

ETHICAL IMPLICATIONS OF PRACTICE ON THE CUTTING EDGE

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Stephen P. Hurley
HURLEY, BURISH & STANTON, S.C.
33 East Main Street, Suite 400
Madison, Wisconsin 53703
(608) 257-0945

"[T]he criminal defense bar [...] has the professional mission to challenge actions of the State." - *Gentile v. Nevada*, 501 U.S. 1030, 1051 (1991)

I. Handling a "High Profile" Case

A. Press bias in Favor of Law Enforcement

1. It is common for the press to cover criminal allegations in detail with little regard to the right of an accused to the presumption of innocence. See e.g., Matheson, *The Prosecutor, the Press, and Free Speech*, 58 Fordham L. Rev. 865, 890 n.143 (1990) ("It is well-established that reporters get most of their crime news from law enforcement sources"); Wilcox, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 Hofstra L. Rev. 1, 15, 26 (1989) (study suggests prosecutorial bias in news coverage).

B. The Supreme Court Rules Regarding Comment to the Media

1. SCR 20:3.6 Trial publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in deprivation of liberty, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in deprivation of liberty, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in deprivation of liberty;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer may state all of the following:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(d) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial likelihood of undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to information that is necessary to mitigate the recent adverse publicity.

(e) A lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall not make a statement that is prohibited by paragraph (a).

(Emphasis supplied).

2. More generally, the Supreme Court Rules also provide:

PREAMBLE: A LAWYER'S RESPONSIBILITIES

SCOPE

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not". These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses to not to act or acts within the bounds of such discretion. * * *

C. **What do the Courts say about a defense lawyer's comments to the media?**

1. Defense counsel serve an important societal function when they present information to the public. *See Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 253-254 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (recognizing legitimate functions fulfilled by defense counsel speech). As the Seventh Circuit described, the need for critique of a criminal case by defense

counsel and to question “[t]he scope and purpose of an investigation is a legitimate subject for public concern and comment. Those in the best position to inform the public on that issue should be free to do so.” *Id.* at 253.

The Court went on to note the imbalance of power favoring government prosecutors as a reason that defense attorneys may need to present information to the public. *Id.* “Those attorneys involved in the investigation for the Government are in a different position. They have the ability to influence and ensure proper governmental procedure without resort to public opinion. Moreover, they know what charges may be brought and are a prime source of damaging statements.” *Id.*

2. “An attorney’s duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client’s reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.”

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1043 (1991)(opinion of Justice Kennedy).

3. As Justice Kennedy noted in *Gentile*, “[...] in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts.” 501 U.S. at 1058 (joined by three other justices; not the opinion of the Court).
4. Prior to *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the United States Supreme Court had firmly and consistently established that the operation of the judicial branch of

government is emphatically the public's business and that limitations on the transmission of information about matters occurring in the judicial system, especially the criminal justice system, are permissible only under the narrowest of circumstances. See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). In interpreting *Gentile*, it is important to note the case was disposed of by the majority's determination that the Nevada interpretation and application of ABA Model Rule of Professional Conduct 3.6 (1981) was vague. (Justice Kennedy wrote the opinion of the Court, in Part III of his opinion, with Marshall, Blackmun, Stevens and O'Connor joining.) Of this group, all except Justice O'Connor believed that it was not only the right, but also the obligation of a defense attorney to use truthful public statements to counter adverse publicity. (Parts I and IV of Justice Kennedy's opinion.)

D. How to Attempt to Balance the Scales

1. The "Mug Shot"

Submit a professional photo of the client and submit it to the news director of media outlets that have, or are likely to, cover the case. Ask that the submitted photo be used, rather than a mug shot, to be consistent with the client's presumption of innocence.

2. Civilian Clothing in Court

- a. In *Estelle v. Williams*, 425 U.S. 501 (1976), the Court emphasized that "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Id.* at 504-05. In *Estelle*, the Court also emphasized (1) "that compelling an accused to wear prison clothing furthers no essential state policy;" and (2) "that compelling the accused to stand trial in prison garb operates usually

against those who cannot post bail before trial." *Id.* at 505. The Court also noted that while having an accused wear jail clothing "may be more convenient for jail administrators [but that] provides no justification for the procedure." *Id.* at 505.

- b. Wisconsin also notes that a "state violates a defendant's right to due process, and therefore the presumption of innocence, when it requires him to appear at trial in *identifiable* prison clothing." *State v. Reed*, 256 Wis.2d 1019, 1026 - 1027, 650 N.W.2d 885, 889 (Ct. App. 2002)(citation omitted).
- c. These cases only address wearing civilian clothing at trial. However, it is worth seeking the logical extension of *Estelle's* holding to allow the accused to wear civilian clothing at all pre-trial court appearances.
 - i. The presumption of innocence is a basic component of the fundamental right to a fair trial. *See Coffin v. United States*, 156 U.S. 432, 453 (1895). "The presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or the evidence awaiting presentation." *Kennedy v. Cardwell*, 487 F.2d 101, 104 (6th Cir. 1973) (citation omitted). "[E]very defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man." *Id.*
 - ii. The principle applies with equal force when prospective jurors are tainted by pretrial publicity depicting an accused in jail attire. To find otherwise would "impose the condition on [only] one category of defendants, over objection, [and thus] would be repugnant to the concept of equal justice embodied in the Fourteenth Amendment." *Estelle*, 425 U.S. at 505-506 (citing *Griffin v. Illinois*,

351 U.S. 12 (1956)). Accordingly, an accused ought be allowed to appear in her own clothing and in the courtroom at all proceedings.

3. Court Enforcement of Media Rules

- A. The Wisconsin Supreme Court Rules prohibit operation of cameras during court recesses (SCR 61.08) and generally, use cameras or recording equipment in the courtroom, absent notice "at least three days in advance" by media (SCR 61.02(2)).
- B. Depending on the nature of the case, it may be worth filing a motion to the Court asking that these rules be followed with exception. This at least provides advance notice of media appearances.

4. Public Comment About a Case

- 1. A defense lawyer may comment when "required to protect a client from the substantial likelihood of undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client" to the extent "necessary to mitigate the recent adverse publicity." SCR 20:3.6(d).
- 2. Even when not responding a recent publicity, a defense lawyer may also comment publicly about a case to identify "the defense involved," "the identity of the persons involved," or to make "a request for assistance in obtaining evidence[.]" SCR 20:3.69(c).
- 3. Don't do this without thinking it through.
 - a. Be smart.
 - b. Be strategic.
 - c. Be brief.

5. Brief in Support of A Signature Bond

The press will read all of the pleadings in a high-profile case. Filing a brief in support of a signature bond provides the opportunity to educate the judge about the obligation to set reasonable bail and to do so in consideration of the client's background. The brief can include positive letters of recommendation about the client. The media will also review this and may choose to include positive information about the accused in media coverage.

E. The Problem of the Unexplained "Not Guilty Plea" in the Public's Mind

Typically, an individual accused of a felony either pleads "not guilty" at arraignment or simply stands "mute" to the allegation and the Court enters a not guilty plea on his or her behalf. Unexplained, a not guilty plea may mean a number of things: (1) the defendant intends to challenge the jurisdiction of the Court, but is not contesting factual guilt, (2) the defendant seeks to challenge a technical or police error that could result in a favorable outcome, but is not contesting factual guilt, (3) the defendant wishes for the court proceeding to continue so that a plea agreement may be sought at a subsequent pre-trial conference, (4) the defendant, without denying the accusation, is indicating that the state cannot prove his guilt, (5) the defendant does not contest that someone committed the alleged crime, but denies that he was the culprit, or (6) the defendant did not in fact commit the offense and no crime occurred; his accuser made a false allegation.

II. The Use of Deception

1. American Bar Association Standard 4.1

4.1 Duty to investigate. It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

See, generally, *State v. Thiel*, 264 Wis.2d 571, 665 N.W.2d 305 (2003).

2. The current version of SCR 20:4.1 (effective July 1, 2007).

SCR 20:4.1 Truthfulness in statements to others

(a) In the course of representing a client a lawyer shall not knowingly:

(1) make a false statement of a material fact or law to a 3rd person; or

(2) fail to disclose a material fact to a 3rd person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by SCR 20:1.6.

(b) Notwithstanding par. (a), SCR 20:5.3(c)(1), and SCR 20:8.4, a lawyer may advise or supervise others with respect to lawful investigative activities.

3. **SCR 20:4.3: Dealing with unrepresented person.**

When dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows, or reasonably

should, that the person misunderstands the lawyer's role, the lawyer will try to correct the misunderstanding.

4. American Bar Association Rule 4.3 only applies when a lawyer acts in the capacity of a lawyer. (ABA/BNA Manual on Professional Responsibility, "How Rule 4.3 Works." at 71:503) The rule is designed to avoid having an unrepresented person misled by another person's status as lawyer. It is concerned that lay people may see a lawyer as an official source of the law, or may assume that the lawyer is looking out for their interests, even though the lawyer is representing someone else. In addition to the ABA Manual, a frequently cited journal article states that Rule 4.3 applies to lawyers acting as lawyers. The rule is designed to deal with the presumed expectations of the third party in dealing with a lawyer. The rule rests on the premise that a person acting as a lawyer engenders expectations as to probity and candor. Investigators who do not pretend to be lawyers cannot create false expectations in the third parties. David B. Isbell, Lucantonio N. Salvi, *Ethical Responsibilities of Lawyers For Deception By Undercover Investigators and Discrimination Testers*, 8 GEORGETOWN JOURNAL OF LEGAL ETHICS 791 (Summer 1995). This article also points out that lawyers who supervise or advise discrimination testers in fair housing and employment investigations have never been sanctioned when the testers pretend to be "real" buyers, renters, or job seekers.

See also, David Luban, *Are Criminal Defenders Different*, 91 MICH. L. REV. 1729 (1993) ("[T]he importance of overprotecting individual rights against the state justifies ... a categorical norm or aggressive defense ... For that reason, we should expect that many of the clauses of our moral job description of the defender will be discretionary[.]"); Peter R. Jarvis, Bradley F. Tellam, *The Dishonesty Rule - A Rule with a Future*, 74 OR. L. REV. 665 (1995) ("[A]s long as there is no other reasonable ... way to gather the information, and as long as it is clear that the conduct does not otherwise violate the substantive law and the sole purpose of this conduct is to gather evidence for legitimate proceedings, this type of conduct would not appear to fall within the range of behavior that the dishonesty rule was expected or intended to prohibit.")

5. American Bar Association Rule 4.3 does not apply to investigations to obtain evidence when the only subterfuge used is to disguise the identity of investigators and the actual purpose of the contact. *Apple Corps Ltd. V. Int'l Collectors Society*, 15 F.Supp.2d 456 (D.N.J. 1988). In that case, plaintiff's investigators, directed by counsel, sought evidence that defendant's employees were violating a consent decree which prohibited defendant from selling likenesses of the Beatles. The investigators posed as customers interested in buying stamps with Beatles pictures on them. These acts did not violate New Jersey RPC 4.3 (which is identical to the Wisconsin rule). "Therefore, [the rule's] prohibitions on allowing the unrepresented person to misunderstand that the lawyer is disinterested only apply to a lawyer who is acting as a lawyer." *Id.* at 476. The rule "was intended to prevent a lawyer who fails to disclose his role in a matter from taking advantage of an unrepresented third party." *Id.* at 476. When plaintiff's counsel and investigators tested compliance with a consent decree, they were not acting in the capacity of lawyers. *Id.* at 476. The Seventh Circuit also found that investigations of racial discrimination often require attorneys to engage in deception in order to gather evidence. *Richardson v. Hunter*, 712 F.2d 319 (7th Cir. 1983).

6. *Office of Lawyer Regulation v. Stephen P. Hurley*

See attached.

7. *Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 (March 2009)*

See attached.

OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WI 53701-1688

TELEPHONE (608) 266-1880

FACSIMILE (608) 267-0640

Web Site: www.wicourts.gov



February 11, 2009

To:

Claude J. Covelli
Boardman, Suhr, Curry & Field, LLP
P.O. Box 927
Madison, WI 53701-0927

Carol Kornstedt
Office of Lawyer Regulation
110 E. Main Street, Ste 315
Madison, WI 53703

Stephen P. Hurley
Hurley, Burish & Stanton, S.C.
P. O. Box 1528
Madison, WI 53701-1528

Judith Sperling-Newton
The Law Center for Children & Families
450 S. Yellowstone Drive
Madison, WI 53719-1086

William J. Weigel
Office of Lawyer Regulation
110 E. Main Street, Suite 315
Madison, WI 53703

You are hereby notified that the Court has entered the following order:

No. 2007AP478-D Office of Lawyer Regulation v. Stephen P. Hurley

The Office of Lawyer Regulation (OLR) has appealed a referee's report and recommendation finding that the OLR failed to satisfy its burden of proof that Attorney Stephen P. Hurley violated former SCR 20:4.1(a) and/or SCR 20:8.4(c), vicariously through SCR 20:5.3(c)(1) and 20:8.4(a).

A referee's findings of fact will not be set aside unless clearly erroneous. See In re Disciplinary Proceedings Against Carroll, 2001 WI 130, ¶29, 248 Wis. 2d 662, 636 N.W.2d 718. We review conclusions of law de novo. See In re Disciplinary Proceedings Against Widule, 2003 WI 34, ¶44, 261 Wis. 2d 45, 660 N.W.2d 686. We conclude that the referee's findings of fact are not clearly erroneous, and we also uphold the referee's conclusions of law that Attorney Hurley's conduct did not violate any ethical rule. Consequently, we dismiss the OLR's complaint without costs.

Attorney Hurley was admitted to practice law in Wisconsin in 1976. He practices in Madison, and his practice emphasizes criminal cases. He has no prior disciplinary history.

In 2003, Attorney Hurley was retained to represent Gordon E. Sussman in a criminal case. Sussman was charged with two counts of repeated sexual assault of a child, two counts of exhibiting harmful material to a child, and 16 counts of possession of child pornography. The sexual assault charges were based on statements of a child named S.B. Sussman and S.B. were acquainted through a mentoring program and spent time together at Sussman's place of business. The charges of possession of child pornography were based on images found on a computer used by Sussman at his place of business.

The disciplinary proceedings against Attorney Hurley involved an undercover investigation devised and supervised by Attorney Hurley during the course of representation of Sussman. The investigation was designed to gather potentially exculpatory evidence from S.B.'s computer through the use of deception of purpose. Attorney Hurley began to doubt S.B.'s credibility and believed he was lying about his allegations against Sussman. Attorney Hurley believed that S.B.'s computer could contain potentially exculpatory evidence. S.B. had accused Sussman of forcing him to view child pornography and other harmful materials. Attorney Hurley believed that S.B. had an independent interest in, and the ability to access, the materials he accused Sussman of showing him. Since S.B. had access to Sussman's work computer, Attorney Hurley considered S.B.'s independent proclivity to view child pornography a key issue in the case.

Attorney Hurley believed that if given advance notice of his desire to examine S.B.'s computer, S.B. would destroy any evidence of wrongdoing on the computer. Attorney Hurley also became suspicious of the investigating detective's intentions, believing him to be heavily biased toward S.B. Attorney Hurley retained a private investigator to work on Sussman's case. After examining various methods available to him to obtain S.B.'s computer, Attorney Hurley decided the only method that had a chance of obtaining the evidence intact was a private investigation involving deceit. Attorney Hurley designed the investigation to deceive S.B. and his mother into giving S.B.'s computer to Attorney Hurley's agent.

Attorney Hurley's investigator sent S.B. a letter on letterhead of a company of which the investigator was a part owner informing S.B. that the company was conducting research into computer usage preferences of students and young adults. The letter informed S.B. he had been selected to receive a new laptop computer free of charge. S.B. was told in order to receive the new computer he would swap his existing computer for the new model and during the 90-day trial period, his current computer would be stored. Attorney Hurley instructed the investigator not to approach S.B. unless S.B.'s mother was present, and he instructed the investigator to give S.B. an opportunity to remove anything he wanted from the old computer before making the exchange.

On August 24, 2004, with S.B.'s mother present, Attorney Hurley's investigator met with S.B. and exchanged his old desktop computer for the new laptop. After proposing the exchange to S.B., the investigator went outside to give S.B. the chance to erase from his old computer whatever he wanted. At the time of the exchange, S.B. was living with his mother in Indiana and was 15 years old. That same day, as Attorney Hurley instructed, the investigator delivered S.B.'s old computer to a forensic computer specialist. The specialist analyzed the computer and found it to contain numerous pornographic images involving adults, children and animals.

On February 27, 2007, the OLR filed a complaint against Attorney Hurley alleging that he violated former SCR 20:4.1(a), which provides that during the course of representing a client a lawyer shall not knowingly "make a false statement of a material fact or law to a third person;..." The complaint also alleged that Attorney Hurley violated former SCR 20:8.4(c), which provided it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation;..."

Judith Sperling-Newton was appointed referee in the matter. A hearing was held in December 2007. The referee issued her report and recommendation on February 5, 2008, concluding that the OLR failed to satisfy its burden of proof that Attorney Hurley violated any supreme court rules. The referee said the testimony presented at the hearing made clear that there was a widespread belief in the Wisconsin Bar that the type of conduct engaged in by Attorney Hurley was and is acceptable. She noted that Dane County District Attorney Brian Blanchard, who filed the grievance against Attorney Hurley, admitted that prosecutors frequently supervise a variety of undercover activities and sting operations carried out by nonlawyers who use deception to collect evidence, including misrepresentations as to identity and purpose. The referee also noted that OLR director Keith Sellen said this type of activity was a "normal practice." While DA Blanchard and director Sellen admitted to finding this conduct acceptable for prosecutors, they said it was not acceptable for private attorneys. However, DA Blanchard and director Sellen were unable to point to any rule, statute, ethics opinion, or Wisconsin case that drew this distinction between prosecutors and other attorneys.

In finding that Attorney Hurley violated no ethical rule, the referee said:

Mr. Hurley was faced with a very difficult decision, with concurrent and conflicting obligations: should he zealously defend his client, fulfill his constitutional obligation to provide effective assistance of counsel, and risk breaking a vague ethical rule that, according to the record, had never been enforced in this way? Or should he knowingly fail to represent Mr. Sussman in the manner to which he was entitled and hand him persuasive grounds for appeal, an ethics complaint, and a malpractice claim? The Sixth Amendment seems to have broken the tie for Mr. Hurley. [footnote omitted] A man's liberty was at stake. Mr. Hurley had to choose, and he chose reasonably, in light of his obligations and the vagueness of the [supreme court rules].

The OLR appealed, arguing that the referee erred in concluding that Attorney Hurley did not violate any ethical rules. Attorney Hurley notes that the OLR does not challenge the referee's findings of fact. He argues that the referee's conclusions of law should also be upheld.

From our independent review of the record, we agree with the referee that the OLR failed to establish by clear and substantial evidence that Attorney Hurley violated any ethical rules. Both director Sellén and DA Blanchard agreed that prosecutors have traditionally been allowed to use dissemblance in order to collect evidence. Neither of them could point to any Wisconsin precedent drawing a distinction between prosecutors and other attorneys in that regard, and the record demonstrates that there was wide belief in the Wisconsin Bar that the type of conduct engaged in by Attorney Hurley was acceptable. We also note that the OLR concedes that Attorney Hurley was not trying to break the rules and may not have known that his conduct would violate any rule. Finally, we note that SCR 20:4.1 was revised effective July 1, 2007, and the OLR does not contend that Attorney Hurley's conduct would violate the current version of the rule. Based upon the foregoing,

IT IS ORDERED that the OLR's complaint is dismissed, without costs.

David R. Schanker
Clerk of Supreme Court

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2009-02
(March 2009)

The inquirer deposed an 18 year old woman (the "witness"). The witness is not a party to the litigation, nor is she represented. Her testimony is helpful to the party adverse to the inquirer's client.

During the course of the deposition, the witness revealed that she has "Facebook" and "Myspace" accounts. Having such accounts permits a user like the witness to create personal "pages" on which he or she posts information on any topic, sometimes including highly personal information. Access to the pages of the user is limited to persons who obtain the user's permission, which permission is obtained after the user is approached on line by the person seeking access. The user can grant access to his or her page with almost no information about the person seeking access, or can ask for detailed information about the person seeking access before deciding whether to allow access.

The inquirer believes that the pages maintained by the witness may contain information relevant to the matter in which the witness was deposed, and that could be used to impeach the witness's testimony should she testify at trial. The inquirer did not ask the witness to reveal the contents of her pages, either by permitting access to them on line or otherwise. He has, however, either himself or through agents, visited Facebook and Myspace and attempted to access both accounts. When that was done, it was found that access to the pages can be obtained only by the witness's permission, as discussed in detail above.

The inquirer states that based on what he saw in trying to access the pages, he has determined that the witness tends to allow access to anyone who asks (although it is not clear how he could know that), and states that he does not know if the witness would allow access to him if he asked her directly to do so.

The inquirer proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and Myspace websites, contact the witness and seek to "friend" her, to obtain access to the information on the pages. The third person would state only truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness. If the witness allows access, the third person would then provide the information posted on the pages to the inquirer who would evaluate it for possible use in the litigation.

The inquirer asks the Committee's view as to whether the proposed course of conduct is permissible under the Rules of Professional Conduct, and whether he may use the information obtained from the pages if access is allowed.

Several Pennsylvania Rules of Professional Conduct (the "Rules") are implicated in this inquiry.

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants provides in part that,

With respect to a nonlawyer employed or retained by or associated with a lawyer:...

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; ...

Since the proposed course of conduct involves a third person, the first issue that must be addressed is the degree to which the lawyer is responsible under the Rules for the conduct of that third person. The fact that the actual interaction with the witness would be undertaken by a third party who, the committee assumes, is not a lawyer does not insulate the inquirer from ethical responsibility for the conduct.

The Committee cannot say that the lawyer is literally "ordering" the conduct that would be done by the third person. That might depend on whether the inquirer's relationship with the third person is such that he might require such conduct. But the inquirer plainly is procuring the conduct, and, if it were undertaken, would be ratifying it with full knowledge of its propriety or lack thereof, as evidenced by the fact that he wisely is seeking guidance from this Committee. Therefore, he is responsible for the conduct under the Rules even if he is not himself engaging in the actual conduct that may violate a rule. (Of course, if the third party is also a lawyer in the inquirer's firm, then that lawyer's conduct would itself be subject to the Rules, and the inquirer would also be responsible for the third party's conduct under Rule 5.1, dealing with Responsibilities of Partners, Managers and Supervisory Lawyers.)

Rule 8.4. Misconduct provides in part that,

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; ...

Turning to the ethical substance of the inquiry, the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed 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. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

The fact that the inquirer asserts he does not know if the witness would permit access to him if he simply asked in forthright fashion does not remove the deception. The inquirer could test that by simply asking the witness forthrightly for access. That would not be deceptive and would of course be permissible. Plainly, the reason for not doing so is that the inquirer is not sure that she will allow access and wants to adopt an approach that will deal with her possible refusal by deceiving her from the outset. In short, in the Committee's view, the possibility that the deception might not be necessary to obtain access does not excuse it.

The possibility or even the certainty that the witness would permit access to her pages to a person not associated with the inquirer who provided no more identifying information than would be provided by the third person associated with the lawyer does not change the Committee's conclusion. Even if, by allowing virtually all would-be "friends" onto her FaceBook and MySpace pages, the witness is exposing herself to risks like that in this case, excusing the deceit on that basis would be improper. Deception is deception, regardless of the victim's wariness in her interactions on the internet and susceptibility to being deceived. The fact that access to the pages may readily be obtained by others who either are or are not deceiving the witness, and that the witness is perhaps insufficiently wary of deceit by unknown internet users, does not mean that deception at the direction of the inquirer is ethical.

The inquirer has suggested that his proposed conduct is similar to the common -- and ethical -- practice of videotaping the public conduct of a plaintiff in a personal injury case to show that he or she is capable of performing physical acts he claims his injury prevents. The Committee disagrees. In the video situation, the videographer simply follows the subject and films him as he presents himself to the public. The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker.

Rule 4.1. **Truthfulness in Statements to Others** 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; ...

The Committee believes that in addition to violating Rule 8.4c, the proposed conduct constitutes the making of a false statement of material fact to the witness and therefore violates Rule 4.1 as well.

Furthermore, since the violative conduct would be done through the acts of another third party, this would also be a violation of Rule 8.4a.¹

The Committee is aware that there is controversy regarding the ethical propriety of a lawyer engaging in certain kinds of investigative conduct that might be thought to be deceitful. For example, the New York Lawyers' Association Committee on Professional Ethics, in its Formal Opinion No. 737 (May, 2007), approved the use of deception, but limited such use to investigation of civil right or intellectual property right violations where the lawyer believes a violation is taking place or is imminent, other means are not available to obtain evidence and rights of third parties are not violated.

¹ The Committee also considered the possibility that the proposed conduct would violate Rule 4.3, **Dealing with Unrepresented person**, which provides in part that

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested . . .

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter the lawyer should make reasonable efforts to correct the misunderstanding.

Since the witness here is unrepresented this rule addresses the interactions between her and the inquirer. However, the Committee does not believe that this rule is implicated by this proposed course of conduct. Rule 4.3 was intended to deal with situations where the unrepresented person with whom a lawyer is dealing knows he or she is dealing with a lawyer, but is under a misapprehension as to the lawyer's role or lack of disinterestedness. In such settings, the rule obligates the lawyer to insure that unrepresented parties are not misled on those matters. One might argue that the proposed course here would violate this rule because it is designed to induce the unrepresented person to think that the third person with whom she was dealing is not a lawyer at all (or lawyer's representative), let alone the lawyer's role or his lack of disinterestedness. However, the Committee believes that the predominating issue here is the deception discussed above, and that that issue is properly addressed under Rule 8.4.

Elsewhere, some states have seemingly endorsed the absolute reach of Rule 8.4. In *People v. Pautler*, 47 P. 3d 1175 (Colo. 2002), for example, the Colorado Supreme Court held that no deception whatever is allowed, saying,

“Even noble motive does not warrant departure from the rules of Professional Conduct. . . We reaffirm that members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive. Purposeful deception by an attorney licensed in our state is intolerable, even when undertaken as a part of attempting to secure the surrender of a murder suspect. . . . Until a sufficiently compelling scenario presents itself and convinces us our interpretation of Colo. RPC 8.4(c) is too rigid, we stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so.” The opinion can be found at <http://www.cobar.org/opinions/opinion.cfm?opinionid=627&courtid=2>

The Oregon Supreme Court in *In Re Gatti*, 8 P3d 966 (Ore 2000), ruled that no deception at all is permissible, by a private or a government lawyer, even rejecting proposed carve-outs for government or civil rights investigations, stating,

“The Bar contends that whether there is or ought to be a prosecutorial or some other exception to the disciplinary rules is not an issue in this case. Technically, the Bar is correct. However, the issue lies at the heart of this case, and to ignore it here would be to leave unresolved a matter that is vexing to the Bar, government lawyers, and lawyers in the private practice of law. A clear answer from this court regarding exceptions to the disciplinary rules is in order.

As members of the Bar ourselves -- some of whom have prior experience as government lawyers and some of whom have prior experience in private practice -- this court is aware that there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of the law, are useful means for uncovering unlawful and unfair practices, and that lawyers in both the public and private sectors have relied on such tactics. However, . . . [f]aithful adherence to the wording of [the analog of Pennsylvania’s Rule 8.4], and this court’s case law does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements. In our view, this court should not create an exception to the rules by judicial decree.” The opinion can be found at <http://www.publications.ojd.state.or.us/S45801.htm>

Following the *Gatti* ruling, Oregon’s Rule 8.4 was changed. It now provides:

“(a) It is professional misconduct for a lawyer to: . . . (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), 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,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. 'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future. "

Iowa has retained the old Rule 8.4, but adopted a comment interpreting the Rule to permit the kind of exception allowed by Oregon.

The Committee also refers the reader to two law review articles collecting other authorities on the issue. See *Deception in Undercover Investigations: Conduct Based v. Status Based Ethical Analysis*, 32 Seattle Univ. L. Rev. 123 (2008), and *Ethical Responsibilities of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation under Model Rules of Professional Conduct*, 8 Georgetown Journal of Legal Ethics 791 (Summer 1995).

Finally, the inquirer also requested the Committee's opinion as to whether or not, if he obtained the information in the manner described, he could use it in the litigation. The Committee believes that issue is beyond the scope of its charge. If the inquirer disregards the views of the Committee and obtains the information, or if he obtains it in any other fashion, the question of whether or not the evidence would be usable either by him or by subsequent counsel in the case is a matter of substantive and evidentiary law to be addressed by the court.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.