

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-434 Issued: November 17, 2012

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org/237>), before relying on this opinion.

- Subject:** Ethical Considerations Relating to a Lawyer's Use of Social Network Sites¹ to Benefit a Client²
- Question:** May a lawyer access or otherwise use the social network site of a third-person to benefit a client?
- Answer:** A lawyer may access or otherwise use the social network site of a third-person to benefit a client, as long as the conduct does not violate the Rules of Professional Conduct.
- References:** SCR 3.130 (3.5), (4.1), (4.2), (4.3), (8.4) (a) and (c); Risk Managing Internet Social Network Investigations, 23 The Risk Manager (newsletter of Lawyers Mutual Ins. Co. of Ky.) (Spring 2012), www.lmick.com/resources/the-risk-manager-by-year/187-newsletter-2012.html; Journal of Computer-Mediated Communications (2007); San Diego Co. Bar Op. 2011-12 (2011); N.Y. State Bar Assn. Op. 843 (2010).

Introduction

The dramatic changes in information technology and the growth of social network sites such as Facebook have significantly changed the way people communicate. At the same time, these changes have made a wealth of personal information available over the internet. While many use these networks for social purposes, connecting with friends and family, they also can be used for business and professional purposes and may be a valuable resource for a practicing lawyer. Information posted on the social network site

¹ Social networks, as commonly understood at the time this opinion was written, include web-based services that allow individuals to build a public or semi-public bounded system; to identify users with whom they share a connections and view and traverse their list of connections and those made by others in the system. boyd, d. m. and Ellison, N. B., Social network sites: Definition, history, and scholarship, *Journal of Computer-Mediated Communications* (2007), <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>.

² This opinion only addresses ethical considerations relating to the lawyer's use of social network sites of third persons. It does not address the ethical restrictions on a lawyer's use of his or her own social network site for advertising or other purposes.

of an adverse party, a witness, juror or other third person could be very useful to the lawyer investigating a matter on behalf of a client.

The Committee has received several inquiries regarding the use of social network sites and the extent to which lawyers may go to obtain access to information from the site of an opponent or other third person. In addressing these issues, the Committee perceived two challenges. First, ethical issues raised by modern technology were not even imagined by the drafters of the Rules of Professional Conduct. However, after considerable discussion the Committee concluded that, despite the advances in technology, the core ethical principles upon which the profession has relied for generations – honesty and fairness --remain unchanged. In the final analysis, though social networking may appear to raise new ethical issues that might require new rules, the current rules adequately address those issues that have been brought to the attention of the Committee. For example, if the Rules of Professional Conduct prohibit lawyers from contacting jurors or communicating with represented parties in the non-technical world, they prohibit such conduct in the virtual world. The underlying principles of fairness and honesty are the same, regardless of context.

The second challenge related to the specific scenarios that the Committee was asked to address. We quickly realized that social networking is extraordinarily complex and is being modified constantly. In addition, new systems are being developed every day and it is beyond the Committee's capacity to imagine what might develop in the future. Because of this, it is not possible to draft an opinion with specific scenarios that would be comprehensive and enduring. Nevertheless, the Committee believes it would be helpful to address the basic Rules of Professional Conduct that might be implicated when a lawyer accesses or otherwise uses a social network site to benefit a client. Specifically, those rules are:

- SCR 3.130(4.1) Truthfulness in Statements to Others
- SCR 3.130 (4.2) Communication with Person Represented by Counsel
- SCR 3.130(4.3) Dealing with Unrepresented Person
- SCR 3.130(3.5) Impartiality and Decorum of the Tribunal
- SCR 3.130(8.4(a)(c)) Misconduct

Some inquiries have focused on whether a lawyer may access the site of a third person. If the site is “public,” and accessible to all, then there does not appear to be any ethical issue.³ If, however, access is limited, then there may be issues of what the lawyer can do to gain access. The Rules of Professional Conduct require truthfulness and honesty in dealing with others. Specifically, SCR 3.130 (4.1) prohibits a lawyer from making false statements.⁴ Also relevant is SCR 3.130(8.4), which prohibits the lawyer from engaging in dishonest conduct.⁵

³ See, San Diego Co. Bar Op. 2011-2 (2011). See also, N.Y. Bar Assn. Op. 843 (2010).

⁴ SCR 3.130(4.1) provides: “In the course of representing a client a lawyer:(a) shall not knowingly make a false statement of material fact or law to a third person; and (b) if a false statement of material fact or law has been made, shall take reasonable remedial

Social network sites generally permit certain people to send messages to others. A lawyer's communication with someone represented by counsel is addressed by SCR 3.130(4.2), which generally prohibits direct contact.⁶ To the extent that someone is represented by counsel, it would apply. The Commentary to Rule 4.2 explains that the rule is to protect against uncounseled disclosures and applies even though the represented person initiates or consents to the contact.⁷ If a person with whom the lawyer is communicating is unrepresented, such as a witness, then SCR 3.130 (4.3) would apply.⁸ The Rules of Professional Conduct,⁹ as well as various statutes and court rules, prohibit improper contact with jurors. Those prohibitions would apply in the social network context as well.

Finally, questions have arisen as to whether a lawyer may request a third person, such as a paraprofessional, investigator or other non-lawyer staff member, to obtain information through means that the lawyer could not ethically use. SCR 3.130 (8.4)¹⁰ and the Comments¹¹ normally would prohibit such conduct. As a general rule, a lawyer cannot use another to do that which the lawyer is prohibited from doing.

Conclusion

Social networking and other technological advances have provided, and will continue to provide, endless possibilities for obtaining information that may be useful in the representation of a client. These systems are extraordinarily complicated and constantly changing, and thus it would be impossible to address every possible ethical consideration that might arise in conjunction with the use of social network sites. Several core

measures to avoid assisting a fraudulent or criminal act by a client including, if necessary, disclosure of a material fact, unless prohibited by Rule 1.6.”

⁵ SCR 3.130(8.4(a),(b),(c)) provides: “It is professional misconduct for a lawyer to:(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation....”

⁶ SCR 3.130(4.2) provides: “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.”

⁷ See Comments 1 and 3 to Rule 4.2.

⁸ SCR 3.130(4.3) provides: “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person. The lawyer may suggest that the unrepresented person secure counsel.”

⁹ SCR 3.130(3.5) provides: “A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate ex parte with such a person as to the merits of the cause except as permitted by law or court order; (c) communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law, local rule, or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment; or (d) engage in conduct intended to disrupt the tribunal.”

¹⁰ SCR 3.130(8.4) provides that it is “professional misconduct for a lawyer to assist or induce another to engage in conduct that violates the Rules of Professional Conduct.”

¹¹ Comment 1 to Rule 8.4 provides: “Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf.”

principles are clear. Every lawyer is bound by the Rules of Professional Conduct. Those rules prohibit a lawyer from misrepresenting material facts, or engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. They also provide that a lawyer may not communicate with persons represented by counsel or state or imply disinterest in dealing with unrepresented persons. In addition, the rules prohibit improper contact with jurors. Finally, Rule 8.4(a) prohibits a lawyer from using a third person to engage in conduct that would violate the Rules of Professional Conduct, if done by a lawyer. A lawyer must keep all of these rules in mind when deciding the appropriate use of social network sites.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. The Rule provides that formal opinions are advisory only.