

FORMAL OPINION NO 2013-189
Accessing Information about Third Parties
through a Social Networking Website

Facts:

Lawyer wishes to investigate an opposing party, a witness, or a juror by accessing the person's social networking website. While viewing the publicly available information on the website, Lawyer learns that there is additional information that the person has kept from public view through privacy settings and that is available by submitting a request through the person's website.

Questions:

1. May Lawyer review a person's publicly available information on a social networking website?
2. May Lawyer, or an agent on behalf of Lawyer, request access to a person's nonpublic information?
3. May Lawyer, or an agent on behalf of Lawyer, use a computer username or other alias that does not identify Lawyer when requesting permission from the account holder to view nonpublic information?

Conclusions:

1. Yes.
2. Yes, qualified.
3. No, qualified.

Discussion:

1. *Lawyer may access publicly available information on a social networking website.*¹

Oregon RPC 4.2 provides:

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

- (a) the lawyer has the prior consent of a lawyer representing such other person;
- (b) the lawyer is authorized by law or by court order to do so; or
- (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Accessing the publicly available information on a person's social networking website is not a "communication" prohibited by Oregon RPC 4.2. OSB Formal Ethics Op No 2005-164 discusses the propriety of a lawyer accessing the public portions of an adversary's website and concludes that doing so is not "communicating" with the site owner within the meaning of Oregon RPC 4.2. The Opinion compared accessing a website to reading a magazine article or purchasing a book written by an adversary. The same analysis applies to publicly available information on a person's social networking web pages.²

¹ Although Facebook, MySpace, and Twitter are current popular social networking websites, this opinion is meant to apply to any similar social networking websites.

² This analysis is not limited to adversaries in litigation or transactional matters; it applies to a lawyer who is accessing the publicly available information of any person. However, caution must be exercised with regard to jurors. Although a lawyer may review a juror's publicly available information on social networking websites, communication with jurors before, during, and after a proceeding is generally prohibited. Accordingly, a lawyer may not send a request to a juror to access nonpublic personal information on a social networking website, nor may a lawyer ask an agent to do so. *See* Oregon RPC 3.5(b) (prohibiting *ex parte* communications with a juror during the proceeding unless authorized to do so by

2. *Lawyer may request access to nonpublic information if the person is not represented by counsel in that matter and no actual representation of disinterest is made by Lawyer.*

To access nonpublic information on a social networking website, a lawyer may need to make a specific request to the holder of the account.³ Typically that is done by clicking a box on the public portion of a person’s social networking website, which triggers an automated notification to the holder of the account asking whether he or she would like to accept the request. Absent actual knowledge that the person is represented by counsel, a direct request for access to the person’s non-public personal information is permissible. OSB Formal Ethics Op No 2005-164.⁴

In doing so, however, Lawyer must be mindful of Oregon RPC 4.3, which regulates communications with unrepresented persons. Oregon RPC 4.3 provides, in pertinent part:

In dealing on behalf of a client or the lawyer’s own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. . . .

law or court order); Oregon RPC 3.5(c) (prohibiting communication with a juror after discharge if (1) the communication is prohibited by law 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); Oregon RPC 8.4(a)(4) (prohibiting conduct prejudicial to the administration of justice). *See, generally, ABA/BNA Lawyers’ Manual on Professional Conduct* § 61:808 and cases cited therein.

³ This is sometimes called “friending,” although it may go by different names on different services, including “following” and “subscribing.”

⁴ See, for example, New York City Bar Formal Ethics Op No 2010-2, which concludes that a lawyer “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.”

The purpose of the rule is to avoid the possibility that a nonlawyer will believe lawyers “carry special authority” and that a nonlawyer will be “inappropriately deferential” to someone else’s lawyer. *Apple Corps Ltd. v. Int’l Collectors Soc.*, 15 F Supp2d 456 (DNJ 1998) (finding no violation of New Jersey RPC 4.3 by lawyers and lawyers’ investigators posing as customers to monitor compliance with a consent order).⁵ A simple request to access nonpublic information does not imply that Lawyer is “disinterested” in the pending legal matter. On the contrary, it suggests that Lawyer is interested in the person’s social networking information, although for an unidentified purpose.

Similarly, Lawyer’s request for access to nonpublic information does not in and of itself make a representation about the Lawyer’s role. In the context of social networking websites, the holder of the account has full control over who views the information available on his or her pages. The holder of the account may allow access to his or her social network to the general public or may decide to place some, or all, of that information behind “privacy settings,” which restrict who has access to that information. The account holder can accept or reject requests for access. Accordingly, the holder’s failure to inquire further about the identity or purpose of unknown access requestors is not the equivalent of misunderstanding Lawyer’s role in the matter.⁶ By contrast, if the holder of the account asks for additional information to identify Lawyer, or if Lawyer has some other reason to believe that the person misunderstands

⁵ See also ABA Model RPC 4.3 cmt [1] (“An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client.”). Cf. *In re Gatti*, 330 Or 517, 8 P3d 966 (2000), in which the court declined to find an “investigatory exception” and disciplined a lawyer who used false identities to investigate an alleged insurance scheme. Oregon RPC 8.4(b), discussed below, was adopted to address concerns about the *Gatti* decision.

⁶ Cf. *Murphy v. Perger* [2007] O.J. No 5511, (S.C.J.) (Ontario, Canada) (requiring personal injury plaintiff to produce contents of Facebook pages, noting that “[t]he plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.”)

Lawyer's role, Lawyer must provide the additional information or withdraw the request.

If Lawyer has actual knowledge that the holder of the account is represented by counsel on the subject of the matter, Oregon RPC 4.2 prohibits Lawyer from making the request except through the person's counsel or with the counsel's prior consent.⁷ *See* OSB Formal Ethics Op No 2005-80 (rev 2016) (discussing the extent to which certain employees of organizations are deemed represented for purposes of Oregon RPC 4.2).

3. *Lawyer may not advise or supervise the use of deception in obtaining access to nonpublic information unless Oregon RPC 8.4(b) applies.*

Oregon RPC 8.4(a)(3) prohibits a lawyer from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.”⁸ *See also* Oregon RPC 4.1(a) (prohibiting a lawyer from knowingly making a false statement of material fact to a third person in the course of representing a client). Accordingly, Lawyer may not engage in subterfuge designed to shield Lawyer’s identity from the person when making the request.⁹

As an exception to Oregon RPC 8.4(a)(3), Oregon RPC 8.4(b) allows 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 constitutional rights, provided the lawyer’s conduct is otherwise in compliance with these Rules of Professional Conduct.” For purposes of the rule “covert activity” means:

⁷ *In re Newell*, 348 Or 396, 409, 234 P3d 967 (2010) (reprimanding lawyer who communicated on “subject of the representation”).

⁸ *See In re Carpenter*, 337 Or 226, 95 P3d 203 (2004) (lawyer received public reprimand after assuming false identity on social media website).

⁹ *See* Oregon RPC 8.4(a), which prohibits a lawyer from violating the Oregon Rules of Professional Conduct (RPCs), from assisting or inducing another to do so, or from violating the RPCs “through the acts of another.”

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[A]n 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.

In the limited instances allowed by Oregon RPC 8.4(b) (more fully explicated in OSB Formal Ethics Op No 2005-173), Lawyer may advise or supervise another’s deception to access a person’s nonpublic information on a social networking website.

Approved by Board of Governors, February 2013.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.5-1 to § 8.5-2 (communications with persons other than the client), § 8.11 (conduct prejudicial to the administration of justice), § 21.3-2(a) (prohibition against misleading conduct) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 11, 98, 99–100, 103 (2000) (supplemented periodically).