

# *July 2011 MPT*

► *FILE*

MPT-2: *In re Social Networking Inquiry*



**THE BALLENTINE LAW FIRM**  
1 St. Germain Place  
Franklin City, Franklin 33033

**M E M O R A N D U M**

**TO:** Examinee  
**FROM:** Bert H. Ballentine  
**DATE:** July 26, 2011  
**RE:** Social Networking Inquiry

I serve as chairman of the five-member Franklin State Bar Association Professional Guidance Committee. The committee issues advisory opinions in response to inquiries from Franklin attorneys concerning the ethical propriety of contemplated actions under the Franklin Rules of Professional Conduct. (These opinions are advisory only and are not binding upon the Attorney Disciplinary Board of the Franklin Supreme Court.)

We have received the attached inquiry, and we briefly discussed it at yesterday's meeting of the committee. Three of my colleagues on the committee thought that the course of conduct proposed by the inquiry would pose no problem, one was undecided, and my view was that the proposed conduct would violate the Rules. We agreed to look into the applicable law and then consider the matter in greater detail and come to a resolution at our meeting next week.

Those committee members who think the proposed conduct does not run afoul of the Rules will draft and circulate a memorandum setting forth their position. I, too, will circulate a memorandum setting forth my position that the proposed conduct would violate the Rules.

Please prepare a memorandum that I can circulate to the other committee members to persuade them that the proposed conduct would indeed violate the Rules. Your draft should also respond to any arguments you anticipate will be made to the contrary. Do not draft a separate statement of facts, but be sure to incorporate the relevant facts into your analysis. Also, do not concern yourself with any Rules other than those referred to in the attached materials.

In addition to the inquiry, I am attaching my notes of yesterday's brief discussion by the committee and the applicable Rules of Professional Conduct. As this is a case of first impression under Franklin's Rules, I am attaching case law from neighboring jurisdictions, which might be

relevant. (These Rules are identical for the states of Franklin, Columbia, and Olympia.) From reading these materials, I have learned that there are three approaches to resolving this issue. I believe that the proposed course of conduct would violate the Rules under all three of the approaches.

**Allen, Coleman & Nelson, Attorneys-at-Law**  
**3 Adams Plaza**  
**Youce, Franklin 33098**

July 1, 2011

Franklin State Bar Association – Professional Guidance Committee  
2 Emerald Square  
Franklin City, Franklin 33033

Dear Committee Members:

I write to inquire as to the ethical propriety of a proposed course of action in a negligence lawsuit involving a trip-and-fall injury in a restaurant in which I am involved as counsel of record for the restaurant.

I deposed a nonparty witness who is not represented by counsel. Her testimony is helpful to the party adverse to my client and may be crucial to the other side's case—she testified that neither she nor the plaintiff had been drinking alcohol that evening. During the course of the deposition, the witness revealed that she has accounts on several social networking Internet sites (such as Facebook and MySpace), which allow users to create personal “pages” on which the user may post information on any topic, sometimes including highly personal information. Access to these pages is limited to individuals who obtain the user's permission by asking for it online (those granted permission are referred to as the user's “friends”). The user may grant such access while having almost no information about the person making the request, or may ask for detailed information about that person before making the decision to grant access.

I believe that the witness's pages may contain information which is relevant to the subject of her deposition and which could impeach her at trial—specifically, that she and the plaintiff had been drinking on the evening in question. I did not ask her to reveal the contents of the pages or to allow me access to them in the deposition. I did visit the witness's various social networking accounts after deposing her, and I found that access to them requires her permission. The witness disclosed during the deposition that she grants access to just about anyone who asks for it. However, given the hostility that the witness displayed toward me when I questioned her credibility, I doubt that she would allow me access if I asked her directly.

I propose to ask one of my assistants (not an attorney), whose name the witness will not recognize, to go to these social networking sites and seek to “friend” the witness and thereby gain access to the information on her pages. My assistant would state only truthful information (including his or her name) but would not reveal any affiliation with me or the purpose for which he or she is seeking access (i.e., to provide information for my evaluation and possible use to impeach the witness).

I ask for the Committee’s view as to whether this proposed course of conduct is permissible under the Franklin Rules of Professional Conduct.

Very truly yours,

A handwritten signature in cursive script that reads "Melinda Nelson".

Melinda Nelson

**July 25, 2011**

**NOTES OF MEETING OF FRANKLIN STATE BAR ASSOCIATION  
PROFESSIONAL GUIDANCE COMMITTEE**

**RE: MELINDA NELSON'S INQUIRY**

Chairman Ballentine asks committee members for initial reactions to Ms. Nelson's inquiry, noting that this appears to be an open question under Franklin law, although different approaches have been followed in Olympia, Columbia, and elsewhere.

Ms. Piel comments that Ms. Nelson's proposed course of action seems harmless enough because social networking pages are open to the public.

Mr. Hamm agrees and states that it is worthwhile to expose a lying witness.

Chairman Ballentine asks if this matter involves a crucial misrepresentation.

Ms. Piel thinks the committee should allow harmless misrepresentations in the pursuit of justice.

Chairman Ballentine questions the impact on the integrity of the legal profession and asks for further discussion.

Mr. Haig favors the "no harm, no foul" approach and is not sure that there is any harm in the instant case.

Chairman Ballentine notes that the witness's testimony may be critical to the case.

Ms. Rossi is undecided and concerned that the committee has not yet referred to the specific Rules that would be involved, let alone any court's interpretation of them. Needs more information on the law.

Chairman Ballentine concludes that the matter should be reopened at the next meeting, with each committee member to look into the question and the law in the meantime.

All agree.