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Electronic Ethics, Part 1: Friends and Other Strangers

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The "electronic" elements of law practice have become pervasive. In this column and the next, we'll look at some of the ethics issues that accompany the electronic facets of our practices. This month, we'll first focus on new ways we interact with both potential clients and adversaries through web-based social media and then we'll turn to law firm web sites as outbound projections for firm marketing and inbound conduits for communications with prospective clients. In the next installment, we'll examine our duty to protect client confidentiality when communicating or sharing files electronically and when we use off-site electronic storage through "cloud computing."

Social Media

"Social media" ranges from global commercial phenomena such as Facebook to individual blogs run on a shoestring. The emergence of social media raises discrete issues for our interactions with both potential clients and adversaries.

With potential clients, there are two broad concerns: solicitation and inadvertently forming attorney-client relationships.

As to solicitation, RPC 7.3 includes "real-time electronic contact" within its prohibition on direct contact with prospective clients unless one of its exceptions

applies (the person contacted is a lawyer, family, a close friend or a former client). Comment 3 to RPC 7.2, which deals with lawyer marketing generally, notes that the key to the solicitation rule in the electronic context is that the prohibited contact is initiated by the lawyer rather than the prospective client.

As to "inadvertent" relationships, the Washington Supreme Court in *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992), articulated a two-part test for determining whether an attorney-client relationship exists: (1) does the client subjectively believe that the lawyer is representing the client? and (2) is that subjective belief objectively reasonable under the circumstances? *Bohn* makes the point that an attorney-client relationship can be implied from the parties' conduct and that payment of a fee is not controlling. Therefore, if casual electronic conversations evolve into detailed legal advice, the lawyer involved may have inadvertently turned a "friend" into a "client"—with all of the accompanying professional and fiduciary duties an attorney-client relationship entails.

With adversaries, social networking sites can potentially provide a wealth of information ranging from useful background to fodder for devastating cross-examination. When considering social network sites in this context, it is important to draw a distinction between "public" and "private" web pages. "Public" pages are simply there for all to see without any special registration, site approval or other interaction while "private" pages generally require one of these

prerequisites. The distinction is central to analysis of both the "no contact" rule and, if a ruse is used to gain access to private pages, the "misrepresentation" rule.

Although there is not yet direct authority in Washington, other states that have examined the question (*see, e.g.*, New York State Bar Ethics Opinion 843 (2010); Oregon State Bar Ethics Opinion 2005-164 (2005)) have generally concluded that simply viewing the "public" pages on a web site does not violate the "no contact" rule, RPC 4.2. This approach is consistent with Washington RPC 4.2 because, like its ABA Model Rule counterparts in other states, our rule prohibits "communication" with a represented person and simply viewing public pages should not ordinarily be considered "communication." By contrast, direct "interactive" communication with a represented person on the subject of representation is generally prohibited by RPC 4.2 (*see, e.g., In re Haley*, 156 Wn.2d 324, 126 P.3d 1262 (2006) (voicemail); *In re Carmick*, 146 Wn.2d 582, 48 P.3d 311 (2002) (telephone call)). In the entity context, *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984), remains the controlling standard and generally limits the prohibition to entity constituents who are "speaking agents" as defined by applicable evidence law.

On using ruses, emerging opinions nationally (*see, e.g.,* New York City Bar Ethics Opinion 2010-2 (2010); Philadelphia Bar Ethics Opinion 2009-2 (2009)) take the position that a lawyer (or a lawyer's agent) cannot misrepresent

the lawyer's identity to gain access to the "private" portions of an adversary or witness's web site. These opinions rely on state versions of ABA Model Rule 4.1(a), which prohibits lawyers from making false statements to third persons, and ABA Model Rule 8.4(c), which proscribes dishonest conduct. A cautionary note is in order because this question opens the broader discussion of lawyer involvement or supervision of both governmental and nongovernmental covert operations that has generated considerable debate nationally (*see, e.g.*, Oregon State Bar Ethics Opinion 2005-173 (2005) (describing Oregon's tortured path to a covert investigation exception to its version of RPC 8.4); *In re Pautler*, 47 P.3d 1175 (Colo. 2002) (prosecutor disciplined under RPC 8.4(c) for impersonating a public defender in a telephone conversation with a murder suspect)). But, Washington's versions of the rules concerned are also patterned on the corresponding ABA Model Rules and the approach taken in the recent New York City and Philadelphia opinions is generally consistent with "nonelectronic" Washington disciplinary cases (*see, e.g., In re Leahy*, Sept. 12, 2007 Disciplinary Stipulation) (opposing counsel who posed as agent of adversary's insurer violated RPCs 4.1(a) and 8.4(c)) and ethics opinions (*see, e.g.,* WSBA Ethics Advisory Opinion 1415 (1991) (using actor to impersonate "patient" to gather information for impeachment of opposing expert would violate RPCs 4.1(a) and 8.4(c)). Beyond the professional rules, Washington (RCW 9.26A.140) and

federal (18 U.S.C. §1039) law prohibit "pretexting" to obtain telephone records in particular.

Law Firm Websites

In many respects, law firm web sites are like windows. They allow law firms to "see out" by projecting their image to potential clients and many also permit potential clients to "see in" by providing firms with information about potential representation. Each side of the "window" presents unique ethics concerns. The ABA issued a detailed ethics opinion last year, Formal Opinion 10-457, that addresses both sides of the "window."

With "seeing out," the primary regulation is RPC 7.2, the "advertising" rule. RPC 7.2(a) applies specifically to "electronic communication" and "public media" and Comment 3 includes internet marketing within the rule. RPC 7.1, in turn, states the overriding rule that all forms of lawyer marketing must be truthful. The comments to RPC 7.1 counsel that even truthful statements can be misleading if presented in a way that creates unjustified expectations. Therefore, the comments encourage the use of disclaimers so that prospective clients can understand the proper context of the information presented.

With "seeing in," firms should carefully consider if and how they invite direct contact with firm lawyers through the firm's web site. RPC 1.18(a) recognizes a "prospective client" as a "person who discusses with a lawyer the possibility of forming a client-lawyer relationship" and RPC 1.18(b)-(c) accord

prospective clients limited rights of loyalty and confidentiality even if they do not become clients of the firm. Comment 2 to RPC 1.18 notes that a prospective client who simply communicates unilaterally with a lawyer will not ordinarily be entitled to the protections afforded by the rule. Further, RPC 1.18(e) permits a lawyer to "condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter." To address the concerns noted above under *Bohn*, disclaimers can also include a warning that communication via a firm's web site does not in and of itself create an attorney-client relationship.

The practical importance of both kinds of disclaimers was illustrated in *Barton v. U.S. District Court for the Central District of California*, 410 F.3d 1104 (9th Cir. 2005). In *Barton*, a plaintiffs' personal injury firm invited prospective clients to complete an on-line questionnaire about a prescription drug involved in litigation the firm was handling. The on-line form included a disclaimer that no attorney-client relationship was formed by completing the questionnaire but did not include a disclaimer of confidentiality. The Ninth Circuit held that absent a clear disclaimer, the firm would still have a duty of confidentiality to those who submitted the questionnaires. Although decided under California law, the rationale the Ninth Circuit used in *Barton* was very close to the duties now recognized under RPC 1.18. The twin duties of loyalty and confidentiality

recognized by RPC 1.18, unless effectively disclaimed or screened as provided by the rule, may create disqualifying conflicts for the firm even if prospective clients do not actually become clients.

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