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Colorado Ethics Committee Issues New Guidance On The Use Of Social Media For Investigative Purposes

The Colorado Bar Association Ethics Committee recently clarified the ethical boundaries associated with attorney use of social media for litigation. Formal Opinion 127 (Opinion), issued in September 2015, addresses certain ethical issues that arise when lawyers search social media for information regarding witnesses, jurors, opposing parties, opposing counsel, and judges. It further addresses circumstances under which attorneys may access the “restricted” portions of an individual’s social media profile.

The Opinion confirmed that a lawyer may view the public portion of an individual’s social media profile as well as any public posts made by a person through social media, but a lawyer acting on behalf of a client may not request permission (e.g., “friend”) to view a restricted portion of an unrepresented individual’s social media profile or website without first identifying himself as a lawyer and disclosing the general nature of the matter in which the lawyer represents the client. In certain circumstances, this may include advising the individual that the attorney’s interests are or may be adverse to those of the individual. When a lawyer knows that an individual is represented by counsel, the lawyer must be mindful not to communicate with the person, just as attorneys must be mindful when communicating, outside social media, with someone known to be represented by counsel. For the same reason, a lawyer must not accept a social media invite or “friend” request by a represented party or individual during the pendency of a case. If the lawyer and represented individual are already part of the same network and have access to one another’s restricted pages, the lawyer should avoid posting communications related to the litigation that may be viewed by the represented party.

Additionally, the Opinion confirms that any investigations conducted through social media must comply with the ethical rules prohibiting attorneys from making a false statement of material fact or law to a third person or engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Accordingly, lawyers may not use deception, including “pretexting” and other forms of trickery, to gain access to a restricted portion of a social media profile or website. This would include donning an alias and “friending” someone on Facebook under that alias in order to gain access to their restricted information.

Importantly, the committee clarified that deceitful conduct by a lawyer “is never justified, even in exigent circumstances.” Lawyers also may not circumvent the prohibition against accessing social media content through means of deception by assigning investigative tasks to subordinates or non-attorneys.

While the Opinion does not differ significantly from current expectations of many in the legal community, it gives practitioners clearer guidance when litigation and social media intersect.

The full text of the Opinion can be found at: http://www.cobar.org/tcl/tcl_articles.cfm?articleid=9073.

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