

**Formal Ethics Opinion
KENTUCKY BAR ASSOCIATION**

**Ethics Opinion KBA E-447
Issued: January 18, 2019**

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

Subject: Disclosure of Information on Social Media

Question #1: In a blog or other social media, may a lawyer reveal information relating to the representation of a current or former client without the client's consent?

Answer: No

Authority: SCR 3.130 (1.9 (c)(2)) and comment 16; (1.6(a)) and comment 4; KBA E-253; Hudson, Client Consent is Key, May 2018 ABA Journal, p. 24; *In re Smith*, 991 N.E.2d 106 (Ind. 2013); *Office of Lawyer Regulation v. Pershek*, 798 N.W.2d 879 (Wis. 2011);

Question #2: May an attorney reveal the identity of a current or former client in a blog or other social media without the client's consent?

Answer: No. See opinion

Authority: KBA E-253.

Question #3: Is there an exception to (1) or (2) for information contained in a public record?

Answer: No. See opinion.

Authority: SCR 3.130(1.6(a)) and comment 4; KBA E-253; Hudson, Client Consent is Key, May 2018 ABA Journal, p. 24.

DISCUSSION:

SCR 3.130(1.6(a)) defines confidential information as "information relating to the representation of a client," a broader definition than is found in the ABA Model Code of Professional Responsibility and the Restatement of the Law Governing Lawyers. The Model Code (DR 4-101) and the Restatement (sec. 60) limit lawyers' duty of non-disclosure to communications protected by the attorney-client privilege and information that might work to clients' disadvantage. Rule 1.6(a) of the ABA Model Rules of Professional Conduct, on which SCR 3.130(1.6)(a) is based, is not so limited. Unless one of the exceptions in Rule 1.6(b) applies, Rule 1.6(a) requires a lawyer to obtain client consent before revealing *any* information relating to the client's representation.

In KBA E-253, applying DR 4-101(C) of the Model Code of Professional Responsibility, the Committee opined that, absent consent, a lawyer may reveal names and addresses of clients only: 1) where the information is in the public record as a result of the attorney's representation; or 2) where the circumstances make it obvious that the client does not expect confidentiality as to the existence of the attorney client relationship, or 3) where the client has specifically authorized in writing the release of the information.

In KBA E-253, the Committee opined that a lawyer may reveal a client's name and address only if it is *obvious* that the client does not expect name and address to be confidential. Clients' names and addresses should be presumed to be confidential. While decided under the old Code, KBA E-253 is sensible and, we believe, consistent with prevailing practice.

Without client consent, a lawyer may reveal names and addresses (and the nature of the representation) where *necessary* to facilitate a firm merger or lateral transfer (KBA E-443), and there may be other situations in which a lawyer should be permitted to reveal client information. As examples, in comment h to Section 60 of the Restatement, the American Law Institute cited cooperating with other lawyers with similar issues, for example personal injury lawyers with products liability claims, and "cooperating with reasonable efforts to obtain information about clients and law practice for public purposes such as historical research," for example a biography of a deceased client.

However, there is no justification for revealing information, without consent, about past or present clients in a blog or other social media. In *Office of Lawyer Regulation v. Pershek*, 798 N.W.2d 879 (Wis. 2011), the lawyer was suspended for blogging about her clients; in *In re Smith*, 991 N.E.2d 106 (Ind. 2013), the lawyer was disbarred for writing a book about a former client. The disciplinary cases involve negative disclosures, but the rule against disclosure applies to all information, whether positive, neutral or negative.

Lawyers should be careful in using thinly disguised hypotheticals. "A violation of Rule 1.6(a) is not avoided by describing public commentary as a 'hypothetical' if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical." ABA Formal Op. 480.

A lawyer's duty of confidentiality extends to both current and former clients. SCR 3.130(1.9)(c)(2) requires that a lawyer not reveal information relating to the lawyer's representation of a client except as the Rules would permit or require with respect to a client. Hence, a lawyer may not *reveal* confidential client information even though such information may be contained in a public record. However, a lawyer may *use* information relating to the representation of a former client if the information has become "generally known." See SCR 3.130(1.9)(c)(1) and ABA Formal Opinion 479.

Note To Reader

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