

Phyllis E. Mann

Subject: FW: Social Networking Site Investigation Issues

From: John Digiacinto [mailto:JohnD@smcba.org]
Sent: Thursday, April 08, 2010 6:09 PM
To: Mike Tobin; Lynnae Johnson
Cc: Suzanne K. Ury
Subject: FW: Social Networking Site Investigation Issues

Hi Mike and Lynnae –

I am forwarding a copy of an email our Chief Investigator sent out to our investigators earlier this month. It addresses aspects of the Social Networking/Investigation conversation we had during today's telephone conference.

If we can be of any assistance, please feel free to call.

See you soon.

John D.

From: John Maness
Sent: Thursday, April 08, 2010 1:34 PM
To: John Digiacinto
Subject: FW: Social Networking Site Investigation Issues

From: John Maness
Sent: Thursday, March 04, 2010 1:39 PM
To: 'd-techinvestigator@sbcglobal.net'; 'omar_barraza@sbcglobal.net'; 'ken@detectivehelp.com'; 'deb@codyinvestigations.com'; 'bcodymail@gmail.com'; 'FrankLDaley@aol.com'; 'DDeSantis4442@aol.com'; 'deinvestigations@sbcglobal.net'; 'fischerpi@hotmail.com'; 'SandRPeyes@aol.com'; 'CDKKGRI@aol.com'; 'mh94526@yahoo.com'; 'njones@allvalleydetectives.com'; 'EJ5375@yahoo.com'; 'mimipi@sbcglobal.net'; '333marine@msn.com'; 'jjlo@prodigy.net'; 'tonymedina@bglinvestigations.com'; 'MenaInvestigate@aol.com'; 'JOinv@comcast.net'; 'spipalma@yahoo.com'; 'calidris@earthlink.net'; 'JStevenot@earthlink.net'; 'valpoly@yahoo.com'; 'VierraPI@aol.com'; 'vierrainv@aol.com'; 'wpijim@sbcglobal.net'; 'scottw@invisionpi.com'; 'tprucyk@earthlink.net'; 'manessmail@aim.com'; 'jsbmswpi@earthlink.net'; 'frankbuchananpi@yahoo.com'; 'bieber36@yahoo.com'; 'suzanneu@smcba.org'; 'submarinvestigations@yahoo.com'; 'counterpointinv@gmail.com'; 'rusteenco@nfrinvestigations.com'; 'alexvera@comcast.net'; 'jerryinterpreter@gmail.com'; 'GeraldCuellar@yahoo.com'
Cc: Myra Weiher; 'Jeff Hayden'
Subject: Social Networking Site Investigation Issues

Investigation Team:

Some questions have been raised concerning the investigation of Internet social networking sites. Of specific concern is whether or not the mere sending of a "friend request" constitutes an attempt to "speak to" a witness under the meaning of Penal Code section 1054.8. The consensus is that it is and Penal Code section 1054.8 applies to both the prosecution and the defense.

I have attached a couple of detailed handouts on the topic. The Social Networking Handbook was prepared for the Santa Clara County Public Defender's Office. Capital Corner was prepared by the Los Angeles County Public Defender's Office. Please review the following email from criminal defense attorney Jeff Hayden, who researched this matter at my request.

I suspect it will not be long before the court has to address this issue. In the meantime, I hope you find this helpful.

Very truly yours,

John Maness, Chief Investigator
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From: Jeff Hayden [mailto:hayden@yourcriminaldefender.com]
To: John Maness
Subject: MySpace issue

John,

You asked for some guidance to whether a My Space "friend request" must be made in compliance with the dictates of Penal Code §1054.8.

In 1998, in response to reports that witnesses in criminal cases were being subjected to interview requests by persons who did not clearly or correctly identify themselves, the State Legislature amended the Criminal Discovery Statute to add a new section, Penal Code section 1054.8. Section **1054.8** regulates the procedures by which prosecutors and defense attorneys and their representatives in criminal cases may interview a witness of the opposing party whose identity has been disclosed as required by the Criminal Discovery Statute.

Section **1054.8** requires that before an attorney or investigator may speak to or interview an opposing party's witness, the attorney or investigator must clearly identify himself or herself, the full name of the agency by whom he or she is employed, and whether he or she represents or has been retained by the prosecutor or the defendant. Any person conducting an in-person interview of such an opposing party's witness must show the person to be interviewed a business card, official badge or other form of official identification.

Penal Code section 1054.8 requires that no prosecuting attorney, attorney for the defendant, **or investigator** for either the prosecution or the defendant shall interview, question, or speak to a victim or witness whose name has been disclosed by the opposing party pursuant to Section 1054.1 or 1054.3 without first clearly identifying himself or herself, identifying the full name of the agency by whom he or she is employed, and identifying whether he or she represents, or has been retained by, the prosecution

or the defendant. While there is not a single published case promulgated under section 1054.8 to determine whether and to what extent the section applies to online forums, it is hard to imagine how anyone could forward a friend request to another user of MySpace or face book without some form of speaking to that victim or witness.

In the absence of any case law, I reviewed the legislative history for further guidance. The language accompanying the bill seemed aimed at protecting defense witnesses (specifically referring to witnesses disclosed by the defense) whereas the statute itself refers to any victim or witness disclosed by the opposing party, but otherwise there is no comment to give additional guidance beyond the language already within the statute.

Whenever the court determines a party failed to comply with the dictate of section 1054.8, the court may impose any of the remedies set forth in section 1054.5.

Penal Code section 1054.5 reads, in pertinent part:

(b) Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.

(c) The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted. The court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States.

There are other statutes which appear to be implicated as well. For example, Business and Professions Code §§6068, 6106 and 6128 have provisions which proscribe deception.

I have attached a memo, prepared for another public defender's office, which specifically addresses the pitfalls of conducting an investigation using Face book or MySpace. The gravamen of their conclusion is that it's ok to be on Face book or MySpace if you have an account in your own name, but never a fictitious one. You can see all that is held out to the public, but not initiate communication without full disclosure. Both networks equate a friend request with talking, and bar either allowing others to use your account or using a fictitious identity in obtaining an account.