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Digital Self-Portraits: Investigations through Electronic Social Media

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I was recently involved in two cases that provided powerful illustrations of the role electronic social media can play in investigations today. In the first, a lawyer had obtained screen shots of a litigation opponent's publicly available social media pages that ran directly counter to the opponent's position in the pleadings and used them to devastating effect during the opponent's deposition. In the second, a jury consultant in a very compressed time period was able to assemble an extremely broad array of information about prospective jurors for use in voir dire—again, based solely on their public web and social media pages.

We know intuitively that concepts of privacy have been reshaped by electronic social media and, as a result, people from all walks of life now routinely post information about themselves in the digital public square that simply would not have been openly available a generation ago. Although these electronic self-portraits are, in appropriate circumstances, subject to formal discovery under CR 26(b)(1), the element of surprise that independent investigation affords—as was the case in the deposition I witnessed—can prove vital in making the most effective use of the information involved against an opponent or a witness. Similarly, although jurors provide basic background information about themselves during voir dire, the ability to independently investigate how a prospective juror

sees him or herself in an electronic self-portrait can provide crucial insights on whether or not to exercise a challenge.

Although investigations can yield critical information, they are also subject to important constraints. In this column, we'll explore those constraints that lawyers and those working with them must follow when searching through the web and social media postings for opposing parties, witnesses and jurors. In doing so, we'll look both at Washington and how these issues are being analyzed nationally. On this last point, all of the authorities mentioned are available on their respective national, state or local bar association web sites.

Opposing Parties

With opposing parties, the primary concern is RPC 4.2—the "no contact" rule. RPC 4.2 broadly prohibits interactive communication—whether "real time" or delayed—with represented parties. It applies with equal measure to represented individuals and, under *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984), the "speaking agents" of represented entities.

The ethics opinions nationally that have examined this facet of investigations through social media focus on whether there is any "communication" via the particular electronic venue involved. New York State Bar Association Opinion 843 (2010) and Oregon State Bar Opinion 2005-164 (2005) are representative of the national authority and contain clear guidelines.

These opinions conclude that simply viewing publicly available web or social media pages does not trigger the "no contact" rule because there is no communication. To illustrate this point, the Oregon opinion uses the example of buying a book written by a party opponent. By contrast, the opinions caution that interactive communication with a represented opponent through electronic social media will trigger the rule in the same way as contact by telephone or email.

Remedies for violations of the "no contact" rule range from regulatory discipline (*see, e.g., In re Haley*, 156 Wn.2d 324, 126 P.3d 1262 (2006)) to exclusion of any resulting evidence obtained (*see, e.g., Engstrom v. Goodman*, 166 Wn. App. 905, 271 P.3d 959 (2012) (striking improperly obtained declaration)) to disqualification (*see generally Jones v. Rabonco*, 2006 WL 2401270 (W.D. Wash. Aug. 18, 2006) (unpublished) (discussing disqualification as remedy in this context)). Moreover, these remedies are not mutually exclusive.

Witnesses

Assuming that a witness is not represented, the "no contact" rule does not apply. With witnesses, the question is often whether a lawyer or someone working with the lawyer can misrepresent their identity or purpose to gain access to on-line material hidden behind a "privacy wall"? This, in turn, implicates RPC 4.1(a), which prohibits false statements of material fact to a third person, and

RPC 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation.

The ethics opinions nationally that have considered this facet of investigations through social media are uniform in holding that a lawyer cannot misrepresent his or her identity—sometimes referred to as "pretexting"—in seeking material behind a privacy wall. Opinions from the Philadelphia (2009-02 (2009)) and San Diego County (2011-2 (2011)) bars have been particularly influential on this point.

Ethics opinions nationally vary in their approach on two related questions.

Some, such as Kentucky (Ethics Opinion E-434 (2012)), Massachusetts (Ethics Opinion 2014-5 (2014)), New Hampshire (Advisory Opinion 2012-13/05 (2012)) and Pennsylvania (2014-300 (2014)) extend the prohibition on pretexting to nonlawyers working on behalf of the lawyer involved under state variants of RPCs 5.3, which deals with lawyer responsibility for nonlawyer assistants, and 8.4(a), which prohibits violating the professional rules through the acts of another person. Others, such as Oregon (Formal Opinion 2013-189 (2013)), allow lawyer supervision of otherwise lawful covert investigations that use deception if permitted by state variants of RPC 8.4 (as in Oregon).

Some, such as the Philadelphia and San Diego opinions noted above, reason that a lawyer cannot even make a "friend request" or the equivalent of a witness using the lawyer's own name without disclosing the purpose of the

request because to do otherwise would constitute a misrepresentation by omission. Others, such as New York City (Formal Opinion 2010-2 (2010)) and Oregon (Formal Opinion 2013-189 (2013)) conclude that a lawyer can use the lawyer's own name, reasoning that there is no inherent misrepresentation even if the purpose of the request is not disclosed.

The same range of remedies is generally available for improper conduct with a witness as noted earlier for "no contact" rule violations—but, with an important twist. Misrepresentation in almost any setting typically increases the potential sanction because it touches on a core value: a lawyer's honesty.

Jurors

RPC 3.5(b) makes clear that a lawyer cannot communicate *ex parte* with either a prospective or selected juror during trial (unless otherwise permitted by a court order). Comment 2 to RPC 3.5 reinforces the prohibition contained in the text of the rule. Both the rule and comment are patterned on the corresponding ABA Model Rule.

The ABA recently addressed web-based investigations of prospective and selected jurors in Formal Opinion 466 (2014). Analyzing the identical ABA Model Rule, the ABA concluded that a lawyer—or a nonlawyer working for the lawyer—cannot contact a juror directly through electronic means. Because Model Rule 3.5(b) is framed broadly, the ABA also reasoned that the prohibition extends to access requests. At the same time, the ABA found that simply viewing a juror's

publicly available web or social media pages does not violate the rule because that does not involve communication. The approach taken by the ABA is consistent with the Washington Supreme Court's extended discussion of prohibited "*ex parte* communications" under RPC 3.5 in *State v. Watson*, 155 Wn.2d 574, 578-81, 122 P.3d 903 (2005).

Sanctions for improper contact with a juror can range from regulatory discipline (*see, e.g., In re McGrath*, 178 Wn.2d 280, 298, 308 P.3d 615 (2013) (disciplining lawyer for improper contact with judge under RPC 3.5(b)) to mistrial and associated monetary penalties (*see generally State v. Casey*, 2012 WL 1392945 (Wn. App. Apr. 23, 2012) (unpublished) (discussing mistrial as a remedy for improper contact with a juror)).

Summing Up

People today often paint with an extremely broad brush in their digital self-portraits on the web or in electronic social media. Independent investigation can offer the significant advantage of stealth over traditional discovery for parties and witnesses or the equivalent for prospective jurors in gathering this information. At the same time, there are distinct constraints to gathering electronic information through independent investigation and corresponding sanctions for violating the rules involved. Lawyers need to be thoroughly familiar with those constraints so that the ultimate surprise when revealing this information in court won't be on them.

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