

NATIONAL TRENDS IN SOCIAL MEDIA USE FOR INVESTIGATIONS AND JURY SELECTION

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OVERVIEW

▶ **Parties & Witnesses**

▶ **Jurors**

LOGISTICS

▶ **Resources**

▶ **Questions**

PARTIES & WITNESSES

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

PARTIES & WITNESSES

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

PARTIES & WITNESSES

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**

PARTIES & WITNESSES

The Example

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

PARTIES & WITNESSES

The Example

“Husband’s” Social Media 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.

PARTIES & WITNESSES

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.

PARTIES & WITNESSES

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?

PARTIES & WITNESSES

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.”

PARTIES & WITNESSES

The Constraints

- ▶ The “no contact” rule: RPC 4.2
- ▶ Misrepresentation to gain access:
RPCs 4.1 and 8.4(c)

PARTIES & WITNESSES

The Constraints

The “No Contact” Rule: RPC 4.2

“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

PARTIES & WITNESSES

The Constraints

The “No Contact” Rule

- ▶ Simply viewing static web pages: Permitted
 - ◆ NY State Bar Op. 843 (2010)
 - ◆ OSB Formal Ethics Op. 2005-164 (2005)
- ▶ Interactive communication with a represented opponent: Prohibited

PARTIES & WITNESSES

The Constraints

Misrepresentation to Gain Access: RPCs 4.1 & 8.4(c)

- ▶ “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person”
- ▶ “It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .”

PARTIES & WITNESSES

The Constraints

Misrepresentation to Gain Access

- ▶ Philadelphia Bar Op. 2009-2 (2009)
- ▶ SD County Bar Op. 2011-2 (2011)
- ▶ NH Bar Op. 2012-1305 (2012)
- ▶ Massachusetts Bar Op. 2014-5 (2014)
- ▶ Pennsylvania Bar Op. 2014-300 (2014)
- ▶ NY City Bar Op. 2010-2 (2010)
- ▶ OSB Formal Ethics Op. 2013-189 (2013)

PARTIES & WITNESSES

The Constraints

Misrepresentation to Gain Access

- ▶ Varying approaches taken on lawyer-direction of non-lawyers
- ▶ Varying approaches taken on lawyers using their own names but not disclosing purpose

PARTIES & WITNESSES

The Consequences

- ▶ **Regulatory discipline**
- ▶ **Exclusion of evidence**
- ▶ **Disqualification**

JURORS

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

JURORS

The Example

- ▶ **Product liability case**
- ▶ **State court trial**
- ▶ **No written jury questionnaire**
- ▶ **Relatively limited time**
- ▶ **Jury consultant**

JURORS

The Example

- ▶ **Public searches only**
- ▶ **Social media, web sites and other public info**
- ▶ **Picked up key demographics**
- ▶ **Provided key indicators on potential leaders**

JURORS

The Constraints

No *ex parte* contact rule: RPC 3.5(b)

“A lawyer shall not . . .

“(b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order;”

JURORS

The Constraints

The No Ex Parte Contact Rule

- ▶ Includes both prospective and selected jurors
- ▶ Includes access requests

JURORS

The Consequences

- ▶ **Regulatory discipline**
- ▶ **Sanctions**
- ▶ **Mistrial**

FOR FURTHER READING

- ▶ **ABA Formal Ethics Op. 466 (2014)**
Lawyer Reviewing Jurors' Internet Presence
- ▶ **ABA Formal Ethics Op. 462 (2013)**
Judge's Use of Electronic Social Networking Media
- ▶ **Mark J. Fucile, *Digital Self-Portraits: Investigations through Electronic Social Media***
69 WSBA NWLawyer 32 (April/May 2015)

QUESTIONS?