

KENTUCKY BAR ASSOCIATION 2011 CONVENTION



PURSUING JUSTICE
IN THE 21ST CENTURY

TWITTER, FACEBOOK, YOUTUBE AND ALL THE REST: THE PROS AND CONS OF USING THE SOCIAL NETWORK IN LITIGATION

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Thursday, June 16, 2011
3:10 p.m. - 5:15 p.m.
Thoroughbred Meeting Rooms 1-3
Lexington Convention Center
Lexington, Kentucky



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**Printed by: Kanet Pol & Bridges
7107 Shona Drive
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Kentucky Bar Association

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JUSTICE MARY C. NOBLE was elected to the Supreme Court of Kentucky in November 2006 from the 5th Supreme Court District and was re-elected, unopposed, in 2008 for an eight year term. She serves as Deputy Chief Justice. Prior to her election to the Supreme Court, Justice Noble was in private practice (1981-1991), served as Domestic Relations Commissioner (1989-1991) and was elected to the Fayette Circuit Court (1991) where she served two terms as Chief Regional Circuit Judge (1998-2002). Justice Noble is one of the founders of Kentucky Drug Courts and served as a Drug Court Judge from 1996 to November 2006. She has been a member of the National Association of Drug Court Professionals Congress of State Drug Courts and has served as its president. She has also served on the board of the National Association of Drug Court Professionals, and has received the Stanley Goldstein Award, making her a member of its National Hall of Fame. Justice Noble chairs the Civil Rules Committee, and has been invited to judge trial competitions at several law schools across the country. In addition, she is a frequent speaker at state and national conferences on a variety of legal topics.



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TWITTER, FACEBOOK, YOUTUBE AND ALL THE REST: THE PROS AND CONS OF USING THE SOCIAL NETWORK IN LITIGATION

Jason Nemes

Tens of millions of Americans use social media, with thousands more joining every day. And though usage of social media is no longer dominated by young persons, Consumer Reports magazine has found that 7.5 million children *under the age of thirteen* have active Facebook accounts. Social media (whether used for business, to connect with family and friends, to run an organization or campaign, to diary one's life, or to receive the news) is becoming as ubiquitous as the telephone or television and is here to stay.

Not surprisingly, the legal profession is implicated in a plethora of ways, from client development to investigating opposing parties, from the ethical implications of "friending" judges to the ethical implications of commenting about one's own client, etc. And the legal profession -- in both customs and regulations -- is undergoing a soul-searching of sorts to determine the proper boundaries of professional conduct for attorneys.

To that end, the American Bar Association has requested comment concerning lawyers' use of internet-based tools. Below are the issues that the ABA has identified as needing further consideration.

- A. Social and Professional Networking Services
 - 1. Identifying the line between personal communications and lawyer advertising.
 - 2. Inadvertent lawyer-client relationships.
 - 3. Lawyers "friending" judges.
 - 4. Gathering information through networking websites.
- B. Blogging and Discussion Forums
- C. Paying for Online Advertising, Referrals, and Leads
- D. Lawyer Websites
 - 1. False or misleading statements on websites.
 - 2. Inadvertent lawyer-client relationships.

3. Giving legal advice.
4. Confidential information on websites.

And what follows are the questions for which the ABA has sought comment:

1. Under what circumstances should the Model Rules of Professional Conduct govern a lawyer's participation in professional and social networking sites, given that such activities often have both a personal and advertising purpose?
2. Should the Commission draft a policy statement for the House of Delegates to consider or a white paper that sets out certain guidelines regarding lawyers' use of networking sites? Alternatively, or in addition, should the Commission propose amendments to Model Rules 7.2, 1.18, 8.4(f), 4.2, or 4.3, or the Comments to those Model Rules in order to explain when communications or other activities on networking sites might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission propose?
3. Under what circumstances should the Model Rules of Professional Conduct govern a lawyer's participation in blogs, given that such activities often have both an advertising and non-advertising function?
4. Should the Commission draft a policy statement for the House of Delegates to consider or a white paper that sets out certain guidelines regarding lawyers' use of blogging? Alternatively, or in addition, should the Commission propose amendments to Model Rules 1.18 or 7.2 or the Comments to those Model Rules in order to explain when these activities might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission offer?
5. Can lawyers create online discussion boards without disclosing that the discussion boards serve a client development function? If lawyers leave comments on such discussion boards or on blogs, are those comments subject to the Model Rules of Professional Conduct? Should the Commission offer a policy statement or white paper that sets out certain guidelines regarding lawyers' use of such sites? Alternatively, or in addition, should the Commission propose amendments to Model Rules 1.18 or 7.2 or the Comments to those Model Rules in order to explain when these activities might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission offer?
6. When a lawyer uploads documents to websites, such as JD Supra, are those materials and the surrounding information regarding those materials governed by the Article 7 Rules? Should the Commission offer a policy

- statement or white paper that sets out certain guidelines regarding lawyers' use of such sites? Alternatively, or in addition, should the Commission propose amendments to Model Rules 1.6, 1.18 or 7.2 or the Comments to those Model Rules in order to explain when these activities might trigger ethical obligations under the Model Rules? If so, what amendments should the Commission offer?
7. Should the Commission offer guidance on whether pay-per-click and pay-per-lead arrangements comply with Model Rule 7.2(b)? If so, should the Commission draft a policy statement for the House of Delegates to consider or a white paper that sets out certain guidelines on this subject? Alternatively, or in addition, should the Commission propose amendments to Model Rule 7.2(b) or its Comments that would clarify when a lawyer's payment for online advertising or other new forms of referrals might violate the Rule? Or should the Commission propose more fundamental amendments to Model Rule 7.2(b) that would re-conceptualize the purpose of the Rule in light of these new forms of advertising?
 8. Should the Commission recommend amendments to Comment 2 of Model Rule 7.2 to clarify which types of websites are, in fact, subject to the restrictions contained in the Article 7 Rules of the Model Rules of Professional Conduct? In addition or as an alternative, should the Commission offer any other form of guidance regarding the applicability of the Article 7 rules to lawyer websites?
 9. Should the Commission propose amendments to Model Rule 1.18 or its Comments to clarify when communications through a website might trigger a lawyer's ethical duties under that Rule? In addition or as an alternative, should the Commission offer any other form of guidance regarding the applicability of the Article 7 rules to lawyer websites?
 10. An ABA Formal Opinion addresses issues arising from websites that contain information about the law. Should the Commission offer additional guidance in this area, such as amendments to Model Rules 4.1(a) (prohibiting false statements of material facts or law to third parties), 7.1 (prohibiting a material misrepresentation of law in advertisements), 8.4(c) (prohibiting misrepresentations), or the Comments to those rules? In addition or as an alternative, should the Commission offer any other form of guidance on this issue?
 11. Should the Commission clarify the extent to which lawyers can post descriptions on their websites about current or past legal matters or the identity of current or past clients? If so, what guidance should the Commission offer? Should guidance take the form of a proposed amendment to Model Rule 1.6 or its Comments?

12. With regard to all of the above questions, to what extent does the First Amendment limit the application of the Model Rules to these areas of lawyer conduct?

There are scores of other ethical and practical issues implicated by the extensive use of social media. Attorneys need to be aware of the ways in which this relatively new phenomenon may affect their practice. At the very least, attorneys will need to discuss their clients' social media practices and inform them how their case may be affected. On the other hand, attorneys should assume opposing parties have valuable information that may be obtained from their use of social media.

LinkedIn Account Type: Basic

Home Profile Contacts Groups Jobs InMail More

IP Pro Intellectual Property Professionals

Discussions Members Promotions Jobs Search More

Start a discussion Group rules

Photos 3 of 21 Next

Third party filing prior art at USPTO
 Will you recommend your client to file prior art against a US pending patent application?
 In Canada, the Patent Office will not communicate with the third party except confirming receipt of the prior art. Therefore, it can be disadvantageous to do so.
 Is it the same at USPTO?
 Is there any other pre-grant opposition proceeding available at USPTO?
 7 views ago

Like Comment Follow Flag More

0 comments

Dr. Josh Good • Here is the answer to your query.
 It is allowed by the USPTO to file prior art by a third party along with certain restrictions. There is no provision of pre-grant opposition in USPTO. Please see the link and the paragraph below for detailed information.
http://www.uspto.gov/web/offices/com/nepatprocedures/108_114_01.htm
 To balance the mandate of 35 U.S.C. 122(i) and the Office's authority and responsibility under 35 U.S.C. 131 and 132 to issue a patent only if it appears that the applicant is entitled to a patent under the law, the Office permits third parties to submit patents and publications (i.e., prior art documents that are public information and which the Office would discover on its own with an ideal prior art search) during a limited (2 month) period after publication of an application in compliance with 37 CFR 1.98. However, 37 CFR 1.99 prohibits third parties from submitting any explanation of the patents or publications, or submitting any other information.
 Third parties may submit patents and publications relevant to the published application, with no further comment or explanation, pursuant to 37 CFR 1.99. The patents and publications may be related to the published file of the corresponding invention with...

Updates: Last 7 Days

Philip O'Keefe, PE stated a discussion
 Right Brain vs. Left Brain Thinking
 7 views ago · Like · Add comment

Bill Black stated a discussion
 A CPA has passed along a request looking for someone who has testified about the value of a domain name. The matter is litigation-related and appears time sensitive.
 1 hour ago · Like · Add comment

Reginald Adams stated a discussion
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Home Group Intellectual Property Group

Intellectual Property Group (public)

Discussion group for IP practitioners

Group Details
 Chief Strategist: Gary Winkler, Joseph Walsh, John Robinson, Jeremy Phillips, Mike Nitti, Steven R. Hillman
 Category: Practice Area
 Members: 262

Overview Blog File Library Forums Members (132)

Should social networks have a dispute policy?

Maximus Barrett wrote on Nov 23, 2014 11:31 AM

Should social networks have a dispute policy? Check out my recent post on askthebar.com. I would be interested in your comments.
 Tom Barrett
 IP Pro

As posted with permission from askthebar.com, November 24, 2014
Background: **Trademark Protection in Context to Social Networks**
 On Facebook, Twitter, and a wide, unregulated world. Facebook and LinkedIn, among other online social networks, are not private companies that have thrived without oversight from any public trading body. And even social networks are profiting like hot dogs in a cheese bun. As a result, trademark protection on social networks is becoming a hot issue. Comment on askthebar.com on these networks post on an identity issue as your expertise. The role of trademark as brand identifiers of an individual is under pressure to disintegrate but without any of the protections that trademark's center gives.
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 The role of trademark as brand identifiers of an individual is under pressure to disintegrate but without any of the protections that trademark's center gives.

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The Spirit of Cuba
 Posted on Nov 24, 2014 by John Robinson
 By John Robinson, a recent decision of the Federal Circuit affirmed a finding of the Trademark Trial and Appeal Board that the trademark "The Spirit of Cuba" was not registrable in accordance with non but was registrable in accordance with non-identical trademark.



My problem with Judge Snyder - Well, he's had it in for me ever since I kinda ran over his dog... Well, replace the word 'kinda' with 'repeatedly' and the word 'dog' with 'son'.

RT @raydowd: Arista Records v Doe 3: Copyright Infringement Trumps Anonymity and First Amendment in Arista Rec... <http://bit.ly/bYMigE>

FORMAL JUDICIAL ETHICS OPINION JE-119

January 20, 2010

Reprinted with permission from Kentucky Bench & Bar, March 2010.

**JUDGES' MEMBERSHIP ON INTERNET-BASED
SOCIAL NETWORKING SITES**

The Ethics Committee of the Kentucky Judiciary has received an inquiry from a judge as to the propriety of his being a member of Facebook, an internet-based social networking site, and being “friends” with various persons who might appear before him in court.

MAY A KENTUCKY JUDGE OR JUSTICE, CONSISTENT WITH THE CODE OF JUDICIAL CONDUCT, PARTICIPATE IN AN INTERNET-BASED SOCIAL NETWORKING SITE, SUCH AS FACEBOOK, LINKEDIN, MYSPACE, OR TWITTER, AND BE “FRIENDS” WITH VARIOUS PERSONS WHO APPEAR BEFORE THE JUDGE IN COURT, SUCH AS ATTORNEYS, SOCIAL WORKERS, AND/OR LAW ENFORCEMENT OFFICIALS?

The Committee concludes that the current answer to the question is a “Qualified Yes.”

Kentucky’s Code of Judicial Conduct was adopted in 1999, and is based on the ABA’s 1990 Model Code. Certainly, the Model Code was promulgated in the early days of the internet, and long before social-networking sites were developed.

Canon 2 of the Code of Judicial Conduct requires “[a] judge [to] avoid impropriety and the appearance of impropriety in all of the judge’s activities.” In addition, a judge shall not “convey or permit others to convey the impression that they are in a special position to influence the judge.” Canon 2D.

Also pertinent to this analysis is Canon 4A:

- A. Extra-judicial Activities in General. A judge shall conduct all of the judge’s extra-judicial activities so that they do not:
 - (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge;
 - (2) demean the judicial office; or
 - (3) interfere with the proper performance of judicial duties.

As noted by the Commentary to Canon 4A, “[c]omplete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.” In this Commonwealth, this commentary is particularly apropos since Kentucky judges stand for election on a periodic basis. Ky. Const. §§117, 119.

While the nomenclature of a social networking site may designate certain participants as “friends,” the view of the Committee is that such a listing, by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge. Certainly, judges have many extra-judicial relationships, connections and interactions with any number of persons, lawyers or otherwise, who may have business before the judge and the court over which he or she presides. These relationships may range from mere familiarity, to acquaintance, to close, intimate friendship, to marriage. Not every one of these relationships necessitates a judge’s recusal from a case. Recusal is generally required by Canon 3E(1) “in a proceeding in which the judge’s impartiality might reasonably be questioned....” Thus, the intensity of a judge’s relationships might be viewed on a continuum. On the one side is the judge’s complete unfamiliarity with a lawyer, a witness or a litigant, except in a judicial setting. No recusal is required. On the other extreme is a judge’s close personal relationship with a lawyer, a party or a witness, such as a family member or a spouse. Recusal is required under Canon 3E(1).¹ At some point between these two extremes, a judge and a participant in a case may have such a close social relationship that a judge should disclose the relationship to attorneys and parties in a case and, if need be, recuse. See Cynthia Gray, “Disqualification and Friendships with Attorneys,” Judicial Conduct Reporter, Fall 2009, at 1. See also In re Adams, 932 So.2d 1025 (Fla. 2006) (publically reprimanding judge who presided over cases involving attorney with whom he had an ongoing romantic relationship); In re Bamberger, Ky. Judicial Conduct Comm’n, (Feb. 24, 2006) Ky. Bench & Bar, May 2006, at 55 (publically reprimanding judge for presiding over a number of cases in which a close, personal friend served as trial consultant in the cases, including a class action case settled for over \$200,000,000; the consultant ultimately received compensation of over \$2,000,000 from that case).

While social networking sites may create a more public means of indicating a connection, the Committee’s view is that the designation of a “friend” on a social networking site does not, in and of itself, indicate the degree or intensity of a judge’s relationship with the person who is the “friend”. The Committee conceives such terms as “friend,” “fan” and “follower” to be terms of art used by the site, not the ordinary sense of those words. Recent judicial ethics opinions in other states

¹ A judge’s participation in cases involving a spouse or family member is prohibited under Canon 3E(1)(d). The Commentary to Canon 3E(1), however, emphasizes that the specific rules in section 3E(1) are not exhaustive.

have reached conflicting results. See Fla. Jud. Ethics Advisory Opinion 2009-20² (concluding that judges may not add lawyers who may appear before the judge as “friends” on a social networking site); *contra* N.Y. Judicial Ethics Advisory Opinion 08-176³ (concluding that judges may belong to internet-based social network, but should exercise discretion and otherwise comply with Rules Governing Judicial Conduct); S.C. Advisory Committee Opinion 17-2009⁴ (concluding that a judge may be a member of Facebook and be “friends” with law enforcement officers, so long as they do not discuss matters relating to the judge’s position.) The Florida committee found it significant that in order for a judge to list someone as a “friend,” or for another person to list the judge as a “friend,” the judge was required to consent to the listing. The New York committee, while not prohibiting participation, cautioned:

The judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge’s court through a social network. In some ways, this is no different from adding the person’s contact information into the judge’s Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (*i.e.*, other users can normally see the judge’s friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a “close social relationship” requiring disclosure and/or recusal.

N.Y. Judicial Ethics Advisory Opinion 08-176.

The consensus of this Committee is that participation and listing alone do not violate the Kentucky Code of Judicial Conduct, and specifically do not “convey or permit others to convey the impression that they are in a special position to influence the judge.” Canon 2D. However, and like the New York committee, this Committee believes that judges should be mindful of “whether on-line connections alone or in combination with other facts rise to the level of a ‘close social relationship’” which should be disclosed and/or require recusal. Canon 3E(1).

² Florida Judicial Ethics Advisory Opinion 2009-20 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>.

³ New York Judicial Ethics Advisory Opinion 08-176 (2009), available at <http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm>.

⁴ South Carolina Advisory Committee on Standards of Judicial Conduct Opinion 17-2009 (2009), available at <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>.

In addition to the foregoing, the Committee is compelled to note that, as with any public media, social networking sites are fraught with peril for judges, and that this opinion should not be construed as an explicit or implicit statement that judges may participate in such sites in the same manner as members of the general public. Personal information, commentary and pictures are frequently part of such sites. Judges are required to establish, maintain and enforce high standards of conduct, and to personally observe those standards. Canon 1. In addition, judges “shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Canon 2A. The Commentary to Canon 2A states:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Thus, pictures and commentary posted on sites which might be of questionable taste, but otherwise acceptable for members of the general public, may be inappropriate for judges. See In re Complaint of Judicial Misconduct, 575 F.3d 279 (3rd Cir. 2009) (interpreting federal Judicial Conduct and Disability Act) (publicly reprimanding judge who had maintained website containing sexually explicit and offensive materials). In its decision, the Third Circuit Court of Appeals noted “[a] judge’s conduct may be judicially imprudent, even if it is legally defensible.” *Id.* at 291.

Additional issues may arise in relationship to Canon 3B. Judges are generally prohibited from engaging in any *ex parte* communications with attorneys and their clients. Canon 3B(7). The Commentary to this section explicitly states that “[a] judge must not independently investigate facts in a case and must consider only the evidence presented.” In addition, a judge is disqualified from hearing a case in which the judge has “personal knowledge of disputed evidentiary facts[.]” Canon 3E(1)(a). A North Carolina judge was publicly reprimanded for conducting independent research on a party appearing before him and for engaging in *ex parte* communications, through Facebook, with the other party’s attorney. Public Reprimand of B. Carlton Terry, Jr., N.C. Judicial Standards Comm’n Inquiry No. 08-234.⁵ See also Richard Acello, “WEB 2.UH-OH; Judged by Facebook,” 95 A.B.A. J. 27 (Dec. 2009) (*noting* the commentary aspect of MySpace, Twitter and Facebook, and a judge’s statement that he uses “sites to keep track of adjudicated offenders under his jurisdiction”). With respect to the judge quoted in the Acello article, this Committee questions whether his active monitoring of offenders under his jurisdiction would be appropriate under the

⁵ North Carolina Judicial Standards Commission Inquiry, No. 08-234, available at <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>.

Kentucky Code of Judicial Conduct, and whether such conduct raises separation of powers concerns. As an example, the Oregon Supreme Court, interpreting its Code of Judicial Conduct, censured a judge who witnessed alleged probation violation, ordered offender into court the following week, and then presided over a probation violation hearing. In re Baker, 74 P.3d 1077 (Or. 2003).

While a proceeding is pending or impending in any court, judges are prohibited from making “any public comment that might reasonably be expected to affect its outcome or impair its fairness....” Canon 3B(9). Furthermore, full-time judges are prohibited from practicing law or giving legal advice. Canon 4G. Judges, therefore, must be careful that any comments they may make on a social networking site do not violate these prohibitions. While social networking sites may have an aura of private, one-on-one conversation, they are much more public than off-line conversations, and statements once made in that medium may never go away. See, e.g., Judicial Misconduct, 575 F.3d at 293 (*noting* that “possession of controversial private material such as that at issue here carried with it the peril of unwanted disclosure”); see also Helen A.S. Popkin, “Twitter Gets You Fired in 140 Characters or Less,” MSNBC.com (March 23, 2009)⁶ (discussing dangers of postings on social networking sites).

The foregoing examples are meant to be illustrative only, and this Opinion should not be read as allowing other conduct on a social networking site by implication.

In conclusion, even a cursory reading of this opinion should make clear that the Committee struggled with this issue, and whether the answer should be a “Qualified Yes” or “Qualified No”. In speaking with various judges around the state, the Committee became aware that several judges who had joined internet-based social networks subsequently either limited their participation or ended it altogether. In the final analysis, the reality that Kentucky judges are elected and should not be isolated from the community in which they serve tipped the Committee’s decision. Thus, the Committee believes that a Kentucky judge or justice’s participation in social networking sites is permissible, but that the judge or justice should be **extremely cautious** that such participation does not otherwise result in violations of the Code of Judicial Conduct.

Please be aware that opinions issued by or on behalf of the Committee are restricted to the content and scope of the Canons of Judicial Ethics and legal authority interpreting those Canons, and the fact situation on which an opinion is based may be affected by other laws or regulations. Persons contacting the Judicial Ethics Committee are strongly encouraged to seek counsel of their own

⁶ Helen A.S. Popkin, “Twitter Gets You Fired in 140 Characters or Less”, Technotica Blog on msnbc.com, available at <http://www.msnbc.msn.com/id/29796962/>. (Ms. Popkin hypothesizes “the cardinal rule of the Internet: Never post anything you wouldn’t say to your mom, boss and significant other.”).

choosing to determine any unintended legal consequences of any opinion given by the Committee or some of its members.

Sincerely,

Arnold Taylor, Chairman
The Ethics Committee of the Kentucky Judiciary

cc: Donald H. Combs, Esq.
The Honorable Laurance B. VanMeter, Judge
The Honorable Jean Chenault Logue, Judge
The Honorable Jeffrey Scott Lawless, Judge
Jean Collier, Esq.

ETHICAL ISSUES WITH INFORMATION – THE SOCIAL NETWORKS REVISITED

Michael M. Losavio

Reprinted with permission from Kentucky Bench & Bar November 2010.

Lawyers are always dealing with ethical concerns with information as legal practice is an information practice. We've reviewed some of those here in the Bench and Bar before. The rules of professional conduct for lawyers address proper conduct relating to information, its acquisition and its dissemination. Some that have a special significance address:

- Confidentiality of information
- Conflict of interest
- Truthfulness in statements to others
- Responsibility for others in the practice and
- Advertising (information regarding legal services)

Several possible ethical considerations arise with the new information services made available by the Internet. Professor David Hricik of Mercer University School of Law in "Communication and the Internet: Facebook, E-mail and Beyond" addressed these considerations, some of which we discuss below. See Hricik, David C., "Communications and the Internet: Facebook, E-Mail, and Beyond" (January 1, 2010). Available at SSRN: <http://ssrn.com/abstract=1557033>.

One of the most significant issues is the application of the rules, especially the advertising rules, to lawyer and law staff participation on social networking sites. These sites, their systems of interaction and stated goals may be quite diverse. FaceBook, MySpace and LinkedIn are examples of such sites.

Yet a lawyer's professional responsibilities as to the information they give out to others do not end when they leave the office, even at the end of the work day. They extend into the online world and in to our personal time. While issues with social networking sites are akin to those with lawyer web sites generally, they deserve special attention as social networking sites are highly interactive and seek to promote that interaction among members. Even with the use of controls that limit who can access some individual sites, these sites are meant to facilitate relationships through the exchange of information. This may create a variety of problems.

This may mean assuring that staff, interns and new (and younger) attorneys understand the obligations for confidentiality of information and that it extends online: no discussion of client matters is permitted!

This may appear self-evident, but the newness and deceptive intimacy of online activity lead some to say things online they would never say in a letter or conversation outside the law office. This is especially important for new people who have never had work with confidentiality obligations but have used confessional media for much of their lives. And even aspects of current tell-all culture may lead some to say things they should not; witness the problems college students have had when their online pictures of drinking, partying and, occasionally, rioting are discovered by prospective employers and graduate schools.

Truthfulness is required of us, regardless of the deceptions of others in email and online. It is improper to deceive someone into “friending” you in order to get access to information on their social networking site. Statements made online should be carefully vetted for candor.

And is it prudent to criticize opposing counsel in an online posting, even if not a violation of the rules?

An attorney using a social networking site must be careful about inadvertently establishing a lawyer-client relationship with someone. In addition to the responsibilities that may create, there may be issues with the unauthorized practice of law if the “client” is from a jurisdiction in which the lawyer is not admitted to practice.

Worse, the receipt of information from someone on a matter for which an attorney represents the opposing party may create a conflict requiring the attorney withdraw from representing either party.

As with the web site, email and voice mail cases involving this situation, the key issue is the interactivity and solicitation of information from others. If the information sent was entirely unsolicited, no conflict relationship would be found. Generally it appears that the more information is solicited from others, the more likely a conflict relationship will be found to have been created. A request for inquiries and information might lead to a conflict, whereas a clear disclaimer directing people not to send case information might help prevent one. Given the interactive, social nature of social networking sites, extra care seems advisable, especially where a conflict created by a new attorney hire may disqualify the entire firm.

Key to this are the rules on information regarding legal services, which deserve special attention. This is certainly true under the Kentucky rules, which as a default defines "Advertise" to mean "... to furnish any information or communication containing a lawyer's name or other identifying information, and an "advertisement" is any information containing a lawyer's name or other identifying information, except the following:..." One of the exceptions is "(j) Information and communication by a lawyer to members of the public in the format of web log

journals on the internet that permit real time communication and exchanges on topics of general interest in legal issues, provided there is no reference to an offer by the lawyer to render legal services.” The rules also bar in-person, live telephone or real time electronic solicitation of clients, with limited exceptions, and place certain requirements on other types of solicitations.

The rules apply to information regarding legal services, so the more removed postings are from that domain the less likely there may be concerns. And the concerns are many. Does linking to another website imply an endorsement of that site? Does a link from another website to yours imply a relationship? Do statements on the site comply with the rules regarding truthfulness, misrepresentation, testimonials, endorsements and solicitation?

This becomes more complex where social networking and lawyer information sites are built to promote professional networking. The South Carolina Bar, in its Ethics Advisory Opinion 09-10, addressed the situation of a professional site collecting information and “peer endorsements” and “client ratings” about attorneys. Attorneys could, at their option, “claim” their profiles and change information on it. The South Carolina Bar opined that

- 1) A lawyer was not responsible for information he or she did not post or encourage to be posted,
- 2) A lawyer was responsible for what they post and those postings must comply with the rules and
- 3) A lawyer was responsible for what they encourage others to post and those postings must comply with the rules.

Straightforward enough, but then it found that if a lawyer “claimed” his or her profile it would then be subject to all the rules and that while a lawyer could even encourage others to submit peer or client comments that those would be subject to the rules and the lawyer responsible for their content. This seems to hold a lawyer responsible for an implied relationship or an appearance of a relationship or endorsement to the posted material. The South Carolina Bar referenced an earlier opinion that a lawyer participating in an online lawyer locator service should assure all the information therein complies with the rules.

The South Carolina Bar also discussed an earlier opinion where a client’s website advertising a lawyer’s services, created without the lawyer’s knowledge, still created issues for the lawyer; the lawyer was advised to counsel the client to comply with the rules and warned that continued representation of the client if the client refused might imply authorization by the lawyer of any non-conforming content.

This advisory opinion only suggests how these issues may be handled in other jurisdictions, but it indicates caution. It specifically noted it was not deciding any constitutional law issues regarding what lawyers can say about their work. Nor did it mention the possible first amendment rights of others to comment positively on the work of lawyers (although negative comments seem to be without objection.)

The opinion is at http://www.scbare.org/member_resources/ethics_advisory_opinions/&id=678. A report on the issue of social networking media and the bar by the South Carolina Bar Young Lawyers Division Social Media Task Force is at <http://www.scbare.org/public/files/docs/Report.pdf>.

This is a difficult area that will evolve with time. It is important we all be careful.

Note Bene – Look for Bill Sharp’s discussion of these issues and perils from the perspective of the judicial conduct rules and Kentucky Judicial Ethics Opinion JE-119 in the upcoming LBA journal.

**SOUTH CAROLINA BAR
ETHICS ADVISORY OPINIONS
ETHICS ADVISORY OPINION 09-10**

Upon the request of a member of the South Carolina Bar, the Ethics Advisory Committee has rendered this opinion on the ethical propriety of the inquirer's contemplated conduct. This Committee has no disciplinary authority. Lawyer discipline is administered solely by the South Carolina Supreme Court through its Commission on Lawyer Conduct.

Full Text

Applicable Rules: 7.1, 7.2, 8.4(a)

Facts:

Company X offers a free website that provides information about attorneys nationwide. Lawyers need not actively sign up to have their names listed on the website. Instead, Company X uses information obtained through requests to state courts and bar associations under the Freedom of Information Act and creates website entries for the lawyers whose information is retrieved through these FOIA requests.

Company X collects information about attorneys and generates an internal rating for each listed attorney. Individual attorneys can “claim” their profiles and update their information. Company X has already created listings and ratings for a number of South Carolina attorneys regardless of each lawyer’s knowledge of the listings.

The website also features peer endorsements. Attorneys are able to write comments about one another that are then displayed on the attorney's profile. It is possible to remove these endorsements from public view. Peer endorsements help raise an individual's rating.

The website also features "client ratings." Anyone can submit a client rating about any lawyer, and the lawyer may invite current and former clients to submit ratings. Client ratings do not impact an attorney's internal rating by Company X, but the client comments are prominently posted on the attorney's listing. While Company X monitors and inspects the client ratings and peer reviews, attorneys are unable to control who endorses or rates them.

Questions:

- 1) May a South Carolina lawyer claim his or her Company X website listing, including peer endorsements, client ratings, and Company X ratings?
- 2) May a South Carolina lawyer invite peers, clients, or former clients to post comments and/or rate the lawyer?

Summary

- 1) Yes, a lawyer may claim the website listing, but all information contained therein (including peer endorsements, client ratings, and Company X ratings) are subject to the rules governing communication and advertising once the lawyer claims the listing.
- 2) A lawyer may invite peers to rate the lawyer and may invite and allow the posting of peer and client comments, but all such comments are governed by the Rules of Professional Conduct, and the lawyer is responsible for their content.

Opinion

Lawyers are responsible for all communications they place or disseminate, or ask to be placed or disseminated for them, regarding their law practice, and all such communications are governed by Rule 7.1 of the Rules of Professional Conduct. See Cmt. 1 (“This Rule governs *all communications about a lawyer’s services.... Whatever means are used* to make known a lawyer’s services, statements about them must be truthful.”)(emphasis added). However, a lawyer is not responsible for statements about the lawyer or the lawyer’s practice that are not placed or disseminated by the lawyer. Statements made by Company X on its website about a lawyer are not governed by the Rules of Professional Conduct unless placed or disseminated by the lawyer or by someone on the lawyer’s behalf.

In the Committee’s view, to “claim” one’s website listing is to “place or disseminate” all communications made at or through that listing after the time the listing is claimed. For example, in Advisory Opinion 99-09, this Committee addressed a client’s website that advertised the lawyer’s services but was created without the lawyer’s knowledge. The Committee advised that, once the lawyer became aware of the advertisement, the lawyer should counsel the client to conform the advertisement to the Rules of Professional Conduct and that, if the client refused, the lawyer’s continued representation of the client may imply the lawyer’s authorization or adoption of the advertisement. Similarly, we advised in Advisory Opinion 00-10 that a lawyer who participates in an internet service for locating attorneys should review, for compliance with Rules 7.1 and 7.2, all information about the lawyer provided through the service. By claiming a website listing, a lawyer takes responsibility for its content and is then ethically required to conform the listing to all applicable rules.

Likewise, a lawyer who adopts or endorses information on any similar web site becomes responsible for confirming all information in the lawyer's listing to the Rules of Professional Conduct. Martindale-Hubbell, SuperLawyers, LinkedIn, Avvo, and other such websites may place their own informational listing about a lawyer on their websites without the lawyer's knowledge or consent, and allow lawyers to take over their listings. The language employed by the website for claiming a listing is irrelevant. (Martindale.com, for example, uses an "update this listing" link for lawyers to claim their listings). Regardless of the terminology, by requesting access to and updating any website listing (beyond merely making corrections to directory information), a lawyer assumes responsibility for the content of the listing.

Information on business advertising and networking websites are both communications and advertisements; therefore, they are governed by Rules 7.1 and 7.2. While mere participation in these websites is not unethical, all content in a claimed listing must conform to the detailed requirements of Rule 7.2(b)-(i) and must not be false, misleading, deceptive, or unfair. In order to be exempt from the filing requirement of Rule 7.2(b), an advertisement must be limited to directory information only and must not be disseminated through a public medium. Comment 5 to Rule 7.2 specifically excludes from the filing requirement "basic telephone directory listings, law directories such as 'Martindale Hubbell' or a desk book created by a bar association." The Comment does not address online versions of such directories; however, to require lawyers to file copies of online directory listings would be to require them to file copies of not only Martindale.com listings, but the South Carolina Bar's online directory listing as well. The Committee does not believe the Court intended the rules to require such filing and therefore does not believe that an online listing containing only directory information must be filed pursuant to Rule 7.2(b). However, if an online listing is updated to include anything beyond directory information (which includes "the name of the lawyer or law firm, a lawyer's job title, jurisdictions in which the lawyer is admitted to practice, the lawyer's mailing and electronic addresses, and the lawyer's telephone and facsimile numbers," according to Comment 5), then 7.2(b) requires that a copy be filed with the Commission.

Soliciting peer ratings does not violate the Rules of Professional Conduct. Martindale-Hubbell has employed a lawyer rating system for more than 100 years, and federal courts have held that advertising factual information about such verifiable, independent ratings does not violate state advertising prohibitions against statements likely to mislead or create unjustified expectations about results. See, e.g., Mason v. Florida Bar, 208 F.3d 952 (11th Cir. 2000). More recently, advertisements about newer ratings organizations, such as SuperLawyers, have been given the same regulatory berth by state agencies. See, e.g., In re Opinion 39 of the Committee on Attorney Advertising, 961 A.2d 722 (N.J. 2008) (*per curiam*) (vacating the court's own committee's 2006 advisory opinion prohibiting advertising of "SuperLawyers" and "Best Lawyers in America" designations, on the grounds that the prohibition is likely unconstitu-

tional because such designations are factually verifiable). Therefore, provided that the rating is presented in a non-misleading way and is independently verifiable, including one's rating in an online listing or elsewhere appears permissible.

Client comments may violate Rule 7.1 depending on their content. 7.1(d) prohibits testimonials, and 7.1(d) and (b) ordinarily also prohibit client endorsements. See Cmt. 1. In the Committee's view, a testimonial is a statement by a client or former client about an experience with the lawyer, whereas an endorsement is a more general recommendation or statement of approval of the lawyer. A lawyer should not solicit, nor allow publication of, testimonials. A lawyer should also not solicit, nor allow publication of, endorsements unless they are presented in a way that is not misleading nor likely to create unjustified expectations. "The inclusion of an appropriate disclaimer or qualifying language *may* preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client." Cmt. 3 (emphasis added).

Lawyers soliciting client comments on web-based business listings are also cautioned to adhere to Rule 8.4(a), which prohibits lawyers from violating the Rules of Professional Conduct through the acts of another. Even absent a specific prohibition against testimonials, several states have concluded that client comments contained in lawyer advertising violate the prohibition against misleading communications if the comments include comparative language such as "the best" or statements about results obtained. See, e.g., Virginia State Bar Lawyer Advertising Opinion A-0113 (2000). Rule 7.1(c) prohibits comparative language in all communications, Rule 7.1(b) prohibits statements that are likely to create unjust expectations about results, and Rule 7.2(f) prohibits self-laudatory language in advertisements. Therefore, a lawyer should monitor a "claimed" listing to keep all comments in conformity with the Rules. If any part of the listing cannot be conformed to the Rules (e.g., if an improper comment cannot be removed), the lawyer should remove his or her entire listing and discontinue participation in the service.

This opinion does not take into consideration any constitutional-law issues regarding lawyer advertising.

PUBLIC REPRIMAND

**B. CARLTON TERRY, JR.
DISTRICT COURT JUDGE
JUDICIAL DISTRICT 22**

This matter came to the attention of the Judicial Standards Commission by a written complaint filed with the Commission. A formal investigation was ordered by the Commission and conducted by the Commission's investigator. During its meeting on February 13, 2009, the Commission completed its review of the investigative report prepared in this matter. The Commission caused a copy of this Public Reprimand to be personally served upon Judge B. Carlton Terry, Jr. In accordance with Rule 11(b) of the Rules of the Judicial Standards Commission, a judge has 20 days within which to accept the Public Reprimand or to reject it and demand, in writing, that disciplinary proceedings be instituted in accordance with Rule 12 of the Rules of the Judicial Standards Commission.

Findings of Fact

1. B. Carlton Terry, Jr., was at all times referred to herein a judge of the General Court of Justice, District Court Division, Judicial District Twenty-two and, as such was subject to the Canons of the North Carolina Code of Judicial Conduct, the laws of the State of North Carolina, and the provisions of the oath of office for a district court judge as set forth in the North Carolina General Statutes, Chapter 11.
2. Beginning Tuesday, September 9, 2008, and continuing through Friday September 12, 2008, Judge Terry presided over a child custody and child support hearing in the matter of Whitley vs. Whitley, Iredell County File No. 07CVD0008.
3. On or about September 9, 2008, while in the judge's chambers, Judge Terry and Charles A. Schieck, attorney for Mr. Sterling Whitley, the defendant in the proceeding, spoke about "Facebook", an internet social networking website. Jessie Conley, attorney for Mrs. Renee Whitley, the plaintiff in the proceeding, was present during the discussion but stated she did not know what "Facebook" was, and that she did not have time for it. Judge Terry and Mr. Schieck designated themselves as "friends" on their "Facebook" accounts so that they could view each other's account.

4. During an in-chambers meeting on or about Wednesday September 10, 2008, Judge Terry, Shieck and Conley were reviewing prior testimony that suggested one of the parties had been having an affair. Schieck asked Judge Terry if he thought Mr. Whitley was guilty of having an affair. Judge Terry stated he believed the allegations were true due to evidence introduced by Conley, but that it did not make any difference in the custody dispute. It was at this time Schieck stated "I will have to see if I can prove a negative."
5. On or about the evening of September 10, 2008, Judge Terry checked Schieck's "Facebook" account and saw where Schieck had posted "how do I prove a negative." Judge Terry posted on his "Facebook" account, he had "two good parents to choose from" and "Terry feels that he will be back in court" referring to the case not being settled. Schieck then posted on his "Facebook" account, "I have a wise Judge."
6. During a break in the proceedings on September 11, 2008, Judge Terry told Conley about the September 10, 2008, exchanges on "Facebook" between Schieck and himself.
7. On or about September 11, 2008, Judge Terry wrote on his "Facebook" account, "he was in his last day of trial." Schieck then wrote "I hope I'm in my last day of trial." Judge Terry responded stating "you are in your last day of trial."
8. Sometime on or about September 9, 2008, Judge Terry used the internet site "Google" to find information about Mrs. Whitley's photography business. Judge Terry stated he wanted to see examples of Mrs. Whitley's photography work. Upon visiting Mrs. Whitley's web site, Judge Terry stated he viewed samples of photographs taken by Mrs. Whitley and also found numerous poems that he enjoyed.
9. When court reconvened at approximately 2:00 p.m. on September 12, 2008, prior to the announcing of his findings in the case, Judge Terry recited a poem, to which he had made minor changes, that he found on Mrs. Whitley's web site.
10. Judge Terry told the Commission's investigator he quoted the poem because it gave him "hope for the kids and showed that Mrs. Whitley was not as bitter as he first thought." Judge Terry stated that he felt the poem reflected favorably towards Mrs. Whitley.
11. Judge Terry acknowledged he accessed Mrs. Whitley's photography web site on the first two days of trial and stated he may have accessed the site on the last day of trial to copy the poem. Judge Terry could not recall

exactly how many times he visited the site but stated that four times was very possible.

12. Judge Terry never disclosed to counsel or the parties at any time during the four days of trial that he had conducted independent research on Mrs. Whitley or had visited any web site belonging to Mrs. Whitley.
13. Following the conclusion of the hearing and after having orally entered his order, Judge Terry requested a bailiff to summon Conley and Schieck to return to the courtroom, whereupon Judge Terry disclosed his actions of having viewed Mrs. Whitley's web site and quoting a poem he found thereon.
14. Conley filed a Motion in the Cause on October 2, 2008, whereby she requested a) Judge Terry's order be vacated, b) a new trial, and c) Judge Terry's disqualification.
15. Judge Terry disqualified himself by Order filed October 14, 2008.
16. Judge Terry's Child Custody and Child Support Order was vacated and an order for a new trial entered on October 22, 2008.
17. Judge Terry cooperated fully with the investigation.

Conclusions

Judge Terry had *ex parte* communications with counsel for a party in a matter being tried before him. Judge Terry was also influenced by information he independently gathered by viewing a party's web site while the party's hearing was ongoing, even though the contents of the web site were never offered as nor entered into evidence during the hearing. Judge Terry's actions described above evidence a disregard of the principles of conduct embodied in the North Carolina Code of Judicial Conduct, including failure to personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved (Canon 1), failure to respect and comply with the law (Canon 2A), failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2A), engaging in *ex parte* communication with counsel and conducting independent *ex parte* online research about a party presently before the Court (Canon 3A(4)). Judge Terry's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute (N.C. Const. Art IV, §17 and N.C.G.S. §7A-376(a)).

Corrective Action and Acceptance of Terms

Judge Terry agrees that he will not repeat such conduct in the future, mindful of the potential threat any repetition of his conduct poses to public confidence in the integrity and impartiality of the judiciary and to the administration of justice.

Judge Terry agrees he will promptly read and familiarize himself with the Code of Judicial Conduct.

Judge Terry further agrees that he will not retaliate against any person known or suspected to have cooperated with the Commission, or otherwise associated with this matter.

Judge Terry affirms he has consulted with, or had the opportunity to consult with counsel prior to acceptance of this Public Reprimand.

I, B. Carlton Terry, Jr., hereby accept the terms contained in this Public Reprimand this the 25 day of March, 2009.

ORIGINAL SIGNED BY

B. Carlton Terry, Jr.

ORDER OF PUBLIC REPRIMAND

Now therefore, pursuant to the Constitution of North Carolina, Article IV, Section 17, the procedures prescribed by the North Carolina General Assembly in the North Carolina General Statutes, Chapter 7A, Article 30, and Rule 11(b) of the Rules of the Judicial Standards Commission, the North Carolina Judicial Standards Commission, hereby orders that B. Carlton Terry, Jr., be and is hereby PUBLICLY REPRIMANDED for the above set forth violations of the Code of Judicial Conduct. Judge Terry shall not engage in such conduct in the future and shall fulfill all of the terms of this Public Reprimand as set forth herein.

Dated this the 1st day of April, 2009.

ORIGINAL SIGNED BY

John C. Martin,
Chairman Judicial Standards Commission

**THE PHILADELPHIA BAR ASSOCIATION PROFESSIONAL GUIDANCE
COMMITTEE OPINION 2009-02 (MARCH 2009)**

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The inquirer deposed an eighteen year old woman (the “witness”). The witness is not a party to the litigation, nor is she represented. Her testimony is helpful to the party adverse to the inquirer’s client.

During the course of the deposition, the witness revealed that she has “Facebook” and “Myspace” accounts. Having such accounts permits a user like the witness to create personal “pages” on which he or she posts information on any topic, sometimes including highly personal information. Access to the pages of the user is limited to persons who obtain the user’s permission, which permission is obtained after the user is approached on line by the person seeking access. The user can grant access to his or her page with almost no information about the person seeking access, or can ask for detailed information about the person seeking access before deciding whether to allow access.

The inquirer believes that the pages maintained by the witness may contain information relevant to the matter in which the witness was deposed, and that could be used to impeach the witness’s testimony should she testify at trial. The inquirer did not ask the witness to reveal the contents of her pages, either by permitting access to them on line or otherwise. He has, however, either himself or through agents, visited Facebook and Myspace and attempted to access both accounts. When that was done, it was found that access to the pages can be obtained only by the witness’s permission, as discussed in detail above.

The inquirer states that based on what he saw in trying to access the pages, he has determined that the witness tends to allow access to anyone who asks (although it is not clear how he could know that), and states that he does not know if the witness would allow access to him if he asked her directly to do so.

The inquirer proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and Myspace websites, contact the witness and seek to “friend” her, to obtain access to the information on the pages. 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. If the witness allows access, the third person would then provide the information posted on the pages to the inquirer who would evaluate it for possible use in the litigation.

The inquirer asks the Committee’s view as to whether the proposed course of conduct is permissible under the Rules of Professional Conduct, and whether he may use the information obtained from the pages if access is allowed.

Several Pennsylvania Rules of Professional Conduct (the “Rules”) are implicated in this inquiry.

Rule 5.3. **Responsibilities Regarding Nonlawyer Assistants** provides in part that,

With respect to a nonlawyer employed or retained by or associated with a lawyer:...

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; ...

Since the proposed course of conduct involves a third person, the first issue that must be addressed is the degree to which the lawyer is responsible under the Rules for the conduct of that third person. The fact that the actual interaction with the witness would be undertaken by a third party who, the committee assumes, is not a lawyer does not insulate the inquirer from ethical responsibility for the conduct.

The Committee cannot say that the lawyer is literally “ordering” the conduct that would be done by the third person. That might depend on whether the inquirer’s relationship with the third person is such that he might require such conduct. But the inquirer plainly is procuring the conduct, and, if it were undertaken, would be ratifying it with full knowledge of its propriety or lack thereof, as evidenced by the fact that he wisely is seeking guidance from this Committee. Therefore, he is responsible for the conduct under the Rules even if he is not himself engaging in the actual conduct that may violate a rule. (Of course, if the third party is also a lawyer in the inquirer’s firm, then that lawyer’s conduct would itself be subject to the Rules, and the inquirer would also be responsible for the third party’s conduct under Rule 5.1, dealing with Responsibilities of Partners, Managers and Supervisory Lawyers.)

Rule 8.4. **Misconduct** provides in part that,

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; ...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; ...

Turning to the ethical substance of the inquiry, the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It 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 inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

The fact that the inquirer asserts he does not know if the witness would permit access to him if he simply asked in forthright fashion does not remove the deception. The inquirer could test that by simply asking the witness forthrightly for access. That would not be deceptive and would of course be permissible. Plainly, the reason for not doing so is that the inquirer is not sure that she will allow access and wants to adopt an approach that will deal with her possible refusal by deceiving her from the outset. In short, in the Committee's view, the possibility that the deception might not be necessary to obtain access does not excuse it.

The possibility or even the certainty that the witness would permit access to her pages to a person not associated with the inquirer who provided no more identifying information than would be provided by the third person associated with the lawyer does not change the Committee's conclusion. Even if, by allowing virtually all would-be "friends" onto her FaceBook and MySpace pages, the witness is exposing herself to risks like that in this case, excusing the deceit on that basis would be improper. Deception is deception, regardless of the victim's wariness in her interactions on the internet and susceptibility to being deceived. The fact that access to the pages may readily be obtained by others who either are or are not deceiving the witness, and that the witness is perhaps insufficiently wary of deceit by unknown internet users, does not mean that deception at the direction of the inquirer is ethical.

The inquirer has suggested that his proposed conduct is similar to the common -- and ethical -- practice of videotaping the public conduct of a plaintiff in a personal injury case to show that he or she is capable of performing physical acts he claims his injury prevents. The Committee disagrees. In the video situation, the videographer simply follows the subject and films him as he presents himself to the public. The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker.

Rule 4.1 **Truthfulness in Statements to Others** provides in part that,

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;

...

The Committee believes that in addition to violating Rule 8.4c, the proposed conduct constitutes the making of a false statement of material fact to the witness and therefore violates Rule 4.1 as well.

Furthermore, since the violative conduct would be done through the acts of another third party, this would also be a violation of Rule 8.4a.¹

The Committee is aware that there is controversy regarding the ethical propriety of a lawyer engaging in certain kinds of investigative conduct that might be thought to be deceitful. For example, the New York Lawyers' Association Committee on Professional Ethics, in its Formal Opinion No. 737 (May, 2007), approved the use of deception, but limited such use to investigation of civil right or intellectual property right violations where the lawyer believes a violation is taking place or is imminent, other means are not available to obtain evidence and rights of third parties are not violated.

Elsewhere, some states have seemingly endorsed the absolute reach of Rule 8.4. In People v. Pautler, 47 P.3d 1175 (Colo. 2002), for example, the Colorado Supreme Court held that no deception whatever is allowed, saying,

¹ The Committee also considered the possibility that the proposed conduct would violate Rule 4.3, **Dealing with Unrepresented person**, which provides in part that

(a) 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 . . .

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter the lawyer should make reasonable efforts to correct the misunderstanding.

Since the witness here is unrepresented this rule addresses the interactions between her and the inquirer. However, the Committee does not believe that this rule is implicated by this proposed course of conduct. Rule 4.3 was intended to deal with situations where the unrepresented person with whom a lawyer is dealing knows he or she is dealing with a lawyer, but is under a misapprehension as to the lawyer's role or lack of disinterestedness. In such settings, the rule obligates the lawyer to insure that unrepresented parties are not misled on those matters. One might argue that the proposed course here would violate this rule because it is designed to induce the unrepresented person to think that the third person with whom she was dealing is not a lawyer at all (or lawyer's representative), let alone the lawyer's role or his lack of disinterestedness. However, the Committee believes that the predominating issue here is the deception discussed above, and that that issue is properly addressed under Rule 8.4.

“Even noble motive does not warrant departure from the rules of Professional Conduct. . . We reaffirm that members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive. Purposeful deception by an attorney licensed in our state is intolerable, even when undertaken as a part of attempting to secure the surrender of a murder suspect. . . . Until a sufficiently compelling scenario presents itself and convinces us our interpretation of Colo. RPC 8.4(c) is too rigid, we stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so.” The opinion can be found at <http://www.cobar.org/opinions/opinion.cfm?opinionid=627&courtid=2>.

The Oregon Supreme Court in In Re Conduct of Gatti, 8 P.3d 966 (Or. 2000), ruled that no deception at all is permissible, by a private or a government lawyer, even rejecting proposed carve-outs for government or civil rights investigations, stating,

“The Bar contends that whether there is or ought to be a prosecutorial or some other exception to the disciplinary rules is not an issue in this case. Technically, the Bar is correct. However, the issue lies at the heart of this case, and to ignore it here would be to leave unresolved a matter that is vexing to the Bar, government lawyers, and lawyers in the private practice of law. A clear answer from this court regarding exceptions to the disciplinary rules is in order.

As members of the Bar ourselves -- some of whom have prior experience as government lawyers and some of whom have prior experience in private practice -- this court is aware that there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of the law, are useful means for uncovering unlawful and unfair practices, and that lawyers in both the public and private sectors have relied on such tactics. However, . . . [f]aithful adherence to the wording of [the analog of Pennsylvania’s Rule 8.4], and this court’s case law does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements. In our view, this court should not create an exception to the rules by judicial decree.” The opinion can be found at <http://www.publications.ojd.state.or.us/S45801.htm>.

Following the Gatti ruling, Oregon’s Rule 8.4 was changed. It now provides:

- (a) It is professional misconduct for a lawyer to: . . . (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.
- (b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitu-

tional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. 'Covert activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. 'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

Iowa has retained the old Rule 8.4, but adopted a comment interpreting the Rule to permit the kind of exception allowed by Oregon.

The Committee also refers the reader to two law review articles collecting other authorities on the issue. See Barry Temkin, "Deception in Undercover Investigations: Conduct Based v. Status Based Ethical Analysis," 32 Seattle U. L. Rev. 123 (2008), and David B. Isbell & Lucantonio N. Salvi "Ethical Responsibilities of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation under Model Rules of Professional Conduct," 8 Geo. J. Legal Ethics 791 (Summer 1995).

Finally, the inquirer also requested the Committee's opinion as to whether or not, if he obtained the information in the manner described, he could use it in the litigation. The Committee believes that issue is beyond the scope of its charge. If the inquirer disregards the views of the Committee and obtains the information, or if he obtains it in any other fashion, 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.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.