

Lawyers Mutual

www.lmick.com

THE

RISK MANAGER

A quarterly newsletter by Lawyers Mutual Insurance Company of Kentucky

SPRING 2012
Volume 23, Issue 2

RISK MANAGING INTERNET SOCIAL NETWORK INVESTIGATIONS

Background:

As the Internet evolved, frequent questions arose about how the Rules of Professional Conduct apply to its use and whether the Rules required significant modification to respond to the dramatic change in how legal service is now delivered. Fairly quickly it was realized that the Rules apply to Internet communications just as they apply to any other form of communication with clients, parties, witnesses, and the public without extensive change. Over the last several years many jurisdictions issued ethics and court opinions on use of the Internet by lawyers that addressed advertising, solicitation, confidentiality, off-site storage of confidential information, lawyer websites, lawyer blogs, e-mail, and electronic client files. While we might wish for more Kentucky authority on some of these issues, there is considerable secondary authority that provides useful guidance for Kentucky lawyers – and when in doubt call the KBA Ethics Hotline.

Along with these developments it soon became obvious what a useful method for investigation the Internet is. Google may be the best means of investigation ever invented followed by websites, blogs, and social networks. It is clear that it is permissible to investigate on the Internet by going to any publicly accessible online location. In fact, it may be negligent not to do so. In one case an appellate court criticized a lawyer and ordered a new trial for failing to perform Internet research on a juror that would have showed he lied about prior jury service (*Johnson v. McCullough*, 306 S.W. 3d 551 (Mo. 2010)).

The Risks of Investigating Social Network Sites

Currently, the most sensitive issue concerning Internet investigations is the propriety of accessing social network sites such as Facebook to learn as much as possible about the targeted person. A useful definition of social network is:

Social networks are internet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to “friends” – those who have specifically sent a computerized request to view their profile page which the user has accepted. Examples of currently popular social networks include Facebook, Twitter, MySpace and LinkedIn. (*Formal Opinion 2010-2: Obtaining Evidence From Social Networking Websites*, New York City Bar Assoc.)

Four recent ethics opinions from other jurisdictions provide useful guidance on the professional responsibility considerations in accessing social network sites in the context of “friending” on Facebook. These opinions offer guidance that is equally applicable to other sites that have privacy protection. What follows is a review of these opinions highlighting the considerations that lawyers must take into account before deciding to access a social network. The applicable

continued

24
SINCE 1987

*“The test of
a vocation is
the love of the
drudgery it
involves.”*

*Logan Pearsall
Smith*

continued from page 1

Kentucky Rules of Professional Conduct are consistent with the rules applied in the opinions and 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(5.3) Responsibilities Regarding Nonlawyer Assistants
- SCR 3.130(8.4) Misconduct
 - 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;
- SCR 3.130(3.5) Impartiality and Decorum of the Tribunal,

Friending a Represented Party

- It is uniformly agreed that it makes no difference what form of contact a lawyer makes with a represented party – either direct or indirect – Rule 4.2 is violated. This is true whether a lawyer or an agent, such as a paralegal or investigator, in person or on the Internet makes the contact. See Rules 5.3 and 8.4(a).
- The violation is not overcome by arguments that a “friend request is not about the subject of the representation because it does not refer to the issues raised by the representation.” The motive behind the request establishes the requisite connection to the representation to trigger Rule 4.2. (*San Diego County Bar Legal Ethics Committee Opinion 2011-2 (5/24/2011)*).
- The violation is not overcome by the argument that friending a represented opposing party is the same as accessing the public website of an opposing party.

The very reason an attorney must make a friend request here is because obtaining the information on the Facebook page, to which a user may restrict access, is unavailable without first obtaining permission from the person posting the information on his social media page. It is that restricted access that leads an attorney to believe that the information will be less filtered than information a user ... may post in contexts to which access is unlimited. Nothing blocks an attorney from accessing a

represented party’s public Facebook page. Such access requires no communication to, or permission from, the represented party, even though the attorney’s motive for reviewing the page is the same as his motive in making a friend request.

The New York State Bar Association recently has reached the same conclusion. (NYSBA Ethics Opinion 843 (2010).) The Bar concluded that New York’s prohibition on attorney ex parte contact with a represented person does not prohibit an attorney from viewing and accessing the social media page of an adverse party to secure information about the party for use in the lawsuit as long as “the lawyer does not ‘friend’ the party and instead relies on public pages posted by the party that are accessible to all members in the network.” (*San Diego County Bar Legal Ethics Committee Opinion 2011-2 (5/24/2011)*).

Friending a Witness

The Philadelphia Bar Association Professional Guidance Committee in Opinion 2009-02 (3/2009) considered the question whether a lawyer could use a third person to friend a deposed and unrepresented witness favorable to the adverse party on Facebook. The third person would offer only truthful information (e.g., her real name), but would not reveal that the real purpose of the request was to acquire impeaching information for use in the litigation.

- First, the Committee found that a lawyer using a third person for friending is responsible for the third person’s conduct under Rule 8.4(a), Misconduct, that prohibits violating or attempting to violate the Rules of Professional Conduct through the acts of another.
- Second, the Committee found that the proposed friending violated Rule 8.4(c), Misconduct, because the communication 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.”

continued

“If the world were a logical place, men would ride side-saddle.”

Rita Mae Brown

continued from page 2

- Finally, the Committee concluded that the proposed conduct violated Rule 4.1, Truthfulness in Statements to Others.

Friending Unrepresented Potential Witnesses

New York City Bar Association Formal Opinion 2010-2: Obtaining Evidence From Social Networking Websites, considered friending in the context of contacting unrepresented persons to obtain information useful in litigation.

- The question considered was: "... whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively "deceptive" behavior to "friend" potential witnesses."
- The opinion, citing Rules 4.1, 5.3, and 8.4(a) and (c), concluded that: "We believe these Rules are violated whenever an attorney "friends" an individual under false pretenses to obtain evidence from a social networking website. Rather than engage in "trickery," lawyers can -- and should -- seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful "friending" of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line."

Internet Investigation Of Juror Internet and Social Networking Postings

One of the most sensitive uses of Internet investigations concerns jurors. Kentucky Rule 3.5, Impartiality and Decorum of the Tribunal, provides this guidance on juror contact:

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;
- (d) engage in conduct intended to disrupt a tribunal.

One ethics opinion addresses this issue under the heading of: Lawyer investigation of juror Internet and social networking postings during conduct of trial (*New York City Lawyers Association Committee On Professional Ethics Formal Opinion No.: 743,5/18/2011*). Those parts of the opinion that are of potential use to Kentucky lawyers are:

- "It is proper and ethical under RPC 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to "friend" jurors, subscribe to their Twitter accounts, send tweets to jurors or otherwise contact them."
- "During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror, but must not "friend," email, send tweets to jurors or otherwise communicate in any way with the juror, or act in any way by which the juror becomes aware of the monitoring."
- The Committee noted that avoiding juror awareness of monitoring is more difficult than it appears: "For example, as of this writing, Twitter apparently conveys a message to the account holder when a new person starts to "follow" the account, and the social networking site LinkedIn provides a function that allows a user to see who has recently viewed the user's profile. This opinion is intended to apply to whatever technologies now exist or may be developed that enable the account holder to learn the identity of a visitor."
- "Moreover, the lawyer may not make any misrepresentations or engage in deceit, directly or indirectly, in reviewing juror social networking sites."

continued

"Of all the disguises truth assumes, fact is the most misleading."

Elizabeth Bibesco

Lawyers Mutual understands your business. Other companies just want your business.



In-house counsel from left to right: Pete Gullett, Jane Broadwater Long, Del O'Roark, Bob Breetz

Lawyers Mutual's Benefits:

- Managed by a Board of experienced Kentucky lawyers
- Excellent risk management programs
- Premiums are tailored to Kentucky legal experience ONLY – not a national pool
- Up to \$10,000 for attorney fees in defending a bar complaint (outside of policy limits) per policy period
- \$500 loss of earning, for each named insured, each day when attending a trial, arbitration, mediation or deposition up to \$10,000 (outside of policy limits) per policy period
- No charge for public official endorsement (County Attorney, Master Commissioner, Commonwealth Attorney)
- Coverage for acts, errors, and omissions anywhere in the world
- Free extended reporting period endorsement ("tail") coverage provided upon death or disability
- Free extended reporting period endorsement ("tail") coverage for retiring attorneys who have been with Lawyers Mutual for five consecutive years
- Preventive legal advice and claims repair
- Four Kentucky lawyers with proven expertise and experience lead the team

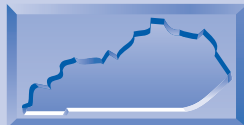
Stop shopping rates and start shopping who can represent you best.

For a complete list of our policy features call Nancy Meyers or visit our Web site to discover what Lawyers Mutual can do for you.

Apply Online with our Quick Quote!

323 W. Main St., Ste 600 • Louisville, KY 40202

502.568.6100 • 800.800.6101 • www.lmick.com • Meyers@lmick.com



Lawyers Mutual
www.lmick.com

Lord Salisbury in a letter to Lord Lytton, Viceroy of India, June 15, 1887:

If I took your gloomy view, I should commence immediate inquiries as to the most painless form of suicide. But I think you listen too much to soldiers. No lesson seems to be so deeply inculcated by the experience of life as that you should never trust the experts. If you believe the doctors, nothing is wholesome; if you believe the theologians, nothing is innocent; if you believe the soldiers nothing is safe. They all require their strong wine diluted by a very large admixture of insipid common sense.

continued from page 3

Conclusion

While other jurisdiction ethics opinions do not substitute for Kentucky authority, the ones covered in this article contain thoughtful consideration of Internet Social Network investigations and reach reasonable conclusions. At a minimum they are a good place to start in researching the professional responsibility requirements for a Kentucky lawyer conducting an Internet Social Network investigation. When in doubt take advantage of the KBA Ethics Hotline. Always keep in mind that an Internet investigation found to be fraudulent might violate criminal law as well as expose a lawyer to civil tort actions for fraud and deceit.

For an overall consideration of the ethics of lawyer investigations you may find the two-part KBA Bench & Bar article “The Ethics of Civil Practice Investigations” appearing in the September and November 2007 issues helpful. The article considers these three questions”

- Are the methods of investigation legal?
- Are the methods of investigation ethical?
- Are the methods of investigation smart?

It is available on Lawyers Mutual’s website at lmick.com. Click on Resources, Bench and Bar Articles, and select the two-part article.

Do You Know the Ethics Rules for Increasing Fees During a Representation?

Avoid Fee Disputes and Malpractice Claims by Carefully Following the Rules

The representation has now dragged on for over three years. It has proven much more time consuming and expensive to practice because of changed circumstances not contemplated at the time the matter was accepted and the fee agreed. Are you stuck with the original fee agreement or is there a way to increase fees without violating fiduciary duties and aggravating the client resulting in a fee dispute and malpractice claim?

Recently published ABA Formal Opinion 11-458, *Changing Fee Arrangements During Representation* (8/4/2011), answers this question with a comprehensive analysis of the issues and provides guidance on the requirements for properly increasing fees mid-stream. What follows is an extract of the opinion’s key points for

your consideration. Google the opinion cite for the full text (*last viewed 3/5/2012*).

Basic Rule: After a representation is accepted and a fee agreement reached, subsequent change to the fee agreement is regarded with great suspicion. Any fee agreement not made close to acceptance of a matter carries an extra burden of justification. Some of the reasons for this burden are that changing lawyers during a representation can be difficult and expensive for a client; and the client may fear the lawyer will resent a refusal to change the fee agreement.

Mid-Representation Fee Changes Are Permissible: Fee changes during a representation are recognized in the Rules of Professional Conduct. Kentucky Rule 1.5(b) provides: “Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.” This does not mean, however, that lawyers are free to change fees by merely giving notice of an increase.

Factors to Consider When Increasing Fees During a Representation:

- Reasonableness: Modification of an existing fee agreement must pass the same test of reasonableness required at the inception of a representation. Reasonableness is tested “in relation to the circumstances at the time of modification.” Modifications must be “...fairly negotiated and not the result of undue influence or coercion by the lawyer.”
- Communication: “Rule 1.4(b) provides that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. An explanation of the lawyer’s proposed modification of a fee arrangement, including the advice that the client need not agree to pay the modified fee to have the lawyer continue the representation, is necessary to enable the client to make an informed decision about the client’s ability and willingness to pay the modified fee for continued representation.”
- Client Acceptance: Mid-representation fee changes must be accepted by the client.

continued

“The best way to remember your anniversary is to forget it once.”

Anonymous



Waterfront Plaza
323 West Main Street, Suite 600
Louisville, KY 40202

This newsletter is a periodic publication of Lawyers Mutual Insurance Co. of Kentucky. The contents are intended for general information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. It is not the intent of this newsletter to establish an attorney's standard of due care for a particular situation. Rather, it is our intent to advise our insureds to act in a manner which may be well above the standard of due care in order to avoid claims having merit as well as those without merit.

Malpractice Avoidance Update

**Member National Association of Bar
Related Insurance Companies**

For more information about Lawyers Mutual,
call **(502) 568-6100** or KY wats **1-800-800-6101**
or visit our Website at **www.lmick.com**

Board of Directors

RUTH H. BAXTER
Carrollton

BRUCE K. DAVIS
Lexington

GLENN D. DENTON
Paducah

CHARLES E. "BUZZ" ENGLISH, JR.
Bowling Green

MARGARET E. KEANE
Louisville

ANNE MILTON McMILLIN
Louisville

JOHN G. McNEILL
Lexington

DUSTIN E. MEEK
Louisville

ESCU L. MOORE, III
Lexington

W. DOUGLAS MYERS
Hopkinsville

JOHN G. PRATHER, JR.
Somerset

MARCIA MILBY RIDINGS
London

BEVERLY R. STORM
Covington

DANIEL P. STRATTON
Pikeville

MARCIA L. WIREMAN
Jackson

STEPHEN D. WOLNITZEK
Covington

DAVID L. YEWELL
Owensboro

Newsletter Editor:
DEL O'ROARK

continued from page 5

Do You Know the Ethics Rules for Increasing Fees During a Representation?

Special Situations:

- It is permissible to include in a letter of engagement periodic billing rate increases (often annually) provided the client is adequately informed of these fee terms.
- Lawyers and clients may convert an hourly fee arrangement to a contingency fee arrangement or vice versa by carefully complying with the applicable fee rules.
- If a fee modification involves a lawyer acquiring an interest in a client business, property, or other nonmonetary property, Rule 1.8(a) covering business transactions with clients must be followed.

No client is going to be happy with a fee increase during the representation. If you must increase fees, carefully follow the ethical requirements. Avoid a fee dispute if at all possible. There is no surer way to provoke a malpractice claim.

2012 ANNUAL POLICYHOLDERS' MEETING

The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 8:00 am, Wednesday, June 6 in the Nunn Room, Galt House East, Louisville, KY. Included in the items of business are the election of a class of the Board of Directors and a report on Company operations. Proxy materials will be mailed to policyholders prior to the meeting. We urge all policyholders to return their proxy and to attend the meeting