THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 671

March 2018

QUESTION PRESENTED

May a lawyer, individually or through an agent, anonymously contact an alleged anonymous online defamer in order to obtain jurisdictional information sufficient for obtaining a deposition pursuant to Rule 202 of the Texas Rules of Civil Procedure?

STATEMENT OF FACTS

A client of a Texas lawyer has been defamed or harassed online by an anonymous party. In preparation for bringing potential claims, the lawyer wishes to conduct a Texas Rule of Civil Procedure 202 deposition but needs to obtain jurisdictional information about the anonymous party first. The lawyer proposes to anonymously contact, or to request that an agent for the lawyer anonymously contact, the party for the purpose of obtaining such information.

DISCUSSION

The internet has many virtues as a forum for communication, but simultaneously presents certain dangers. Technology can permit an anonymous person to disseminate defamatory statements to millions of readers, ruining reputations and careers with the click of a button. The challenge for a party contemplating a lawsuit is identifying who is behind such postings. Yet for those injured by anonymous online defamation or harassment, the Texas Supreme Court has made it clear that a Texas court cannot order a pre-suit deposition to identify an anonymous online defamer unless the alleged defamer has sufficient contacts with Texas for personal jurisdiction. *In re: John Doe a/k/a "Trooper,"* 444 S.W.3d 603, 610 (Tex. 2014).

Like Texas, courts in many jurisdictions have sought to balance constitutional protections for anonymous speech and personal jurisdictional requirements with the ability to pursue defamation causes of action. But any proposed solution to the conundrum poses ethical concerns that relate to the propriety of attorneys and their agents anonymously seeking to obtain identifying or jurisdictional information from an anonymous individual.

In general, Rules 4.01(a) and 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct address a Texas lawyer's duty to avoid making material misrepresentations to third parties and engaging in conduct that involves dishonesty, fraud, deceit, or misrepresentation. Rule 4.01 provides in part that, 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…." Rule 8.04(a)(3) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Furthermore, Rule 4.03, which governs dealing with unrepresented persons, provides that a lawyer shall not state or imply that the lawyer is disinterested, and further provides that "[w]hen a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." Additionally, Rule 5.03 subjects a lawyer to discipline if the lawyer orders, encourages, or permits conduct by an agent that would be in violation of the Rules if engaged in by the lawyer.

Several ethics committees in other states have dealt with the analogous situation of attorneys and their agents contacting individuals via social media for purposes of case investigation or pre-suit information gathering, such as sending a "friend" request on Facebook, requesting to be connected to someone on LinkedIn, or following someone on Instagram or Twitter. The New York City Bar Association Committee on Professional Ethics, for example, has opined that a lawyer shall not "friend" an unrepresented individual using "deception," and that there is no deception when a lawyer uses his "real name and profile" to send a "friend" request to obtain information from an unrepresented person's social media account. *Ass'n of the Bar of the City of New York Prof' Ethics Comm., Formal Opinion* 2010-2 (2010). That jurisdiction does not require the lawyer to disclose the reason for making the request. Similarly, both the New York State Bar Association Committee on Professional Ethics and the Philadelphia Bar Association Ethics Committee concluded that a lawyer, or someone working under a lawyer's supervision (such as a paralegal), cannot "friend" a witness under false pretenses. *New York State Bar Association Commission on Professional Ethics, Opinion 843 (2010); Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02 (2009).* Both of these bodies relied upon their respective state's counterparts to Rule 8.04(a)(3). As the Philadelphia Committee observed, failing to tell the witness of the attorney's identity and role (or the paralegal's, or investigator's) "omits a highly material fact, namely, that the third party who [requests] access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness." As the New York City Bar opinion observed, the fact that deception is even easier in the virtual world than in person makes this an issue of heightened concern in the Digital Age.

Other ethics committees have insisted that an attorney engaging in such online investigation must be even more forthcoming. A New Hampshire Bar Association opinion explains that a request to "friend" must "inform the witness of the lawyer's involvement in the disputed or litigated matter," and provide disclosure of the "lawyer by name as a lawyer," and the identification of "the client and the matter in litigation." *N.H. Bar Ass' n Ethics Committee Advisory Comm. Opinion 2012-13/ 05.* In Massachusetts, it is not permissible for a lawyer to make a "friend" request to a third party in a lawsuit "without disclosing that the requester is the lawyer for a potential plaintiff." *Massachusetts Bar Ass'n Comm. On Prof. Ethics Opinion 2014-5 (2014).* A San Diego Bar Association opinion requires disclosure of the lawyer's "affiliation and the purpose for the request." *San Diego County Bar Ass'n Legal Ethics Comm. Opinion 2011-2 (2011).* An Oregon ethics opinion states that if the person being sought out on social media asks for additional information to identify the lawyer, or if the lawyer has some other reason to believe that the person misunderstands his role the "[l]awyer must provide the additional information or withdraw the request." *Oregon State Bar Comm. On Legal Ethics, Formal Opinion 2013-189 (2013).*

By analogy, it is the opinion of this Committee that the failure by attorneys and those acting as their agents to reveal their identities when engaging in online investigations, even for the limited purpose of obtaining identifying or jurisdictional information, can constitute misrepresentation, dishonesty, deceit, or the omission of a material fact. Accordingly, lawyers may be subject to discipline under the Rules if they, or their agents, anonymously contact an anonymous online individual in order to obtain jurisdictional or identifying information sufficient for obtaining a Rule 202 deposition. In order to comply with the Rules, attorneys, and agents of attorneys, must identify themselves and their role in the matter in question.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, Texas lawyers, and their agents, may not anonymously contact an anonymous online individual in order to obtain jurisdictional or identifying information sufficient for obtaining a deposition pursuant to Rule 202 of the Texas Rules of Civil Procedure.