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Electronic Ambush: Covert Investigations through Social Media

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I was recently 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 public social media sites that they had left their relationship 10 years before under very bitter circumstances. One of the defense lawyers discovered the postings (which the plaintiffs' lawyer hadn't known about) and used them to devastating effect during their video depositions.

This illustration highlights the crucial role that social media evidence can play in many cases today. This example also highlights that although social media evidence is generally subject to formal discovery (as long as it is relevant), it can often be at its most effective if it is gathered silently and sprung on an unsuspecting deposition or trial witness in an "electronic ambush."

The Oregon State Bar earlier this year provided important guidance on gathering social media evidence in Formal Ethics Opinion 2013-189. This opinion, in turn, built on two earlier OSB ethics opinions: 2005-164, which addressed obtaining evidence from web sites; and 2005-173, which discusses lawyer participation and supervision in covert investigations generally. All three opinions are available on the OSB web site at www.osbar.org. Opinion 2013-189

first addresses the “no contact” rule—RPC 4.2—and then turns to Oregon’s special rule on the use of misrepresentations in covert investigations—RPC 8.4(b). We’ll do the same.

“No Contact” Rule

Opinion 2013-189 reaches the same two conclusions on social media that Opinion 2005-164 did on web sites. First, simply viewing a static web page that is publicly available is not a “communication” within the meaning of RPC 4.2. Both opinions use the analogy of reading a magazine article or book written by an adversary. Second, by contrast, RPC 4.2 prohibits interactive communication with a person represented on the subject involved (whether a party or a witness). Significantly, Opinion 2013-189 concludes that the prohibition extends to interactive requests for “friending” and the like with a person the lawyer knows to be represented on the subject involved. As Opinion 2013-189 notes, the “no contact” rule also applies to represented organizations (and OSB Formal Ethics Opinion 2005-80 discusses this topic in detail).

By its terms, RPC 4.2 applies to both lawyers and nonlawyers working under the lawyer’s direction: “a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented[.]” Therefore, the prohibition on direct contact would also apply to an investigator or paralegal working with the lawyer.

“Misrepresentation” Rule

As a result of a torturous and nationally unique history that predated electronic social media, Oregon has a special rule on the use of misrepresentations in covert investigations: RPC 8.4(b). Under that rule “it 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,” in turn, is defined in the rule as “an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.” In short, a lawyer cannot engage in misrepresentations him or herself, but can supervise nonlawyers who do in the course of otherwise lawful covert investigations. Opinion 2005-173 discusses RPC 8.4(b) in detail and offers a number of useful examples in both the criminal and civil contexts.

Applied to social media or other web investigations, RPC 8.4(b) would allow a lawyer to supervise a nonlawyer investigator who may use misrepresentations (in this setting often called “pretexting”) to gain access to a social media or other web site as long as the investigation meets the definition of authorized “covert activity” under the rule. It is critical to underscore, however, that RPC 8.4(b) does not “trump” RPC 4.2. In other words, RPC 8.4(b) permits an investigator working with a lawyer to gain access to a site through

misrepresentation of the investigator's purpose or identity but only if the contact involved does not include interactive communications with a represented person.

With an unrepresented person, Opinion 2013-189 finds that simply using one's own name in a "friend request" or the equivalent without disclosing the investigative purpose is not, in and of itself, a misrepresentation. It cautions, however, that if the person to whom the request is directed asks the lawyer the purpose of the request, the lawyer must answer truthfully (or withdraw the request). Nonlawyers working under a lawyer's supervision, in turn, would be governed in this situation by RPC 8.4(b) as discussed above.

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