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## **Will You Be My Friend? Covert Investigations on the Web**

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Most companies and even many individuals now have their own web sites or the equivalent. Company web sites often contain a wealth of information and some have “interactive” components where, for example, visitors can converse with sales representatives. Individuals who use Facebook or similar social media sometimes share an even more revealing spectrum of information about themselves and their activities. All that adds up to a potent source of information about legal adversaries and witnesses (both expert and lay). Although both are subject to formal discovery through, respectively, document requests or subpoenas, sometimes lawyers favor stealth. The element of stealth can have both strategic and tactical applications. Whether in a civil or criminal setting, covert investigations may play a central role in overall strategy for determining whether a civil or criminal case should go forward. Tactically, the roots of a devastating cross-examination are often firmly planted in surprise.

Conducting covert investigations on the web can touch on two central rules: the “no contact” rule, RPC 4.2; and Oregon’s unique exception to the “misrepresentation” rule, RPC 8.4(b). These rules can be difficult to apply in the investigative context. The Oregon State Bar, however, has comprehensive ethics opinions addressing both, Formal Ethics Opinion 2005-164 on the former

and Formal Ethics Opinion 2005-173 on the latter. Both are available on the OSB's web site at [www.osbar.org](http://www.osbar.org). In this column, we'll look at both rules.

***The “No Contact” Rule on the Web***

RPC 4.2 prohibits a lawyer (or someone working for the lawyer) from communicating with a person represented on the matter involved. Focusing on the word “communicate,” Formal Ethics Opinion 2005-164 concludes that simply viewing the “public” web pages of even a represented opponent does not violate the “no contact” rule because there is no “communication.” By contrast, 2005-164 counsels that “interactive” communication with a represented opponent (or witness) is prohibited. With opposing entities, 2005-164 notes that even nonmanagement employees are generally construed to fall within corporate counsel's representation (and, therefore, are “off limits” under RPC 4.2) if the contacting lawyer is seeking to hold the entity liable through the conduct of the nonmanagement employees contacted.

To illustrate, a lawyer investigating an allegedly fraudulent investment scheme by a represented opponent might go to the opponent's web site to gather general information about how the investment is marketed. Under 2005-164, simply clicking through the opponent's public web pages is permitted because it doesn't involve any communication. By contrast, questioning the opponent online through “live chat” to develop evidence holding the opponent liable for the scheme is prohibited under 2005-164.

***Misrepresentation in Covert Investigations***

Covert investigations often use misrepresentation to gain access to information. In the web context, misrepresenting one's identity to "friend" someone and thereby gain access to an otherwise unavailable "private" set of web pages is a ready example. The ethics of such conduct is currently a topic of lively debate nationally. In an odd twist, however, Oregon is "ahead of the curve" on this issue as a result of a pair of controversial disciplinary decisions in 2000 and 2002 that spawned a lawsuit against the Oregon State Bar by the federal government, special legislation to protect prosecutors in the form of ORS 9.528 and eventually an exception to the misrepresentation rule that is now found at RPC 8.4(b).

RPC 8.4(b), which has no counterpart in the ABA Model Rules, reads:

"[I]t shall not be professional misconduct for 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. 'Covert activity,' as used in this rule, means an 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."

Formal Ethics Opinion 2005-173 summarizes the history and focus of the rule and includes a number of discussion scenarios to illuminate its application.

Although both the rule and the opinion were developed for the "real" world, it

should apply with equal measure to the “virtual” world. An important qualifier at least as it applies to civil matters not subject to ORS 9.528 (which is broader in its exemption for prosecutors and others involved in public law enforcement) is that the exemption applies to lawyer *supervision* of covert investigations rather than direct lawyer *participation*. But, under RPC 8.4(b), lawyers are permitted to supervise investigators undertaking otherwise lawful covert activity.

#### **ABOUT THE AUTHOR**

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