any prosecutorial misconduct, the tapes of an incriminating conversation between the cooperating witness and the defendant obtained by using the fake documents. “The fact that the state bar did not thereafter take action against the prosecutor here does not prove the inadequacy of the remedy. It may, to the contrary,

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(Third) of the Law Governing Lawyers, the corporate attorney-client privilege may be waived only by an authorized agent of the corporation.

suggest support for our conclusion that there was no ethical violation to begin with.” (*Id.* at \*6.)

There are several responses to this final objection. First, *Carona* was a ruling on the appropriateness of excluding evidence, not a disciplinary ruling as such. The same is true, however, of *U.S. v. Sierra Pacific Industries*, which addressed a party’s entitlement to a protective order as a result of a Rule 2-100 violation. Second, the Court ruled that the exclusion of the evidence was unnecessary because of the availability of state bar discipline if the prosecutor had offended Rule 2-100. The Court of Appeals’ discussion of Rule 2-100 therefore was dicta. Third, the primary reason the Court of Appeals found no violation of Rule 2-100 was because there was no direct contact between the prosecutor and the represented criminal defendant. The same cannot be said of an attorney who makes a direct ex parte friend request to a represented party.

#### 4. Limits of Rule 2-100 Analysis

Nothing in our opinion addresses the discoverability of Facebook ruminations through conventional processes, either from the user-represented party or from Facebook itself. Moreover, this opinion focuses on whether Rule 2-100 is violated in this context, not the evidentiary consequences of such a violation. 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 evidentiary, and even the disciplinary, consequences of such conduct are beyond the scope of this opinion and the purview of this Committee. (See Rule 1-100(A): Opinions of ethics committees in California are not binding, but “should be consulted by members for guidance on proper professional guidance.” See also, Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02, p. 6: If an attorney rejects the guidance of the committee’s opinion, “the question of whether or not the evidence would be usable either by him or by subsequent counsel in the case is a matter of substantive and evidentiary law to be addressed by the court.” But see Cal. Prac. Guide Fed. Civ. Proc. Before Trial, Ch. 17-A, ¶17:15: “Some federal courts have imposed sanctions for violation of applicable rules of professional conduct.” (citing *Midwest Motor Sports, supra.*)

#### B. Attorney Duty Not To Deceive

We believe that the attorney in this scenario also violates his ethical duty not to deceive by making a friend request to a represented party’s Facebook page without disclosing why the request is being made. This part of the analysis applies whether the person sought to be friended is represented or not and whether the person is a party to the matter or not.

ABA Model Rule 4.1(a) says: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person. . . ." ABA Model Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." In *Midwest Motor Sports, supra*, the Eighth Circuit found that the violations of the rule against ex parte contact with a represented party alone would have justified the evidentiary sanctions that the district court imposed. (*Midwest Motor Sports, supra*, 347 F.3d at 698.) The Court of Appeals also concluded, however, that Franchisor's attorney had violated 8.4(c) by sending a private investigator to interview Franchisees' employees "under false and misleading pretenses, which [the investigator] made no effort to correct. Not only did [the investigator] pose as a customer, he wore a hidden device that secretly recorded his conversations with" the Franchisees' employees. (*Id.*, at 698-699.)<sup>5</sup>

Unlike many jurisdictions, California has not incorporated these provisions of the Model Rules into its Rules of Professional Conduct or its State Bar Act. The provision coming closest to imposing a generalized duty not to deceive is Business & Professions Code section 6068(d), which makes it the duty of a California lawyer "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never seek to mislead the judge . . . by an artifice or false statement of fact or law." This provision is typically applied to allegations that an attorney misled a judge, suggesting that the second clause in the provision merely amplifies the first. (See e.g., *Griffith v. State Bar of Cal.* (1953) 40 Cal.2d 470.) But while no authority was found applying the provision to attorney deception of anyone other than a judicial officer, its language is not necessarily so limited. The provision is phrased in the conjunctive, arguably setting forth a general duty not to deceive *anyone* and a more specific duty not to mislead a judge by any false statement or fact or law. We could find no authority addressing the question one way or the other.

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<sup>5</sup> The New York County Bar Association approached a similar issue differently in approving in "narrow" circumstances the use of an undercover investigator by non-government lawyers to mislead a party about the investigator's identity and purpose in gathering evidence of an alleged violation of civil rights or intellectual property rights. (NYCLA Comm. On Prof. Ethics Formal Op. 737, p. 1). The Bar explained that the kind of deception of which it was approving "is commonly associated with discrimination and trademark/copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or job seekers while negotiating or engaging in a transaction that is not by itself unlawful." (*Id.* at p. 2.) The opinion specifically "does not address whether a lawyer is ever permitted to make dissembling statements himself or herself." (*Id.* at p. 1.) The opinion also is limited to conduct that does not otherwise violate New York's Code of Professional Responsibility, "(including, but not limited to DR 7-104, the 'no-contact' rule)." (*Id.* at p. 6.) Whatever the merits of the opinion on an issue on which the Bar acknowledged there was "no nationwide consensus" (*id.* at p. 5), the opinion has no application to an ex parte friend request made by an attorney to a party where the attorney is posing as a friend to gather evidence outside of the special kind of cases and special kind of conduct addressed by the New York opinion.

There is substantial case law authority for the proposition that the duty of an attorney under the State Bar Act not to deceive extends beyond the courtroom. The State Bar, for example, may impose discipline on an attorney for intentionally deceiving opposing counsel. “It is not necessary that actual harm result to merit disciplinary action where actual deception is intended and shown.” (*Coviello v. State Bar of Cal.* (1955) 45 Cal.2d 57, 65. See also *Monroe v. State Bar of Cal.* (1961) 55 Cal.2d 145, 152; *Scofield v. State Bar of Cal.* (1965) 62 Cal.2d 624, 628.) “[U]nder CRPC 5-200 and 5-220, and BP 6068(d), as officers of the court, attorneys have a duty of candor and not to mislead the judge by any false statement of fact or law. These same rules of candor and truthfulness apply when an attorney is communicating with opposing counsel.” (*In re Central European Industrial Development Co.* (Bkrtcy. N.D. Cal. 2009) 2009 WL 779807, \*6, citing *Hallinan v. State Bar of Cal.* (1948) 33 Cal.2d 246, 249.)

Regardless of whether the ethical duty under the State Bar Act and the Rules of Professional Conduct not to deceive extends to misrepresentation to those other than judges, the *common law* duty not to deceive indisputably applies to an attorney and a breach of that duty may subject an attorney to liability for fraud. “[T]he case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm’s length.” (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 202.)

In *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4<sup>th</sup> 54, 74, the Court of Appeal ruled that insured’s judgment creditors had the right to sue insurer’s coverage counsel for misrepresenting the scope of coverage under the insurance policy. The *Shafer* Court cited as authority, *inter alia*, *Fire Ins. Exchange v. Bell by Bell* (Ind. 1994) 643 N.E.2d 310, holding that insured had a viable claim against counsel for insurer for falsely stating that the policy limits were \$100,000 when he knew they were \$300,000.

Similarly, in *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4<sup>th</sup> 282, the Court of Appeal held that an attorney, negotiating at arm’s length with an adversary in a merger transaction was not immune from liability to opposing party for fraud for not disclosing “toxic stock” provision. “A fraud claim against a lawyer is no different from a fraud claim against anyone else.” (*Id.* at 291.) “Accordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient.” (*Ibid.*, citation omitted.) While a “casual expression of belief” that the form of financing was “standard” was not actionable, active concealment of material facts, such as the existence of a “toxic stock” provision, is actionable fraud. (*Id.* at 291-294.)

If there is a duty not to deceive opposing counsel, who is far better equipped by training than lay witnesses to protect himself against the deception of his adversary, the duty surely precludes an attorney from deceiving a lay witness. But is it impermissible deception to seek to friend a witness without disclosing the purpose of the friend request, even if the witness is not a represented party and thus, as set forth above, subject to the prohibition on ex parte contact? We believe that it is.

Two of our sister Bar Associations have addressed this question recently and reached different conclusions. In Formal Opinion 2010-02, the Bar Association of the City of New York’s Committee on Professional and Judicial Ethics considered whether “a lawyer, either directly or through an agent, [may] contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation.” (*Id.*, emphasis added.) Consistent with New York’s high court’s policy favoring informal discovery in litigation, the Committee concluded that “an attorney or her agent may use her real name and profile to send a ‘friend request’ to obtain information from an unrepresented person’s social networking website without also disclosing the reasons for making the request.” In a footnote to this conclusion, the Committee distinguished such a request made to a party known to be represented by counsel. And the Committee further concluded that New York’s rules prohibiting acts of deception are violated “whenever an attorney ‘friends’ an individual under false pretenses to obtain evidence from a social networking website.” (*Id.*)

In Opinion 2009-02, the Philadelphia Bar Association Professional Guidance Committee construed the obligation of the attorney not to deceive more broadly. The Philadelphia Committee considered whether a lawyer who wishes to access the restricted social networking pages of an adverse, unrepresented witness to obtain impeachment information may enlist a third person, “someone whose name the witness will not recognize,” to seek to friend the witness, obtain access to the restricted information, and turn it over to the attorney. “The third person would state only truthful information, for example, his or her true name, but would not reveal 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 posted on the pages to a lawyer for possible use antagonistic to the witness.” (Opinion 2009-02, p. 1.) The Committee concluded that such conduct would violate the lawyer’s duty under Pennsylvania Rule of Professional Conduct 8.4 not to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . .” The planned communication by the third party

omits a highly material fact, namely, that the third party who asks to be allowed access to the witness’s pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the [attorney] and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

(*Id.* at p. 2.) The Philadelphia opinion was cited approvingly in an April 2011 California Lawyer article on the ethical and other implications of juror use of social media. (P. McLean, “Jurors Gone Wild,” p. 22 at 26, California Lawyer, April 2011.)

We agree with the scope of the duty set forth in the Philadelphia Bar Association opinion, notwithstanding the value in informal discovery on which the City of New York

Bar Association focused. Even where an attorney may overcome other ethical objections to sending a friend request, the attorney should not send such a request to someone involved in the matter for which he has been retained without disclosing his affiliation and the purpose for the request.

Nothing would preclude the attorney's client himself from making a friend request to an opposing party or a potential witness in the case. Such a request, though, presumably would be rejected by the recipient who knows the sender by name. The only way to gain access, then, is for the attorney to exploit a party's unfamiliarity with the attorney's identity and therefore his adversarial relationship with the recipient. That is exactly the kind of attorney deception of which courts disapprove.

#### IV. CONCLUSION

Social media sites have opened a broad highway on which users may post their most private personal information. But Facebook, at least, enables its users to place limits on who may see that information. The rules of ethics impose limits on how attorneys may obtain information that is not publicly available, particularly from opposing parties who are represented by counsel.

We have concluded that those rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further 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. 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.