

ELECTRONIC ETHICS 2012

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OVERVIEW

- ▶ **Discovery & Social Media**
- ▶ **Metadata**
- ▶ **Cloud Computing**

LOGISTICS

- ▶ **Rules and ethics opinions cited are available on the Oregon State Bar web site at: www.osbar.org**
- ▶ **Questions**

DISCOVERY & SOCIAL MEDIA

- ▶ **Can be a powerful tool**
- ▶ **But, there are also some distinct constraints**

DISCOVERY & SOCIAL MEDIA

- ▶ **Begin with an example**
- ▶ **Follow with the constraints**

DISCOVERY & SOCIAL MEDIA

The Example

- ▶ **Product liability case**
- ▶ **“Husband” and “Wife” were co-plaintiffs**
- ▶ **Included loss of consortium claim**
- ▶ **Presented themselves as a devoted couple**
- ▶ **Turned out “Husband” and “Wife” hadn’t lived together for over 10 years**

DISCOVERY & SOCIAL MEDIA

The Example

- ▶ **Both “Husband” and “Wife” had Facebook pages with essentially no privacy settings**
- ▶ **“Wife” also posted comments on “Dr. Phil’s” web site**
- ▶ **Excerpts from “Husband’s” video deposition**

DISCOVERY & SOCIAL MEDIA

The Example

“Husband’s” Facebook Page

Q. Mr. [Husband], I’m handing you what I marked as Exhibit 13 . . . That’s your Facebook page, right?

A. Yeah. It looks like it.

DISCOVERY & SOCIAL MEDIA

The Example

“Husband’s” Facebook Page

Q. [T]here’s a spot there that says “interests”?

A. . . . Interested in, yes.

Q. And it says what?

A. Women.

DISCOVERY & SOCIAL MEDIA

The Example

“Wife’s” Dr. Phil Posting

Q. I want to show you Exhibit 10 . . . the posting for May 22, 2006, at 2:31 p.m.

A. Okay...

Q. Would you please read to the ladies and gentlemen of the jury how “Wife” felt about you?

DISCOVERY & SOCIAL MEDIA

The Example

“Wife’s” Dr. Phil Posting

- A. Okay. It says “I raised a husband and have finally escaped after 35 years. It is devastating to him to lose another mommy . . . [I am] so glad I got away.”

DISCOVERY & SOCIAL MEDIA

The Constraints

- ▶ The “no contact” rule: RPC 4.2
- ▶ Misrepresentations in covert investigations:
RPC 8.4(b)

DISCOVERY & SOCIAL MEDIA

The Constraints

The “No Contact” Rule

- ▶ **RPC 4.2**
- ▶ **OSB Formal Ethics Opinion 2005-164**

DISCOVERY & SOCIAL MEDIA

The Constraints

The “No Contact” Rule

- ▶ Simply viewing static web pages: Permitted
- ▶ Interactive communication with a represented opponent: Prohibited

DISCOVERY & SOCIAL MEDIA

The Constraints

Misrepresentations in Covert Investigations

- ▶ **RPC 8.4(b)**
- ▶ **OSB Formal Ethics Opinion 2005-173**

DISCOVERY & SOCIAL MEDIA

The Constraints

Misrepresentations in Covert Investigations

- ▶ *Lawyer supervision* of lawful covert investigations involving misrepresentation: Permitted
- ▶ *Lawyer participation* of lawful covert investigations involving misrepresentation: Prohibited

METADATA

- ▶ **“Data about data”**
- ▶ **OSB Formal Ethics
Opinion 2011-187**

METADATA

- ▶ **2011-187 looks at duties in a non-litigation setting**
- ▶ **ORCP 43 now includes “electronically stored information”**
- ▶ **RPC 3.4 addresses discovery requests and responses and generally requires adherence to corresponding procedural rules**

METADATA

The Sender

- ▶ **RPCs 1.1 and 1.6: Twin duties to act competently to protect confidentiality**
- ▶ **Duty to understand and use technology to protect client confidentiality**

METADATA

The Receiver

- ▶ **RPC 4.4(b): Notification**
- ▶ **RPC 4.4(b): Privilege waiver left to evidence law**
- ▶ **Sweeping indictment of “data mining”**

CLOUD COMPUTING

- ▶ **The evolution of
“off site storage”**
- ▶ **OSB Formal Ethics
Opinion 2011-188**

CLOUD COMPUTING

- ▶ **Confidentiality**
- ▶ **Coverage**

CLOUD COMPUTING

Confidentiality

- ▶ **RPCs 1.1 and 1.6: Twin duties to act competently to protect confidentiality**
- ▶ **Duty to understand and use technology to protect client confidentiality**
- ▶ **Includes a duty to adequately research security measures used by an outside vendor**

CLOUD COMPUTING

Coverage

Exclusion 22

“This Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM.”

FOR FURTHER READING

- ▶ **September 2011 Multnomah Lawyer:
“Will You Be My Friend? Covert Investigations
on the Web”**
- ▶ **June 2012 Multnomah Lawyer:
“Metadata: The (Really) Fine Print”**
- ▶ **July-August 2012 Multnomah Lawyer:
“Cloud Computing: Confidentiality and
Coverage”**

QUESTIONS?