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Will You Be My Friend? Covert Investigations Through Social Media

By Mark J. Fucile
Fucile & Reising LLP

Last year I was involved in a personal injury case that included a large claim for loss of consortium. The plaintiffs presented themselves as a devoted couple. There was only one problem: both of them had posted on various social media sites that they had left their relationship under acrimonious circumstances 10 years before and had not been together since. One of the defense lawyers in the case discovered the postings (which the plaintiffs' lawyer hadn't known about) and used them to devastating effect during their depositions.

This "real life" story underscores the critical role that social media evidence has come to play in many cases today. Social media evidence can generally be obtained through formal discovery as long as it meets the standard criteria for relevance in a particular case. *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387 (E.D. Mich. 2012), and *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. 2010), are recent examples of how social media evidence is handled through formal discovery. *Moreno v. Hanford Sentinel, Inc.*, 91 Cal. Rptr.3d 858 (Cal. App. 2009), contains an equally good discussion on the associated issue of why social media postings usually aren't entitled to any privacy protection that would otherwise preclude discovery.

The most effective use of web postings, however, is often the fruit of informal investigation that doesn't "tip off" an unsuspecting witness or litigation opponent before the trap is "sprung" in a deposition or at trial. In those circumstances, there are two primary ethical concerns: (1) the "no contact" rule, RPC 4.2; and (2) using misrepresentation—sometimes called "pretexting"—to gain access to the information involved, which invokes RPCs 4.1 and 8.4(c). These concerns, in turn, reflect the twin goals of minimizing disciplinary risk and making sure that any useful evidence obtained is not subject to exclusion on the grounds that it was gathered improperly. *In re Korea Shipping Corp.*, 621 F. Supp. 164 (D. Alaska 1985), includes a useful survey of remedies on this last point. In this column, we'll look at both the "no contact" rule and prohibitions on "pretexting."

The "No Contact" Rule

RPC 4.2 prohibits communication with a person that the contacting lawyer "knows to be represented by another lawyer in the matter[.]" Comment 7 to RPC 4.2 notes that the prohibition applies when the contacting lawyer either has actual knowledge of the representation or the requisite actual knowledge can be inferred from the circumstances. Alaska RPC 4.2, which varies slightly from its ABA Model Rule counterpart, specifically includes both represented parties and persons within the scope of its prohibition.

Use of social media, of course, isn't limited to individuals. Corporations also use social media and often have detailed information about themselves and their principals on firm web sites. Alaska Bar Association Ethics Opinion 2011-2 (2011) discusses direct contact with corporate employees. It generally concludes that, as applied to entities, the prohibition applies "only [to] employees who have authority to legally bind the corporation[.]"

The New York and Oregon state bars have both addressed the "no contact" rule in the web and social media contexts. New York Ethics Opinion 843 (2010), is available on the New York State Bar web site at www.nysba.org, and Oregon Formal Ethics Opinion 2005-164 (2005), is available on the Oregon State Bar web site at www.osbar.org. The opinions conclude that simply viewing publically available web pages does not violate their comparable versions of RPC 4.2 because it entails no communication. By contrast, direct "interactive" communication by means of social media or a web site with a represented person on the subject of the representation is generally prohibited under the "no contact" rule.

"Pretexting"

RPC 4.1(a) prohibits lawyers from making "a false statement of material fact . . . to a third person." RPC 8.4(c), in turn, prohibits lawyers from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation[.]"

Moreover, RPC 8.4(a) applies this prohibition to both our own conduct as lawyers

and to “the acts of another” such as someone who works for us. RPC 5.3 emphasizes this last point by generally making lawyers responsible for staff conduct.

Before “pretexting” went electronic, courts and bar associations nationally had already grappled with the question of whether lawyers could misrepresent their identities in the course of investigations or related work. The results were not uniform. Lawyers in *In re Gatti*, 8 P.3d 966 (Or. 2000), and *In re Pautler*, 47 P.3d 1175 (Colo. 2002), were disciplined for conduct held deceptive. By contrast, ethics opinions in Utah (02-05 (2002)) and Virginia (1738 (2000)), among others, reasoned that lawyers were permitted to use deception in conducting otherwise lawful covert investigations. A few, such as *In re Ositis*, 40 P.3d 500 (Or. 2002) (since modified by a rule change, see Oregon Formal Ethics Op. 2005-173 (2005)), extended the prohibition to lawyer supervision of covert investigations by non-lawyers. More, however, such as *Apple Corps, Ltd. v. International Collectors Soc.*, 15 F. Supp.2d 456 (D.N.J. 1998), concluded that supervision was permissible as long as the investigation itself was lawful. Comment 4 to Alaska RPC 8.4, which does not have a counterpart in the ABA Model Rules, strikes a balance by permitting supervision of otherwise lawful “covert activity” while prohibiting direct lawyer participation:

“This rule does not prohibit a lawyer from advising and supervising lawful covert activity in the investigation of violations of criminal law or civil or constitutional rights, provided that the lawyer’s conduct is otherwise in compliance with these rules and that the lawyer in good faith believes

there is a reasonable possibility that a violation of criminal law or civil or constitutional rights has taken place, is taking place, or will take place in the foreseeable future. Though the lawyer may advise and supervise others in the investigation, the lawyer may not participate directly in the lawful covert activity. ‘Covert activity,’ as used in this paragraph, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.”

In the social media context, emerging opinions nationally have taken the general approach that lawyers cannot misrepresent their identities (or intentions) to gain access to the “private” portions of an adversary or witness’s web site or social media page. Ethics opinions from local bar associations in Philadelphia (2009-2 (2009); www.philadelphiabar.org), New York City (2010-2 (2010); www.nycbar.org) and San Diego County (2011-2 (2011); www.sdcba.org) reason that their state versions of RPCs 4.1 and 8.4 prohibit lawyers from affirmatively using deception to gain access to web information that is not otherwise openly available to the public. This is consistent with the Alaska comment noted above. The New York City opinion, however, concluded that a lawyer could make a “friend” request in the lawyer’s own name that did not disclose the reason for making the request. The Philadelphia and San Diego opinions, by contrast, found that even this approach would be deceptive because it would omit the material fact that the only reason the request was being made was to gather potentially damaging information about the recipient. Given the still evolving state of the law in this area, the Philadelphia and San Diego opinions are clearly the “safer” approaches pending further clarification.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.