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INVESTIGATING FACEBOOK: THE ETHICS OF USING SOCIAL NETWORKING WEBSITES IN LEGAL INVESTIGATIONS

Shane Witnov†

Abstract

Social networking websites, like Facebook, contain a wealth of data that can be useful in legal disputes and investigations. Some information on social networks is publicly available, but much of it is restricted to "friends." This article examines when and how lawyers, and those they supervise, may ethically and legally collect information on social networking websites, and in particular, when they may use undercover techniques and make friend requests to gain access to restricted information. Although the case law is occasionally contradictory and the rules are unclear, the article analyzes the types of activities that are likely to be ethical and unethical based upon existing precedent. Finally, the article proposes minor changes to the rules to make them clearer and fairer.

I. INTRODUCTION

An 18-year-old witness, whose testimony is helpful to the adverse party, is not a party or represented by a lawyer. During her

† Associate at Winston & Strawn, LLP. An earlier version of this paper won the Notre Dame Law School Smith Doheny Legal Ethics Writing Competition. The article was inspired by a simple question posed to U.C. Berkeley Law’s Samuelson Law Technology & Public Policy Clinic by the Santa Clara Public Defender’s Office. They wondered in what situations they were allowed to conduct investigations on social networking websites. The research into that question resulted in an office policy (David Lee & Shane Witnov, Handbook on Conducting Research on Social-Networking Websites in California, BERKELEY LAW (Dec. 1, 2008), http://www.law.berkeley.edu/files/Social_Networking_Website_Research-Handbook.pdf) and a full-day conference (Berkeley Law, October 2009 Social Networking). Many thanks to my partner on those projects, David Lee, and our supervisor, Jennifer Lynch. This paper would not have happened without them. The research inspired another project with the Electronic Frontier Foundation investigating how the federal government is using social networking websites. Electronic Frontier Foundation, FOIA: Social Network Monitoring, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/foia/social-network-monitoring (last visited Jul. 18, 2011, 11:17 AM). Thanks to Brian Carver for advising me on the article. For helpful comments and edits thanks to Andrew Bridges, Chris Harvey, Rachel Mackenzie, Kellie McEvoy, Paul Ohm, Jason Schultz, and John Steele. Of course, all opinions (and any mistakes) expressed below are my own.
deposition, she revealed she has a Facebook account. The events she testified about took place at a party and you have reason to suspect her sobriety at the party and the accuracy of her testimony during the deposition. You suspect that the witness and her friends posted photographs of the party or commented on the party on their Facebook profiles. This evidence could contradict the witness or provide valuable evidence of what actually happened that night. Unfortunately, her photographs and comments are private so you cannot access them without adding her as a “friend.” The witness has hundreds of friends and you think she might accept a friend request from just about anyone. Would it violate legal ethics for your summer intern, who is closer to her age, to make a friend request?

The answer is unclear. In New York City, such friending would probably be ethical; in Philadelphia, it probably is not; everywhere else is undecided. However, as more lawyers face this question every day, a clear answer is essential.

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A lawyer who uses a social networking website, such as Facebook or MySpace, to collect information about an opposing party or witness may be violating ethical rules. Time and money constraints frequently incentivize lawyers to use fast informal processes to collect information. In these cases, social networking websites can be a lawyer’s best friend. With a quick search and perhaps a friend request, a lawyer can gain access to detailed personal information that could make or break a case. Nevertheless, the friend request may be unethical.

Lawyers are using social networks frequently as part of basic due diligence and information collection. In some firms, a search of social networks is the first task a lawyer performs after acquiring a new client. A 2010 poll found 81% of matrimonial lawyers have used evidence from social networks. Regardless of how lawyers feel about

1. See N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2010-2 (2010); see Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2009-02 (2009). See also San Diego Cnty. Bar Legal Ethics Comm., Op. 2011-2 (2011) (On May 24, 2011, the San Diego County Bar Legal Ethics Committee adopted a third opinion addressing this issue that determined that friend requests without disclosing a lawyer’s affiliation and purpose for the request would be deceptive and thus unethical. The article does not discuss the opinion in detail because the Committee decided the opinion too late in the editing process. While the opinion is worth noting, it does not change the analysis because the relevant parts of the opinion follow the Philadelphia opinion, which the article already discusses in detail).


3. Leanne Italie, Divorce Lawyers: Facebook Tops in Online Evidence in Court, USA
social networks, they contain too much valuable information to ignore. However, informally obtaining that information, while generally easy, is fraught with ethical pitfalls.

Social networking websites ("social networks") like Facebook are massive databases of self-reported information. They contain diverse types of information, ranging from pictures of pets to evidence of fraud to the details of criminal conspiracies. These websites are heavily used and still growing.\(^4\) Nearly 70% of all Americans age twelve to twenty-nine have profiles on social networking websites.\(^5\) The majority of these profiles are on Facebook,\(^6\) which, as of February 2011, reported that the average user shared 90 pieces of content, such as photographs, links, or messages, a month.\(^7\) All together, Facebook users share more than 30 billion pieces of total content a month.\(^8\) There is substantial growth in the number of online profiles,\(^9\) making social networks invaluable research tools for learning about almost anyone’s actions, interests, and thoughts.

Lawyers have used social networks in a variety of legal cases, with serious implications. Murder suspects have been identified based upon MySpace photos.\(^10\) Gangs have left evidence of criminal activity on social networks.\(^11\) One particular individual had charges dismissed against him by showing he was logged into Facebook at the time the crime took place.\(^12\) Profiles have been used in assessing a person’s character during sentencing.\(^13\) In child custody battles, information on


\(^{5}\) Amanda Lenhart, Kristen Purcell, Aaron Smith & Kathryn Zickuhr, Social Media & Mobile Internet Use Among Teens and Young Adults, PEW INTERNET & AMERICAN LIFE PROJECT, 3, 5 (Feb. 3, 2010), http://www.pewinternet.org/-/media//Files/Reports/2010/PIPSocialMedia_and_Young_Adult s_Report_Final_with_toplines.pdf.

\(^{6}\) Id. at 3. Over 70% of Americans with profiles have one on Facebook. Id.

\(^{7}\) Facebook Statistics, supra note 4.

\(^{8}\) Id.

\(^{9}\) See, e.g., Facebook Timeline, supra note 4.

\(^{10}\) See Jaksic, supra note 2.

\(^{11}\) Id.

\(^{12}\) Damiano Beltrami, I’m Innocent. Just Check My Status on Facebook., N.Y. TIMES, Nov. 12, 2009, at A27.

\(^{13}\) A drunken driving case “went from being a probation case to a prison case and it was
social networks has been used to demonstrate a parent’s unfitness to care for children.¹⁴ State and federal tax collectors even use social network information to find tax deadbeats.¹⁵

Some information on social networks is publicly available, but most of it is restricted.¹⁶ The simplest way of obtaining access to a person’s restricted information is to become “friends” on the social network, which usually grants access to more privileged information. At the University of Wisconsin La Crosse, the police fined a number of students for underage drinking based upon photos the police had seen posted on Facebook.¹⁷ The students had restricted access to the photographs to their Facebook friends, believing this protected them from the police.¹⁸ However, one of the young men who had posted photos of the party on Facebook later recalled accepting a friend request from an attractive young woman he did not know.¹⁹ After the arrests, he began suspecting that the woman was actually an undercover police officer.²⁰ While traditionally, law enforcement is permitted to use deceptive techniques to go “undercover” to obtain information,²¹ the ethical rules governing undercover investigations for lawyers are far more restrictive. This paper examines whether a lawyer or the investigators she supervises could ethically and legally go undercover, in the same manner as the police in the above example, to obtain information that is not publicly available.

The answer to this question is not as simple as consulting the

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¹⁴. See, e.g., Italie, supra note 3.
¹⁶. Amanda Lenhart, Pew Internet Project Data Memo re. Adults and Social Network Websites, PEW INTERNET & AMERICAN LIFE PROJECT, 2 (Jan. 14, 2009), http://www.pewinternet.org/-/media/Files/Reports/2009/PIP_Adult_social_networking_data_memo_FINAL.pdf.pdf. 60% of adult social network users restrict access to their friends. Id.
¹⁷. KJ Lang, Facebook Friend Turns into Big Brother, LA CROSSE TRIB. (Nov. 19, 2009), http://lacrossetribune.com/news/local/article_0f4df7a-d4d1-11de-afb3-001ce4c002e0.html.
¹⁸. See id.
¹⁹. Id.
²⁰. Id.
²¹. See infra notes 118-126.
ethical rules on traditional undercover investigative techniques and applying them to the online world. First, the ABA Model Rules of Professional Conduct, state bar ethics rules, and the legal cases and ethical opinions on traditional undercover investigations are contradictory and undecided. Second, the only two ethical opinions that directly address the use of dissemblance on social networks to collect information are contradictory. Third, social networks introduce new subtleties regarding when an omission is a deception, and the fine line between public and private information. These subtleties do not have real world counterparts, making comparisons to existing case law difficult.

Most importantly, lawyers need to know when and how they may ethically use social networks. Collecting documents through traditional discovery procedures is expensive and time consuming, incentivizing lawyers to collect as much data as possible through informal processes. Getting information about persons of interest from a social network profile is often the cheapest, fastest, and easiest way to collect information. Because a user's profile may contain a record of thoughts and actions during the period of time in which the dispute took place, the information can be invaluable. With the trend moving towards nearly everyone having a social network profile, informal research on social networks will become the de facto first research step in any legal conflict.

### A. Confusion about the Rules

Nearly every state has adopted Model Rule of Professional Conduct 8.4, which makes it professional misconduct for a lawyer to engage in conduct involving dishonesty and misrepresentation. It is also misconduct for a lawyer to supervise someone acting in a way the lawyer may not. Thus under a plain reading, it should be unethical for a government lawyer to be involved in any sort of undercover sting operation which requires misrepresentation by definition. However, plaintiffs' attorneys often have been praised for

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22. See, e.g., infra text accompanying notes 97-100.
their undercover work to reveal housing and job discrimination, and ethical charges are rarely if ever brought against government attorneys for supervising police sting operations. The confusion over the ethics of undercover operations makes it difficult to determine whether it would be ethical to send a friend request to a witness, or even an opposing party.

**B. Contradictory Opinions**

An ethics opinion by the Philadelphia Bar Professional Guidance Committee addressed whether an investigator, working for a lawyer, would ethically be able to use all true information and send a friend request to a hostile third-party witness in an effort to get access to the person's profile. The committee found it was deceptive to omit "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." However, under the hypothetical that the Bar addressed, there was no overt deception; the profile of the requester contained accurate information and the lawyer did not propose that the investigator make any proactive deceptive statements to trick the witness into accepting his friend request.

27. *See infra* notes 157-163.
28. *See infra* note 121.
30. *Id.*
31. *Id.*
32. *Id.* In the opinion, the Philadelphia Professional Guidance Committee focused upon the ethics of an investigator making a friend request. *See id.* The opinion actually noted that the lawyer could ethically ask to see the witness's profile, but that conclusion was based upon very specific circumstances—namely that the witness knew who the lawyer was because he had deposed her. *Id.* The Committee wrote that the lawyer who took the deposition of the witness could simply ask "the witness forthrightly for access" and that "would not be deceptive and would of course be permissible." *Id.* A situation in which a lawyer or investigator fully discloses the reason for the friend request or a factual situation makes it obvious to the party of interest why a lawyer or investigator is making a friend request—as in this fact scenario—is of course ethical. *Id.* The opinion should not be read as concluding that lawyers may ethically make friend requests in other situations where their intentions are not obvious. Further, the Committee actually found that the lawyer may send a friend request via Facebook. *Id.* Rather the opinion allows the lawyer to ask "the witness forthrightly for access," *id.*, by which the Committee may have meant the lawyer should have asked directly, in person, during the deposition. In general, depending upon the amount of time that passed between a party of interest interacting with a lawyer and the photographs used on the lawyer's profile, a friend request might not sufficiently identify the lawyer and his intentions to the witness for it to be ethical under the Committee’s
In a contrary opinion considering a similar fact pattern, the Bar of the City of New York Committee on Professional Ethics determined that it would be ethical for an attorney or her agent to “use her real name and profile to send a ‘friend request’ to obtain information from an unrepresented person’s” profile without disclosing the reasons for the request. The New York Committee determined that there is no unethical deception “when an attorney or investigator uses only truthful information to obtain access” to a social network profile. The Committee did find, however, that it would be unethical to use false pretenses to obtain access by using a fake profile to send the friend request.

C. New Issues

Social networks complicate the already confusing undercover investigation analysis. A lawyer may not need to use overt deception to gain access to a person’s profile because some people readily accept friend requests from anyone. In the physical world, people tend to be more suspicious, so collecting personal information from someone would likely require overt deception. Generally, lawyers are prohibited from employing overt deception, but whether a social network friend request is an unethically deceptive act is a new issue. Although the ethical rules against deception have traditionally protected an individual’s privacy by preventing lawyers from invasively spying on private activities, the inherently communal nature of social networks, combined with confusing “privacy settings,” make it hard to distinguish what information is public and what information is private. Lawyers, scholars, and the general

34. Id.
35. Id.
37. Facebook Statistics, supra note 4 (The average Facebook user has 130 friends). By default, almost all information on Facebook is shared with one’s friends. Matt McKeon, The Evolution of Privacy on Facebook, MATTMCKEON.COM, http://www.mattmckeon.com/facebook-privacy/ (last visited Sept. 8, 2011) (showing how Facebook’s default privacy settings have changed over time). Users of social networks can often choose who to share different types of information with using privacy settings. Some possible levels of sharing of information can include friends, networks or groups, all users of the social network, or publically available to anyone on the Internet. See id. Through most of 2009, by default, Facebook users shared their wall posts, photos, friend lists, and birthday with all members of any network the user belonged to. Id. Networks can be very large for example alumni networks or networks for geographic regions like the Bay Area, which would include
public need to determine whether this type of information is worthy of protection.

D. Outline of the Argument

Based on the existing rules and precedent, this paper argues that: (1) access to publicly available information on social networks is ethical; (2) material deception, such as using a fake profile or other overtly deceptive methods to obtain information, is unethical; and (3) making a friend request without other overt deception will be ethical in some jurisdictions and not in others. This paper further proposes that making a friend request without other overt deception should only sometimes be ethical in civil cases, rather than in all situations as the Bar of the City of New York Committee on Professional Ethics found. Friend requests without overt deception should generally be ethical in criminal cases because of the higher stakes involved. However, in both criminal and civil cases, a friend request without overt deception should only be ethical when there is no other practicable way to obtain the information and the friending party reasonably believes that the information exists on the targeted individual’s profile.

Gaining unrestricted access to a person’s profile for purposes that likely differ from that person’s expectations is an invasion of the person’s privacy. However, if a person is indiscreet enough to readily accept friend requests from strangers, it is a less serious invasion that may be justified by an important need for the information. Determining appropriateness of obtaining information by these methods should include an analysis of the likelihood the information exists, its importance to the case, whether it could be obtained by any other means, and the importance of the case to broader societal values such as justice and public safety. These factors should be balanced against the costs, including the seriousness of the invasion of privacy and the level of trickery or deception involved, which could reflect poorly on the lawyer and on the legal profession.

Acts on the far ends of the ethical spectrum are the simplest to address. Lawyers should be able to use information that is publicly available (e.g., Google search results). Conversely, because lawyers are barred from engaging in deceptive acts, creating a fake profile or utilizing other overtly deceptive means of covertly obtaining information is generally unethical. The situation the committees considered—a friend request using a truthful profile—is a unique

thousands if not tens of thousands of users. See id.
problem created by social networks. It does not involve overtly deceptive behavior, but it may include some trickery, leaving the situation in an ethically gray area. This paper addresses this question as well as examines the range of information gathering possibilities and their corresponding ethical problems.

This paper examines when and how lawyers are ethically and legally permitted to collect information from social networking websites, and in particular when undercover data collection is, if ever, appropriate. First, the paper briefly reviews how social networks can be used in investigations. Second, it examines how the Model Rules of Professional Conduct and website terms of use limit undercover investigations. Third, these restrictions are analyzed in light of different methods of obtaining information from social networks. Based upon these findings, the paper suggests some amendments to the Model Rules of Professional Conduct and a standard for evaluating undercover investigations.

II. SOCIAL NETWORKING WEBSITES

There are many different social networks. Some social networks serve specific populations, such as fans of a given band; others are general purpose, like Facebook. Wikipedia lists over two hundred different social networking websites. This paper focuses on Facebook, the most influential social network with over 500 million active users, and will also discuss MySpace and LinkedIn. The fundamentals of social networking websites are sufficiently similar that the analysis and issues addressed here are broadly applicable.

A. Overview

At their most basic, social networks are websites that allow users to create profiles that contain basic information about the user and allow the user to link to other profiles, thereby creating a network. In social networking website parlance, the people whom a user is linked to are usually called “friends.” The process of adding “friends”

39. Id.
40. Facebook Statistics, supra note 4.
usually consists of a user sending another user a message asking to be the person’s “friend.” If the second party agrees and accepts, both parties’ profiles are updated to include the other user as a “friend,” thus growing both users’ networks. “Friends” on a social network are not isomorphic with “friends” offline. Some people accept friend requests from anyone—becoming “friends” online with someone they would not call a friend offline. Others actively solicit “friends” in order to meet new people or merely to grow their number of online friends, which itself has become a status symbol.

Additionally, social networks allow users to contact other users via private messages that are similar to email, except that a user sends and receives them from within a webpage that is part of the social networking website. Finally, users can post information, such as a comment or picture, to their profile and comment upon what others post. This form of group communication and sharing is what makes social networking websites so valuable and compelling. Access to information in a user’s profile is governed by a variety of privacy settings that limit access to some types of information to certain groups of users. For example, user A might decide that any other user can view a profile picture and contact information, but only friends can view written comments and all of A’s pictures. In contrast, user B might only allow friends to view any information about her.

B. Types of Information Available on Social Networks

In different legal proceedings parties will be interested in different information available on social networks. First, social networking websites can contain valuable evidence. Prosecutors and law enforcement may be interested in evidence of crimes, such as pictures posted to the websites showing possession of illegal drugs or

42. Id. at 27. “A very small number of Facebook friends are people that we might refer to as strangers. The average Facebook user has never met in-person with 7% of their Facebook friends. An additional 3% are people they have only ever met in-person one time.” Id.


44. Facebook’s changes to its privacy settings near the end of 2009 changed the options that are available to users, declaring that profile pictures and friend lists were public information that users could not restrict. Ryan Singel, Facebook’s Zuckerberg Becomes Poster Child for New Privacy Settings, WIRED (Dec. 11, 2009), http://www.wired.com/epicenter/2009/12/zuckerberg-facebook-privacy.
stolen goods, or comments indicating participation in a crime or gang. Defense attorneys could be interested in exculpatory evidence, and civil litigants want proof of their alleged claims.

Second, information on a social networking website could be used to impeach the opposition’s witness’s testimony. In the example at the beginning of this paper, a picture of the hostile witness drinking alcohol before and during the party would damage the reliability of her testimony. Further, evidence in the pictures might contradict the testimony she gave in her deposition. For example, comments or pictures on social networks could be used to show gang affiliation or drug use that contradicts a witness’s testimony.

Finally, parties could be interested in identifying individuals who may be witnesses or have information relevant to the controversy. For example, if a crime or a tort took place in a semi-public venue such as a bar, the individuals directly involved may not know the names or contact information of many of the people present who might possess relevant information. Pictures on a social network of the individuals at the bar might be linked to the individual’s profiles, which can help provide this identifying information. In this situation, the information collected from the site would not necessarily be used in court.

III. BACKGROUND: CONTRACTS AND ETHICS

There are many different ethical rules and contract terms that restrict access to information on social networks. The contractual terms that every user of a social networking website implicitly agrees to comply with purport to limit what a user may do on the website.45 These terms may be enforced by anti-hacking laws.46 Ethical rules, which have been adopted by every state and are exemplified by the American Bar Association’s Model Rules of Professional Conduct, limit what a lawyer and those working under her may do.47 This paper focuses upon ethical rules, but it briefly considers contractual obligations because they can relate to ethical considerations.


46. See, e.g., United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009). Although the court found that Lori Drew did not violate the Computer Fraud and Abuse Act by violating MySpace’s terms of use, the case demonstrates that the government occasionally may be willing to bring criminal charges under the Computer Fraud and Abuse Act for violations of terms of service. Id.

47. Infra note 101.
A. Contracts: Terms of Use

Social networking websites have terms of use agreements that govern users’ actions on the website and affect users’ legal rights, remedies and obligations. Many methods of accessing the social networks to collect information may violate specific provisions of the terms of use. This paper will consider the terms of use of MySpace and Facebook, which are representative of other sites. Violations of the terms could result in the termination of a user’s account. Although unlikely, violations could lead to criminal or civil liability under the Computer Fraud and Abuse Act.

The terms of use for both websites are long and contain many subtle requirements that could be implicated by conducting investigations on the websites. Some of the more salient terms include prohibitions on copying or sharing of information on the website and on sharing or transferring of existing accounts. Further, Facebook requires that a user “not provide any false personal information on Facebook, or create an account for anyone other than [the user] without permission,” while MySpace insists the user maintain the accuracy of the information submitted at registration.

In addition to the possibility that the terms of use create a binding contract, the Federal Computer Fraud and Abuse Act criminalizes fraudulent access and other activities in connection with

50. Facebook Terms of Use, supra note 45. “If you collect information from users, you will: obtain their consent, make it clear you (and not Facebook) are the one collecting their information, and post a privacy policy explaining what information you collect and how you will use it.” Facebook Terms of Use, supra note 45. “[Y]ou may not copy, modify, translate, publish, broadcast, transmit, distribute, perform, display, or sell any Content appearing on or through the MySpace Services.” MySpace Terms of Use, supra note 48.
51. MySpace Terms of Use, supra note 48. “You agree not to use the account, username, email address or password of another Member at any time or to disclose your password to any third party.” MySpace Terms of Use, supra note 48. “You will not share your password . . . or . . . let anyone else access your account . . . .” Facebook Terms of Use, supra note 45.
52. Facebook Terms of Use, supra 45.
53. MySpace Terms of Use, supra note 48. To use MySpace you must “warrant that (a) all registration information you submit is truthful and accurate; (b) you will maintain the accuracy of such information.” MySpace Terms of Use, supra note 48.
54. There is extensive literature and cases on the validity of terms of use as contracts, and the issue is outside the scope of this paper. See, e.g., Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004); Specht v. Netscape Commun’cs Corp., 306 F.3d 17 (2d Cir. 2002); Feldman v. Google, Inc., 513 F. Supp. 2d 229 (E.D. Pa. 2007); RAYMOND T. NIMMER & JEFF DODD, MODERN LICENSING LAW § 3:37 (2008), available at WL MODLICENLAW § 3:37.
the use or misuse of computers.\textsuperscript{55} The statute makes it criminal to "intentionally access[] a computer without authorization or exceed[] authorized access."\textsuperscript{56} This is an area of active debate within the legal community.\textsuperscript{57}

\textbf{B. Ethics: The Model Rules of Professional Conduct}

Every state has adopted a set of ethical rules that govern the behavior of lawyers, including their interactions with clients, opposing parties, and the public at large. Every state except for California has adopted some version of the American Bar Association's ("ABA") Model Rules of Professional Conduct.\textsuperscript{58} The ABA Model Rules and individual state interpretations of the Rules are analyzed in detail in this paper to determine how they should apply to investigations on social networking websites. The rules discussed below are those that most significantly limit an attorney's ability to engage in undercover or covert investigations.

\textbf{i. Misconduct: Model Rule 8.4}

Model Rule of Professional Conduct 8.4(c) makes it professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."\textsuperscript{59} The comments to the rule state that "a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice," suggesting that not all lies are ethical violations.\textsuperscript{60} However, the Supreme Court of Washington sums up the rule: "the question is whether the attorney lied."\textsuperscript{61}

Fraud is defined as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive,"\textsuperscript{62} The Oregon Supreme Court decided that "[f]raud and deceit require, among other things, a false representation
to another, with the intent that the other act upon the false representation to his or her damage.\textsuperscript{63} "Misrepresentation' occurs when a lawyer makes a false statement of a material fact or a nondisclosure of a material fact.\textsuperscript{64} Finally, "Dishonesty' is conduct that indicates a disposition to lie, cheat or defraud; untrustworthiness; lack of integrity.\textsuperscript{65}

Misrepresentation does not include any element of negative or harmful intent. A misrepresentation can be "simply an omission of fact that is knowingly, false, and material in the sense that, had it been disclosed, the omitted fact would or could have influenced significantly the hearer's decision-making process.\textsuperscript{66} The Court of Appeals of Maryland found that "intent is not a necessary ingredient of dishonesty or misrepresentation.\textsuperscript{67}

The Oregon Supreme Court found that a lawyer engaged in dishonesty\textsuperscript{68} when he impersonated a former classmate, who was a teacher, as a joke. "[W]hen he created a Classmates.com account in the teacher's name, posted a message purporting to be written by the teacher, and led others to believe that the teacher had posted the message," he violated rule 8.4.\textsuperscript{69} The message implied the teacher had engaged in sexual relations with students.\textsuperscript{70} The court found that a lawyer does not have to be acting in a professional capacity to violate the rules of ethical conduct because the purpose of the rules is to protect the "public's interest in the integrity and trustworthiness of lawyers."\textsuperscript{71} To violate an ethical duty the "conduct must demonstrate that the lawyer lacks those characteristics that are essential to the practice of law."\textsuperscript{72} The lawyer's "conduct indicates that the accused lacks aspects of trustworthiness and integrity that are relevant to the

\textsuperscript{63} In re Starr, 952 P.2d 1017, 1026 (Or. 1998) (quoting In re Hockett, 734 P.2d 877 (Or. 1987)).
\textsuperscript{64} Id.
\textsuperscript{65} Id. (citation omitted).
\textsuperscript{66} In re Obert, 89 P.3d 1173, 1178 (Or. 2004) (en banc) (citation omitted).
\textsuperscript{67} Attorney Grievance Comm'n of Maryland v. Reinhardt, 892 A.2d 533, 540 (Md. 2006) (finding "[respectant was dishonest and misrepresented the truth when he told his client that he was working on the case when, in fact, he had lost the file and was not working on the case at all.").
\textsuperscript{68} In re Carpenter, 95 P.3d 203, 205-06 (Or. 2004).
\textsuperscript{69} Id. at 209. At the time the lawyer actually violated DR 1-102(A)(3), based upon the ABA Model Code of Professional Responsibility, which has since become the Model Rules of Professional Conduct. The rule prohibited "conduct involving dishonesty, fraud, deceit or misrepresentation," the same as Model Rule 8.4.
\textsuperscript{70} Id. at 206.
\textsuperscript{71} Id. at 208.
\textsuperscript{72} Id.
practice of law.” After considering mitigating factors, the court publicly reprimanded the lawyer for his dishonesty.

ii. Truthfulness in Statements to Others: Model Rule 4.1

Rule 4.1 requires a lawyer, in the course of representing a client, to not knowingly “make a false statement of material fact or law to a third person.” The fact is material “if it could have influenced the hearer.” The rule prohibits misrepresentations that “occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.” However, the comments state that a lawyer “generally has no affirmative duty to inform an opposing party of relevant facts.” The Colorado Supreme Court found that a lawyer had violated this rule by telling a witness she knew about his criminal record, when he did not in fact have one. The lawyer also tried to act as a neutral third party negotiator by claiming she did not represent the defendant even though she did. The lawyer violated the rule by making false statements to influence witnesses’ actions.

iii. No Contact with Represented Parties: Model Rule 4.2

Model Rule 4.2 says that:

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.

The rule is not restricted by the medium of communication. Electronic communications are governed by the rules, the same as face-to-face and telephone communications. However, accessing publicly available information such as a website run by an opposing party is not considered communication for purposes of the rule.

73. Id. at 210.
74. Id. at 214.
77. MODEL RULES OF PROF’L CONDUCT ANN. R. 4.1 cmt. no. 1 (2010).
78. Id.
79. In re Myers, 981 P.2d 143, 144 (Colo. 1999) (en banc).
80. Id.
83. Id.
Further, a New York district court found that an investigator did not communicate with a represented party by speaking with sales people at a business involved in a trademark dispute because "the investigators merely recorded the normal business routine in the . . . showroom and warehouse."\textsuperscript{84} One reading of these decisions is that information that is in some sense publicly available may be obtained, even if some communication with a represented party is required to obtain it. However, not all courts are in agreement with this standard.\textsuperscript{85}

iv. Dealing with Unrepresented Persons: Model Rule 4.3

Model Rule 4.3 requires that a lawyer, in "dealing on behalf of a client[,]" ensure that an unrepresented party understands the lawyer's interests in communicating with that person and must proactively clarify misunderstandings that the party may hold.\textsuperscript{86} The D.C. Bar determined that this rule allowed a lawyer to send an investigator to interview a petitioner who allegedly violated a domestic violence protection order.\textsuperscript{87} However, the attorney was obligated to ensure that the investigator did "not mislead the petitioner about the investigator's or the lawyer's role in the matter . . . [and] should also take reasonable steps to ensure that, where an investigator reasonably should know that the unrepresented person misunderstands the investigator's role, the investigator makes reasonable affirmative efforts to correct the misunderstanding."\textsuperscript{88} In one case involving an investigation into racial hostility, the court concluded that Rule 4.3 meant that "neither an attorney nor his agent can mislead an unrepresented employee into believing that they are a disinterested party when the attorney is acting on behalf of his client."\textsuperscript{89} Generally, attorneys comply with Rule 4.3 by clearly communicating whom they represent and where their interest lies.

\textsuperscript{85} See, e.g., Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693, 698 (8th Cir. 2003) (finding violations of 4.2 when an investigator spoke with sales people).
\textsuperscript{86} MODEL RULES OF PROF'L CONDUCT R. 4.3 (2010).
\textsuperscript{88} Id.
v. Lawyers Responsible for Those Working Under Them: Model Rule 5.1–5.3, 8.4

Model Rules 5.1 through 5.3 make lawyers ethically responsible for those working under them.90 Rule 5.1 makes a lawyer responsible for the ethical conduct of any other lawyer if "the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved."91 Rule 5.2 makes a lawyer ethically responsible for her actions even if they were at the behest of another.92 Rule 5.3 holds a lawyer responsible for the ethical violations of non-lawyers working under her.93 If an investigator "acts as [a] lawyer’s ‘alter ego,’ the lawyer is ethically responsible for the investigator’s conduct."94 Finally, Model Rule 8.4 makes it misconduct to violate or attempt to violate the Rules, "knowingly assist or induce another to do so, or do so through the acts of another."95 At least one court has implied that the more closely a lawyer directs and is kept updated by an investigator, the more the lawyer is responsible for the investigator’s actions.96

C. Undercover Operations Are Limited by the Ethical Rules

The ABA Model Rules of Professional Conduct ("ABA Model Rules") make it misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation,"97 apparently barring the use of undercover operations. However, the annotations to the Rules state that the rule "does not, standing alone, bar lawyers from participating in lawful undercover investigations into possible unlawful conduct."98 The New Hampshire Supreme Court declared "[b]ecause ‘no single transgression reflects more negatively on the legal profession than a lie,’ it is the responsibility of every attorney at

90. MODEL RULES OF PROF’L CONDUCT R. 5.1-5.3 (2010).
92. MODEL RULES OF PROF’L CONDUCT R. 5.2 (2010).
93. MODEL RULES OF PROF’L CONDUCT R. 5.3 (2010).
95. MODEL RULES OF PROF’L CONDUCT R. 8.4(a) (2010).
96. See Allen v. Int’l Truck and Engine, No. 1:02-cv-0902-RLY-TAB, 2006 WL 2578896, at *23 (S.D. Ind. 2006) (finding ethical violations where “in-house and outside counsel were integrally involved in the investigation from its conception to close" and “reviewed daily summaries on a regular basis”); cf. Jones v. Scientific Colors, Inc., 201 F. Supp. 2d 820 (N.D. Ill. 2001) (finding no ethical violations where investigators were hired and directed by the clients rather than the attorneys, and did not provide regular updates).
97. MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2010).
all times to be truthful.”99 While the New York County Lawyers
Association concluded “it is generally unethical for a non-government
lawyer to knowingly . . . employ dissemblance in an investigation,”
they determined that “it was ethically permissible in a small number
of exceptional circumstances.”100

These apparently contradictory statements are largely the result
of undecided law. Lawyers are bound by many different ethical rules
and laws, which add to the confusion. Each state adopts its own
ethical rules that are usually enforced by the state bar associations,
which have reached different and sometimes contradictory decisions.
However, because nearly every state has adopted some form of the
ABA’s Model Rules, they share common language.101

A few states have adopted explicit rules that make it clear when
undercover operations are ethical, although in at least two states the
exception only applies to governmental lawyers.102 In 2000, the
Virginia Ethics Committee noted that “[d]espite the fact that these law
enforcement and testing practices [of engaging in covert
investigations] are longstanding and widespread, there have been no
reported judicial decisions or ethics committee opinions addressing
the ethical propriety of a lawyer directing such practices.”103 A widely
cited law review article on undercover investigations from 1995
concluded that despite widespread use of misrepresentation by
attorneys and investigators under attorney supervision for socially
desirable ends, the ethical propriety of such misrepresentations was
unclear.104 Some states have explicitly modified their rules of

100. N.Y. County Lawyer’s Ass’n Comm. on Prof’l Ethics, Formal Op. 737 (2007).
101. See American Bar Association, Model Rules of Prof’l Conduct, ABA,
http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Mar. 8, 2011). California is the only state that has not
adopted the Model Rules, but they include many of the same provisions as the Model Rules.
Compare MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2010) (prohibiting a lawyer from
engaging “in conduct involving dishonesty, fraud, deceit or misrepresentation”), with CAL. BUS.
& PROF. CODE § 6068(d) (West 2004) (requiring lawyers to “employ . . . those means only as
are consistent with truth”), and CAL. BUS. & PROF. CODE § 6106 (West 2004) (prohibiting a
lawyer from committing any act involving “moral turpitude, dishonesty, or corruption”).
102. ALA. RULES OF PROF’L CONDUCT R. 3.8(2) (LexisNexis 2011) (governing lawyers
only); FLA. RULES OF PROF’L CONDUCT R. 4-8.4(c) (LexisNexis 2011) (same); IOWA RULES
OF PROF’L CONDUCT R. 32:8.4 cmt. 6 (2010) (allowing limited undercover investigations by all
lawyers); OR. RULES OF PROF’L CONDUCT R. 8.4(b) (2010) (same).
104. David B. Isbell & Lucantonio N. Salvi, Ethical Responsibility of Lawyers for
Deception by Undercover Investigators and Discrimination Testers: An Analysis of the
Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct, 8
professional conduct to clarify what is ethically permissible. Others have issued clarifying ethical opinions mostly related to government lawyers; nevertheless, the majority has not clearly ruled.

i. Oregon Allows Attorneys to Supervise Covert Investigations

Oregon is one of the only states that explicitly allows lawyers—both civil and criminal—to participate in undercover operations, although they are restricted to supervising investigations. Oregon Rules of Professional Conduct Rule 8.4(b) says “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.” The rule defines a covert activity as “an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.” As originally written, the rule only allows the prosecution or plaintiff to use covert activity to obtain information, but does not allow the defense to do so. However, when Oregon adopted most of the ABA Model Rules in 2005, it amended Rule 8.4(c) to add that “dishonesty, fraud, deceit or misrepresentation” was only misconduct if it “reflects adversely on the lawyer’s fitness to practice law,” which can be read to allow undercover investigations by all lawyers in appropriate circumstances.

Oregon’s unusually specific rule was issued to overrule an Oregon Supreme Court holding that a private lawyer engaged in misconduct when he misrepresented himself as a chiropractor to investigate improper procedures used by a medical review company working for State Farm. As a defense, the accused lawyer pointed to traditional “prosecutorial exceptions” that allowed

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105. See, e.g., ALA. RULES OF PROF’L CONDUCT R. 3.8(2) (LexisNexis 2011); ALASKA RULES OF PROF’L CONDUCT R. 8.4 cmt. 4 (2011); FLA. RULES OF PROF’L CONDUCT R. 4-8.4(c) (LexisNexis 2011); IOWA RULES OF PROF’L CONDUCT R. 32:8.4 cmt. 6 (2010); VA. RULES OF PROF’L CONDUCT R. 8.4(c) (2011); WIS. RULES OF PROF’L CONDUCT R. SCR 20:4.1(b) (2011).


107. IOWA RULES OF PROF’L CONDUCT R. 32:8.4 cmt. 6 (2011) (effective July 1, 2005) (Iowa also allows supervision of undercover investigations by lawyers).


109. Id.


111. In re Conduct of Gatti, 8 P.3d 966 (Or. 2000).
misrepresentations during investigations of criminal conduct.\textsuperscript{112} The government even joined the case as \textit{amicus curiae}, asking the court to recognize a government exception for "attorneys who advise, conduct or supervise legitimate law enforcement activities that involve some form of deception or covert operations."\textsuperscript{113} However, the court found that the rule applied broadly to "all members of the bar" and "case law does not permit recognition of an exception for \textit{any} lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements."\textsuperscript{114} After considering mitigating circumstances, the accused was publicly reprimanded.\textsuperscript{115}

Because of the Oregon Supreme Court's ruling, the Department of Justice sued the Oregon Bar to enjoin it from disciplining government lawyers for supervising undercover operations.\textsuperscript{116} In 2002, Oregon resolved the conflict by revising its rules to allow both government and private lawyers to supervise undercover operations that are otherwise legal.\textsuperscript{117}

\begin{itemize}
  \item[ii.] The "Prosecutorial Exception": Most States Implicitly Allow Covert Investigations by Law Enforcement

Law enforcement has long relied on covert investigations supervised by lawyers, to catch criminals. These practices are rarely challenged. Chris Toth, Executive Director of the National Association of Attorneys General, speculated that "many ethical complaints against law enforcement attorneys for using deception have and are dismissed out of hand... and thus never end up providing the basis for published opinions.... [A] certain unwritten tradition probably exists in most jurisdictions that affirm the permissibility of the use of deception."\textsuperscript{118} The New York District court noted that "opinions of state and local bar associations hold [that the old version of Rule 8.4(c) with identical language] do[es] not apply to prosecuting attorneys who provide supervision and advice to

\end{itemize}

\begin{footnotes}
\item 112. Id. at 974.
\item 113. Id. at 974-75.
\item 114. Id. at 976.
\item 115. Id. at 980.
\item 117. Oregon Amends Disciplinary Rule to Clarify That Lawyers May Supervise Covert Activity, 18 Laws. Man. On Prof. Conduct (ABA/BNA) 94 (Feb. 13, 2002).
\end{footnotes}
undercover investigations." In In re Conduct of Gatti the court quoted the United States Attorney’s argument that:

the United States Department of Justice “regularly supervises and conducts undercover operations in Oregon that necessarily involve a degree of deception.” Such covert operations involve both civil and criminal cases, ranging from enforcement of civil rights statutes to international narcotics conspiracies. She contends that federal courts long “have upheld the use of deceptive law enforcement tactics” and that she has “not found a single case in which deception and subterfuge are prohibited as a tool of law enforcement.”

The Virginia Bar summarized the “prosecutorial exception” as allowing government attorneys to supervise law enforcement activities that promote “important and judicially-sanctioned social policy.”

Courts have long recognized the importance of undercover investigations in catching and deterring crime. The Supreme Court wrote in 1932:

Artifice and stratagem may be employed to catch those engaged in criminal enterprises. The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law.

Similarly, in United States v. Russell, the Supreme Court wrote that “infiltration is a recognized and permissible means of investigation” as related to drug investigations because the “gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task.” Justice Powell noted in another drug case that contraband offenses are “difficult to detect in the absence of

121. In re Conduct of Gatti, 8 P.3d 966, 975 (Or. 2000) (en banc).
undercover Government involvement.”125 Although these cases did not specify whether attorneys were involved, the local prosecutors likely had knowledge of the investigations even if they did not actively supervise them. The Utah State Bar concluded that “a governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct.”126 Most, but not all, states have followed this reasoning.127

Wisconsin has gone farther than most states and, in at least one case, determined that there was no ethical distinction between prosecutors and other lawyers.128 The Supreme Court of Wisconsin handed down an unusually permissive ethical decision in the unpublished opinion Office of Lawyer Regulation v. Hurley.129 Hurley, a named partner at a Wisconsin law firm, was defending a man accused of sexual assault of a teenage boy and possession of child pornography.130 Over the course of investigating and preparing his defense, Hurley became convinced that the boy his client was accused of assaulting had fabricated the allegation and placed the pornography on his client’s computer.131 Hurley hired an investigator who sent the boy a letter telling him he had been selected to receive a

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127. An extreme example in Colorado is often cited for the proposition that even prosecutors can never lie. See, e.g., Douglas R. Richmond, Deceptive Lawyering, 74 U. CIN. L. REV. 577 (2005); Livingston Keithley, Should a Lawyer Ever Be Allowed to Lie? People v. Pautler and a Proposed Duress Exception, 75 U. COLO. L. REV. 301 (2004). The state supreme court concluded that “[p]urposeful deception by an attorney licensed in our state is intolerable, even when it is undertaken as a part of attempting to secure the surrender of a murder suspect.” In re Pautler, 47 P.3d 1175, 1176 (Colo. 2002). Chief Deputy District Attorney Mark Pautler presented himself as “Mark Palmer,” public defender, in order to secure the surrender of a literal axe murderer. Id. at 1177. The court found that he violated Colorado’s Rule 4.3 and 8.4(c) of Professional Conduct, id. at 1184, whose language is identical to the rules in the Model Code. Compare COLO. RULES OF PROF’L CONDUCT R. 4.3 (2008), and COLO. RULES OF PROF’L CONDUCT R. 8.4(c) (2008), with MODEL RULES OF PROF’L CONDUCT R. 4.3 (2010), and MODEL RULES OF PROF’L CONDUCT 8.4(c) (2010).
129. Id.
130. Id. at 2.
131. Id.
new free laptop. In order to participate, he would turn over his computer to be stored for a 90-day trial period. Hurley’s investigator made the exchange and then turned the boy’s computer over to a forensic specialist that found evidence of child pornography. Nearly three years later, Hurley was accused of violating Rule 8.4 and 4.1. However, the Wisconsin Supreme Court found that Hurley did not violate any ethical rules. They noted that “prosecutors have traditionally been allowed to use dissemblance in order to collect evidence” and that no one could point to “precedent drawing a distinction between prosecutors and other attorneys.” The court concluded that since prosecutors participate in this type of behavior, Hurley could too.

iii. Explicit Rules

Likely in response to Oregon’s determination that rule 8.4 did not include a prosecutorial exception, a number of states—including Alabama, Alaska, Florida, Iowa, Virginia, and Wisconsin—have created specific rules that authorize some types of undercover investigations. Alabama creates special powers for prosecutors under Rule 3.8. In addition, an opinion found it ethical for a lawyer to employ private investigators to engage in pretexting as part of an investigation into intellectual property rights infringement, expanding the exception to private lawyers in civil cases.

Florida Rules of Professional Conduct state that “it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule.”

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132. Id.
133. Id. at 2-3.
135. Id. at 4.
136. Id.
137. Id.
138. See, e.g., ALA. RULES OF PROF’L CONDUCT R. 3.8(2) (LexisNexis 2011); ALASKA RULES OF PROF’L CONDUCT R. 8.4 cmt. 4 (2011); FLA. RULES OF PROF’L CONDUCT R. 4-8.4(c) (LexisNexis 2011); IOWA RULES OF PROF’L CONDUCT R. 32:8.4 cmt. 6 (2010); VA. RULES OF PROF’L CONDUCT R. 8.4(c) (2011); WIS. RULES OF PROF’L CONDUCT R. SCR 20:4.1(b) (2011).
139. ALA. RULES OF PROF’L CONDUCT R. 3.8(2) (LexisNexis 2011).
141. FLA. RULES OF PROF’L CONDUCT R. 4-8.4(c) (LexisNexis 2011).
adopted the exact same wording as Florida, but put it in the comments to Rule 8.4 instead of in the rule itself. Alaska also amended a comment to Rule 8.4, permitting “advising and supervising lawful covert activity in the investigation of violations of criminal law or civil or constitutional rights.” In 2003, Virginia amended 8.4(c) to explicitly state that an act is only misconduct if it “reflects adversely on the lawyer’s fitness to practice law,” narrowing the general prohibition on “dishonesty, fraud, deceit, or misrepresentation.”

Prior to amending the rules, a Virginia ethics opinion had “acknowledge[d] that the conduct of undercover investigators and discrimination testers acting under the direction of an attorney involves deception and deceit... These methods of gathering information in the course of investigating crimes or testing for discrimination are legal, long-established and widely used for socially desirable ends.” Wisconsin modified Rule 4.1 to allow lawyers to advise or supervise “lawful investigative activities.”

Still, whether intentional or not, the wording adopted by most states excludes defense lawyers from using covert tactics. Alabama, Florida, and Iowa’s exception allowing covert investigations is limited to prosecutors. Alaska allows supervision of “lawful covert activity in the investigation of violations of criminal or civil or constitutional rights.” On the other hand, Oregon and Virginia both modified the Model Rules’ traditional prohibition on “dishonesty, fraud, deceit, or misrepresentation” to only apply to conduct that “reflects adversely on the lawyer’s fitness to practice law.” This wording probably gives defense attorneys some leeway. Wisconsin’s language is the most permissive, allowing misrepresentation during any lawful investigative activity.

Many of the recent changes to state ethical codes regarding covert investigations may be in a response to the Citizen Protection

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142. Iowa Rules of Prof’l Conduct R. 32:8.4 cmt. 6 (2010).
147. See supra notes 139, 141, and 142. Although in Alabama lawyers can hire private investigators to use pretexting in intellectual property rights cases. See supra note 139.
Act of 1998, 152 which made federal prosecutors “subject to State laws and rules, and local Federal court rules.”153 Prior to the act, federal prosecutors were bound by the rules issued by the Attorney General and under those guidelines were given considerable leeway to direct undercover investigators and contact represented individuals, especially prior to filing of charges.154

iv. Non-Law Enforcement Use of Undercover Investigations Are Permitted in Special Circumstances

Courts have explicitly found undercover investigations ethical in three general situations.155 The first, for law enforcement purposes, has already been discussed above. The other two exceptions involve private lawyers acting to enforce the law. The second exception is discrimination cases—usually racial discrimination related to housing. The third exception is enforcement of intellectual property rights. The general rule governing these exceptions is that “[t]he prevailing understanding in the legal profession is that a public or private lawyer’s use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.”156

1. Discrimination Cases

“In housing discrimination cases, testers have long been approved by the courts as a valid means to enforce the Fair Housing Act of 1968, which creates an enforceable right to truthful information concerning the availability of housing.”157 The Supreme Court defined testers as “individuals who, without an intent to rent or

155. See, e.g., ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 01-422 (2001) (noting that investigations of “criminal activity, discriminatory practices, and trademark infringement” commonly use deceptive practices that are sometimes found ethical, but declining to address the issue). The Virginia Bar Ethics Committee notes a fourth possible exception: “threat or actual commission of criminal activity where the attorney is the victim.” Va. Legal Ethics Comm., Op. 1765 (2004). However, the situation will not be examined by this paper because it is not relevant to the large question.
purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful” discrimination “because of race, color, religion, sex, or national origin.”158 Although the court did not directly address the ethical problems of the probable attorney involvement with the deception, later courts have condoned it, finding that “this requirement of deception was a relatively small price to pay to defeat racial discrimination.”159 Further, there is a long line of cases supporting the use of testers in discrimination cases.160

The extensive use of testers in civil rights cases shows wide legal acceptance and implies that they are ethical. Although courts have noted that “conduct may be unethical . . . even if it is not unlawful,”161 the cases and ethical opinions discussing testers have generally found the practice ethical.162 Courts have permitted this deception because they recognize the importance of preventing discrimination and “[i]t is frequently difficult to develop proof in discrimination cases” without testers using deceptive means of gathering evidence.163

2. IP Infringement

Similarly, courts have recognized the permissibility of limited deception in investigating intellectual property (“IP”) infringement. Ethical rules do not restrict a party from “investigating potential unfair business practices by use of an undercover [sic] posing as a member of the general public engaging in ordinary business transactions with the target.”164 The Alabama Ethics Committee concluded that “[d]uring pre-litigation investigation of suspected infringers of intellectual property rights, a lawyer may employ private investigators to pose as customers under the pretext of seeking services of the suspected infringers on the same basis or in the same

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159. Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983).
162. See, e.g., Howard, 712 F.2d at 321 (rejecting the trial court’s criticism of using false pretenses in investigations of housing discrimination cases and noting that the misleading of landlords was regrettable but finding that “deception was a relatively small price to pay to defeat racial discrimination”).
163. id.
manner as a member of the general public." \(^{165}\)

In *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, \(^{166}\) plaintiff lawyers for Gidatex hired investigators to pose as customers and speak with salespeople to determine whether Campaniello had complied with a trademark cease and desist letter. \(^{167}\) The court did not find ethical violations, stating that "hiring investigators to pose as consumers is an accepted investigative technique, not misrepresentation." \(^{168}\) The goal of the rule barring misrepresentation is to "protect parties from being tricked into making statements in the absence of their counsel and to protect clients from misrepresentations by their own attorneys." \(^{169}\) Although the court determined that the sales people were properly considered parties to the suit represented by counsel—and thus speaking to them would normally violate the rules of speaking to a represented party—no rules were broken because the investigator's "actions simply do not represent the type of conduct prohibited by the rules." \(^{170}\)

Similarly in *Apple Corps Ltd. v. International Collectors Society*, \(^{171}\) the court determined that the misrepresentation used to investigate trademark infringement in violation of a settlement agreement was not material and thus not a violation of the New Jersey Professional Conduct Rule 8.4(c). \(^{172}\) Further, the court determined that the attorney and investigators did not violate Rule 4.3 because they were not "acting in the capacity of lawyers." \(^{173}\)

However, *Midwest Motor Sports v. Arctic Cat Sales, Inc.* \(^{174}\) came to a different conclusion. The plaintiff's attorney hired an investigator to speak to sales people to collect information about a violation of state franchise law. \(^{175}\) The Eighth Circuit concluded that "an attorney is responsible for the misconduct of his nonlawyer employee or associate if the lawyer orders or ratifies the conduct." \(^{176}\) However,
unlike other courts, it also found that the salespeople were represented parties and that speaking with them violated Rule 4.2 since the plaintiffs were using statements of the salespeople as "admissions by the organization." The court also found a violation of Rule 8.4(c), but it was for making non-consensual recordings of conversations. The court did not address misrepresentations related to posing as a customer.

3. Other Cases: Misrepresentations Are Usually Unethical

Outside of these recognized exceptions, courts generally prohibit the use of deception. In one case, an attorney hired a private investigator to impersonate the defendant in order to obtain information about that defendant’s insurance policy. The court found he violated an ethical rule identical to Rule 8.4(c). Similarly, an attorney representing an individual in an auto accident made an unethical misrepresentation when he did not identify himself as an attorney when asked who he was by the opposing party during a phone interview.

In one of the rare cases addressing the use of investigators by defendants, the court found attorneys violated Rule 8.4 when they “allowed the investigators to give false information about who they were to the Plaintiffs and other employees.” Defendants operated a facility where there had been allegations of racial hostility. They hired investigators to talk to employees about the incident. The court summarized: “lawyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not say or do.”

177. Id. at 697 (noting South Dakota adopted the ABA’s Model Rules of Professional Conduct).
178. Id. at 697-698.
179. Id. at 699-700.
181. Id. at 515.
184. Id. at *1.
185. Id. at *2.
186. Id. at *6 (quoting Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 880 (N.D. Ill. 2002)).
4. **Other Cases: Acting As a General Member of the Public Is Ethical**

On the other hand, courts generally permit undercover investigators to observe opposing parties' actions or business if they do not discuss the controversy or related subjects. In a case alleging interference with business on the basis of disparaging remarks, the court concluded that it was ethical for undercover investigators to visit defendants' business to observe their practices. The court found that the "[defendants'] shops were open for business and the investigators did no more than ordinary customers might and may have done. Thus, the investigators' technique in general should not be deemed improper." Moreover, in a case involving personal injury in an auto accident, the court approved of an investigator who visited the plaintiff's beauty salon and over the course of three hours had her hair "shampooed, cut and permed" by the plaintiff. During the visit the investigator only discussed "Christmas shopping and holiday plans" with the plaintiff. The content of their conversation did not relate to the case in controversy, only the investigator's observations of the hairdresser were relevant. The court wrote that "[i]t is well settled that a private investigator’s observations of a plaintiff in a personal injury suit are admissible where relevant to the issue of the extent and permanency of the plaintiff’s injury. However, the same is not true where statements are elicited by opposing counsel from a party without notice to the attorney known to be representing her."

5. **Rules 4.1–4.3 Only Apply in the Course of Representing a Client**

Rules 4.1 through 4.3 only apply in the course of representing a client. The comments to Rule 4.1 note that "[m]isrepresentations made other than in the course of representing a client are subject to

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188. Id. at 559.
190. Id.
191. Id. at 273-74.
192. Id. at 274 (citation omitted).
Rule 8.4." Some courts and ethical opinions have found this preamble highly significant. Others have not found it worth commenting on.

David Isbell and Lucantonio Salvi, in their widely cited law review article Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers, conclude that misrepresentations used in undercover investigations are not made "in the course of representing a client." The authors argue that if a lawyer or an investigator supervised by a lawyer makes misrepresentations while undercover, it is in the course of acting as an investigator or civil rights "tester," not as a lawyer, and thus falls outside the bounds of rules 4.1–4.3. Isbell and Salvi rightly conclude that a retired lawyer who happens to work as a discrimination tester or an F.B.I. agent who has a law degree is not acting in the course of representing clients. From this, they wrongly extrapolate that when a lawyer hired by a client directs an investigator, she is acting as an investigator, not a lawyer, and thus her actions are not in the course of representing clients.

Isbell and Salvi's conclusion does not match reasonable expectations or the general conclusion of courts. If an individual goes to a law firm and hires a lawyer, everything that lawyer does while employed by that individual is in the course of representation. It is absurd to say that when an individual hires a lawyer for ten hours of work, for six of those hours she acted as a lawyer and was representing the individual, but the four hours of investigations and interviews she performed on behalf of the individual were not in the course of representation. This proposition seemed so obvious to numerous courts that they did not even address the issue and accepted as uncontested that the lawyers directing the investigators were doing it in the course of representing clients.


196. Id. at 812.

197. Id. at 815.

6. Conclusion: General Rules

The New York Ethics Committee summarizes the ethical contours of undercover investigations well:

while it is generally unethical for a non-government lawyer to knowingly utilize and/or supervise an investigator who will employ dissemblance in an investigation... it is ethically permissible in a small number of exceptional circumstances where the dissemblance by investigators is limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence.\(^{199}\)

Additionally, the ethics committee required that the “evidence sought is not reasonably and readily available through other lawful means,” and that no laws or ethical rules were otherwise violated.\(^{200}\)

IV. Analysis\(^{201}\)

The rules on undercover operations are unclear and can vary significantly among jurisdictions. In considering the ethics, a lawyer should consider a number of questions. First, is the lawyer acting in her capacity as a lawyer representing a client? If she is not, then Model Rules 4.1 through 4.3 do not apply and the lawyer is bound by only Rule 8.4. Second, is the misrepresentation or omission material? Under Rule 8.4, only material omissions are unethical. Finally, is the misrepresentation the kind of offense that “indicate[s] a lack of those characteristics relevant to law practice”?\(^{202}\) If so, the deception is clearly a violation of Rule 8.4.

Investigations on social networking websites require the same analysis as traditional undercover investigations, but with some new twists, especially regarding the propriety of friend requests.

A. Publicly Available Information

Accessing publicly available information does not require deception and is thus ethical. Most social networking websites provide built-in search tools that will return publicly available information based upon searches using names, email addresses, or

\(^{199}\) N.Y. County Lawyer’s Ass’n Comm. on Prof’l Ethics, Formal Op. 737 (2007).

\(^{200}\) Id.

\(^{201}\) This section analyzes different ethical standards across the country in an effort to find common trends and commonality in the standards. Conclusions about ethical behavior should NOT be construed as suggestions on how to behave in practice since ethical standards vary significantly by jurisdiction and the ethical rules are unclear.

\(^{202}\) MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. 2 (2010).
other information. Similarly, general search engines like Google or Microsoft's Bing link to profiles with public information on social networking websites. By only viewing information open to the public, the investigator does not initiate any contact with others and thus does not implicate any of the rules prohibiting communication with represented or unrepresented parties. Existing ethical opinions agree with this analysis.  

i. Information Available to Social Networking Website Members

Publicly available information can be difficult to define, and the lines are important because on many social networks more information is available to members than to non-members. A footnote to an Oregon Ethics Committee opinion provides a good guideline: if a website is password protected but the public is generally allowed to register and access the website, then information contained behind that password is publicly available. The big social networking websites such as Facebook and MySpace meet this criterion.

ii. Information Available to Members of the Same Network

In order to further restrict access to their profiles, individuals sometimes only allow general subsets of users to view their profiles. These subsets are often referred to as networks or groups. For example, many users belong to their school or work networks and networks of organizations they support. This situation should follow the same analysis as above. If access to the group is open to anyone, an investigator can ethically join the group to gain access to a user's profile since it does not involve deception and is essentially public information.

A more interesting edge case is if the group is not open to the public, but the investigator already has access to the network, perhaps because she attended the same school as the person of interest.


204. 60% of adult social network users limit access to their profiles. Lenhart, supra note 16, at 10. A common privacy setting is to limit access to members of the social network. Id.

Although this may no longer be considered publicly available information, the investigator should still ethically be able to collect information because no deception was involved and the information was shared with an entire network of people, making it at least semi-public.\textsuperscript{206}

Although vaguely unsettling, based upon the above logic it should be ethical for a lawyer to hire an investigator specifically for the organizations she belongs to. University students often want people they meet at the university to be able to find them and thus allow anyone who attends the university to see their profiles. If a lawyer wanted to access this information, it should not be unethical to hire a student at the same university as a person of interest to look up that person’s profile.

\textbf{B. Obtaining Information From Clients or Other Friendly Parties About Their “Friends”}

Although most social networks provide a variety of privacy settings, one of the most common is limiting access to profile information to individual people the user has connected with, or “friends.” Frequently, parties to a lawsuit will previously have been friends or associates, and thus a client may have a social network account that has access to relevant information because the client is still “friends” with the opposing party or relevant witness.\textsuperscript{207}

\textit{i. Client-Provided Information}

Receiving information from a client is generally ethical. An investigator need not make any misrepresentations in observing a client browsing a social networking website or by receiving copies of the information that is available to the client as a user of one of the websites.\textsuperscript{208} Clients are also relatively free to collect information and communicate with opposing parties. The Restatement of Law Governing Lawyers states:

\textsuperscript{206}. In fact, it may be difficult for an investigator to distinguish between a user that has a publicly accessible profile and one that restricts access to a group the investigator is a part of. Generally a user can either access information or she cannot. The websites do not inform a user of why she cannot access information nor usually indicate that information exists when a user cannot access it.

\textsuperscript{207}. This is particularly common in divorce and custody cases. \textit{See, e.g., Italie, supra} note 3.

\textsuperscript{208}. The investigator may be liable for the actions of the member while she is online for the purposes of the investigation because the member could be under the direct supervision of the investigator. This means that the attorney or investigator should not tell the member to lie or encourage her to break the law to get information.
[n]o general rule prevents a lawyer's client, either personally or through a nonlawyer agent, from communicating directly with a represented nonclient. Thus, while neither a lawyer nor a lawyer's investigator or other agent... may contact the represented nonclient, the same bar does not extend to the client of the lawyer or the client's investigator or other agent.209

This reasoning was adopted by a district court in Jones v. Scientific Colors, Inc.210 The Oregon Bar Ethics Committee reached a similar conclusion that a lawyer has no duty to prevent communications between represented clients.211 However, the committee ruled that it would be a violation of Rule 8.4 if an attorney directed her client to deliver a particular message.212 The Restatement of Law Governing Lawyers states that a lawyer is not prohibited from "assisting the client in otherwise proper communication by the lawyer’s client with a represented nonclient."213 Although a lawyer may not communicate with represented parties and may not direct clients in communications with other parties, she is not obligated to prevent clients from communicating with other parties on social networks to obtain information.214 Lawyers are also not barred from using such information.215 Thus, a client can make friend requests in order to provide information to her attorney, who can ethically accept it.

ii. Using a Client's Account

Similar to providing information obtained through research on a social network, a client could provide her attorney with her login and password in order to let the attorney do the research. This method can be especially useful if the client is in jail and unable to help collect information. With a client's login information the attorney can browse

212. Id.
213. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99(2).
214. See, e.g., Miano v. AC & R Adver., Inc., 148 F.R.D. 68, 89 (S.D.N.Y. 1993) (stating "[e]thics opinions allow that attorneys need not prevent clients from engaging in ex parte or taped conversation with adversaries, and are permitted to counsel clients regarding the scope and ramifications of such conduct. . . . While the attorney's subsequent receipt and use of information secured by the client goes a step further, logic dictates that if the information was not secured illegally or unethically, its use does not place the attorney in violation of the disciplinary rules. . . . When a client independently and legally secures information which is relevant and useful to his case and provides it to counsel, the attorney's use of the information is not unethical.").
215. Id.
a social network as her client and see all of the same information the client sees. Passively browsing—without directly communicating with other members—is ethical since the attorney is only accessing information already available to the client and is acting as the agent of the client. \footnote{216} Active communications and making friend requests would probably be a material deception and thus unethical, as explored more fully below in the section discussing fake accounts. Further, a lawyer must be careful to clearly obtain consent to use someone else's account because in some states, including California and Texas, it is illegal to impersonate someone online without consent. \footnote{217}

\section*{C. Fake Accounts}

Scholars and practitioners have written extensively on the ethics of undercover investigations in the real world. \footnote{218} Creating a fake profile on a social networking website and then communicating via messages or wall posts is ethically identical to putting on a disguise in order to have a conversation with someone in the real world. The goal of the communications from the investigator's point of view is to elicit specific comments that are likely to the detriment of the person

\footnote{216. A word of caution: By logging in as a client, an investigator is technically misrepresenting herself to the social networking site and she might be in violation of the social networking website's terms of use. \textit{See}, e.g., Facebook Terms of Use, FACEBOOK (Apr. 26, 2011), http://www.facebook.com/terms.php?ref=pf ("You will not . . . access an account belonging to someone else."); MySpace Terms of Use, MYSPACE (June 25, 2009), http://www.myspace.com/help/terms ("You agree not to use the account, username, email address or password of another Member at any time or to disclose your password to any third party"). However, the investigator is acting with the member's permission and as her client's agent. Since ethical guidelines are designed to "prevent attorneys from utilizing their legal skills to gain an advantage over an unsophisticated lay person," it is unlikely to be an ethical violation to deceive a website by logging in as someone else with her permission. \textit{In re} Howes, 940 P.2d 159, 165 (N.M. 1997). However, on rare occasions the government has brought criminal charges for using a fake account to access websites as discussed in the next section.}

\footnote{217. \textit{CAL. PENAL CODE} § 528.5 (West 2011); \textit{TEX. PENAL CODE ANN.} § 33.07 (West 2011), available at http://www.statutes.legis.state.tx.us/docs/pe/htm/pe.33.htm.}

being deceived. Such behavior is usually unethical for lawyers, but because of the prosecutorial exception, prosecutors generally may ethically use or oversee the use of fake accounts.

i. Using a Fake Account Violates the Terms of Use

Using a fake account to collect information covertly would violate the terms of use of most social networking websites. Both Facebook and MySpace explicitly prohibit the use of fake accounts. Facebook users agree not to “provide any false personal information on Facebook.” MySpace requires that all the “registration information you submit is truthful and accurate” and users are required to “maintain the accuracy of such information.” Violations of the terms of use could be a contract violation.

Although unlikely to be repeated often, the government has brought criminal charges for creating a fake account, arguing that accessing a website in violation of its terms of use is unauthorized access to a computer system, which is criminal under the Computer Fraud and Abuse Act. A criminal violation for fraud would certainly violate Rule 8.4.

ii. Using a Fake Account Is Ethical When It Does Not Reflect Adversely on a Lawyer’s Fitness to Practice Law

Although Rule 8.4 prohibits misrepresentations, misrepresentations that do not reflect adversely on a lawyer’s fitness to practice law are probably ethical in most jurisdictions. Both the ABA Model Rules and guidelines suggest this reading, as do the various cases. There are few situations, however, in which using a fake account to communicate would not reflect adversely on a

219. The traditional exceptions permitting the use of deception are even less likely to apply and more likely to be an invasion of privacy because they involve individual profiles rather than businesses. IP investigations usually involve a place of business not a personal profile. Housing and job discrimination usually take place in physical locations, not in cyberspace.

220. As previously discussed, Virginia, Oregon, and Wisconsin all have rules that appear to permit covert investigations of the type described, but they are relatively new rules and have not been thoroughly tested. Thus even in those jurisdictions, the law is still unsettled.


lawyer’s fitness to practice law.

The annotations to Model Rule 8.4 state that “[t]he limited number of court and ethics opinions dealing with the subject generally agree that Model Rule 8.4(c) . . . does not, standing alone, bar lawyers from participating in lawful undercover investigations into possible unlawful conduct.”224 Nearly every state has adopted Rule 8.4 along with some form of the ABA’s comment two to Rule 8.4,225 which states that “a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.”226 These clarifications to the rules suggest that only serious misrepresentations that reflect adversely on a lawyer’s ability to do her job are violations of the act. Similarly, the ABA’s standards on sanctioning lawyers state that the first goal of lawyer discipline is to protect the public and the administration of justice from lawyers who will not properly discharge their duties.227 The standards go on to define appropriate disciplinary action for conduct involving “dishonesty, fraud, deceit, or misrepresentation.”228 The least severe suggested punishment, admonition, is still only appropriate when the conduct “reflects adversely on the lawyer’s fitness to practice law,” suggesting that deception that does not adversely reflect a lawyer’s fitness is not an ethical violation because there is no punishment.229

The Oregon Supreme Court has followed this logic, finding that “the accused lawyer’s conduct must be connected rationally to the lawyer’s fitness to practice law to constitute a violation of [the old version of Rule 8.4(c)] by dishonesty.”230

Most of the “limited court and ethics opinions” mentioned in the annotation above that approve of covert investigations have been discussed by this paper, and they help define what types of deceptions reflect adversely on a lawyer’s ability to practice law. Courts and

225. See Model Rules of Prof’l Conduct, supra note 101.
226. MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. 2 (2010).
227. ABA JOINT COMM. ON PROF’L SANCTIONS, STANDARDS FOR IMPOSING LAWYER SANCTIONS III.1.1 (1992). (“The purpose of lawyer discipline is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge properly their professional duties to clients, the public, the legal system, and the legal profession.”).
228. Id. at III.5.1.
229. Id. at III.5.14.
ethics committees generally approve of non-government lawyers using undercover techniques to obtain publicly available information about businesses, especially in two specific types of cases. First, undercover investigations in IP cases attempt to discover if a business sells an infringing product. Second, in the discrimination cases the investigators try to obtain a rental or a job that should be available to anyone.

*Midwest Motor Sports* helps define when deception implicates a lawyer’s fitness to practice law. Although the deception in *Midwest Motor Sports* resembles a traditional IP case because it took place in a business, the Eighth Circuit came to a different conclusion.231 The case was distinguishable from traditional IP cases because the undercover investigator’s “purpose in visiting [the defendant’s store] was to elicit specific admissions from [the defendant’s] employees about [the defendant’s] sales.”232 Unlike other IP cases, the undercover agent spoke with the president of the company rather than low-level employees.233 The court found that this level of deception was an ethical violation.234 The case suggests that undercover operations to elicit damaging non-public disclosures would reflect adversely on a lawyer’s fitness and thus be unethical.235

Rarely will creating a fake account and communicating with someone on a social network be ethical, because most communication on social networks is personal rather than business related. Although in most jurisdictions creating a fake profile to make an inquiry about suspected counterfeit merchandise would probably be ethical, email and other means not requiring deception would probably work as well. Using a fake profile to communicate with an individual about personal matters, for which social networks are particularly useful, would be unethical because of the deception involved.

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232. *Id.* at 699.
233. *Id.* at 696.
234. *Id.* at 698.
235. Another example is *In re An Anonymous Member of the S.C. Bar*, in which the Supreme Court of South Carolina found that it was an unethical misrepresentation for an attorney to call an adverse party and identify himself as his client’s “cousin” in order to learn about a car accident. *In re An Anonymous Member of S.C. Bar*, 322 S.E.2d 667, 668 (S.C. 1984). A more interesting issue would be if the attorney had actually been his client’s cousin or hired someone who was to make the phone call.
iii. Making a Friend Request with a Fake Account

Making a friend request with a fake profile is unethical. Although bound by different rules, the La Crosse Police found fake friend requests to be quite effective when the stranger making the request was an attractive young woman. By becoming “friends” with an individual, the police officer gained access to photographs of underage college students drinking and fined them. In general, a person of interest may be more likely to grant a “friend” request to a fictitious profile that matches the person’s general demographics. However, social network users in general are not likely to accept “friend” requests from strangers.

Even though friend requests with fake profiles might be more effective, they are unethical. Using a fake account to trick someone into accepting a friend request would reflect adversely upon a lawyer’s fitness to practice law because it would be an overt deception. Even the New York City ethical opinion, the more permissive of the two opinions on this point, found that using a fake profile to send a friend request would be unethical.

D. Friend Requests

The issue of whether or not making a friend request with a real account is ethical is the most challenging and important question this paper grapples with. Friend requests are ethically the most difficult issue because they may or may not be a deceptive communication and the information obtained may or may not be public. Regardless, the issue is important because friend requests are the most valuable tool to investigators. The surest way of obtaining access to all, or nearly all, of a user’s information is by becoming “friends.”

Because of the subtleties involved, the next few sections first consider the nature of information on social network profiles and the

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236. KJ Lang, Facebook Friend Turns into Big Brother, LA CROSSE TRIB. (Nov. 19, 2009), http://lacrossetribune.com/news/local/article_0ff40f7a-d4d1-11de-afb3-001ce4c002e0.html.

237. Id.

238. See Amanda Lenhart & Mary Madden, How Teens Manage Their Online Identities and Personal Information in the Age of MySpace, PEW INTERNET & AMERICAN LIFE PROJECT, 33 (Apr. 18, 2007), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Society_and_the_Internet/P/IP_Teens_Privacy_SNS_Report_Final.pdf. (9% of teens are friends with people on social networking websites that neither they nor their friends have ever met).

two ethics opinions addressing this question. Then each of the four relevant ethical rules is examined in turn to determine if making a friend request using an account that contains truthful information is ethical.

i. Social Networking Profiles Are Semi-Public

Making a friend request is similar to the public interactions that have been found ethical in IP infringement cases, discrimination testing, and injury cases. "Merely observing someone conduct business is not the same as 'communicating' with that person."\(^\text{240}\) Courts have approved of undercover investigations that merely observe the opposing party's place of business as long as there is no discussion of the controversy.\(^\text{241}\) The ethical line is whether the investigator is merely acting as a general member of the public\(^\text{242}\) or deceiving someone by not disclosing a material fact.

Friend requests differ from these traditional exceptions in that they are not places of business. This distinction would normally weigh against allowing undercover investigations using friend requests, as compared to entering a business, which has a reduced expectation of privacy. However, social networks are places specifically created to share information between many people; they are not highly private spaces in the way that a home or a person's papers are. The average Facebook user has 130 friends and these friends all have constant access to the user's profile.\(^\text{243}\) Anyone who accepts friend requests from strangers can no longer claim that her profile is private—it has become semi-public. A semi-public place deserves some protections, but not to the same degree as private ones.

ii. The Ethics Opinions

Two ethics bodies have issued opinions on whether a lawyer or associate under a lawyer's direction may make a friend request using her real social network account. Under similar versions of the Model Rules, the Philadelphia Bar Professional Guidance Committee determined that it was unethical\(^\text{244}\) and the Association of the Bar of

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\(^\text{242}\) Many cases generally approve of impersonating general members of the public. See, e.g., id.; Apple Corp. Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456 (D.N.J. 1998); Richardson v. Howard, 712 F.2d 319 (7th Cir. 1983).

\(^\text{243}\) Facebook Statistics, supra note 4.

\(^\text{244}\) As previously discussed, supra note 29, the Philadelphia Opinion said it was ethical for the lawyer to make a friend request, but only based upon the assumption that party of interest
the City of New York Committee on Professional and Judicial Ethics decided it was ethical.245

The Philadelphia Committee concluded that the request would violate Rule 8.4(c) and Rule 4.1.246 The committee found it was deceptive to omit "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."247 On the other hand, the New York City Committee wrote that although there are "ethical boundaries to such 'friending,' in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements."248

The analogy drawn by the Philadelphia Committee to a hidden camera carried by someone disguised as a utility worker is misleading and led to the incorrect conclusion. In the question presented to the Philadelphia Committee, the lawyer suggested that his proposed behavior was like the common and ethical practice of videotaping the public conduct of a plaintiff in a personal injury case.249 The committee agreed that filming someone "as he presents himself to the public" was ethical.250 However, the committee went on to say that the lawyer's practice would be unethical because when filming in public the videographer does not have to ask permission to enter a private area.251 The committee suggested the lawyer's proposed behavior was similar to bringing a hidden camera into a house by pretending to be a utility worker.252 This is an odd and inaccurate comparison. The lawyer is not proposing to use a disguise of any kind.253 Rather, the lawyer is proposing to use information that the

245. N.Y. City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2010-2 (2010) (finding that "an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request").


247. Id.


250. Id.

251. Id.

252. Id.

253. Even covert recordings can be ethical. An ABA Formal Opinion determined that covert recording of phone conversations—when permitted by state and federal law—was ethically permissible when it was not accompanied by other misrepresentations, such as a false
witness would apparently provide to any stranger who asked. This behavior seems closer to public videotaping, which the committee approved of, than their analogy of a disguised person sneaking into a house. The investigator is not disguising herself to gain admittance; instead, she is a stranger clearly knocking on the door and asking to be admitted into a space that is likely accessible to hundreds if not thousands of other people. Information made available to anyone who asks is semi-public information and should not be compared to information kept in the home.254

iii. Rule 8.4 Permits Friend Requests Without False Information

Model Rule 8.4 prohibits "dishonesty, fraud, deceit or misrepresentation."255 As previously discussed, the comments to Model Rule 8.4 and the suggested disciplinary actions for violations suggest that Rule 8.4 applies only to actions that raise questions about a lawyer's fitness to practice law.256 Making a friend request does not raise questions about a lawyer's fitness. An investigator sending a person of interest a friend request, when the investigator's profile only contains true information, is not a misrepresentation. The Philadelphia Opinion concludes that such actions are deceptive because they omit highly material facts, specifically the investigator's intent in making the request.257 However, friend requests normally do not explicitly express any intent. In making a friend request, the investigator is expressing interest in learning more about the person. In receiving a friend request from a stranger, a person could impute a number of motives: wanting to be friends, establishing business connections, learning more about the person, romantic interests, or sending spam. If the person doubts the investigator's intentions, she can refuse to accept him or can ask why he wants to be friends. The New York City Committee does not think there is a misrepresentation for not disclosing the reasons for the request.258


254. At some point real world analogies break down. A comedy sketch by The Idiots of Ants illustrates some of the absurdities of the information sharing culture that Facebook has created as well as the problems of translating online norms into real world analogies. Idiots of Ants, Facebook in Real Life, YouTube (Nov. 21, 2008), http://www.youtube.com/watch?v=LrFdOz1Mj8Q.

255. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2010).

256. See supra Part IV.C.ii.


The term "friend request" does suggest a certain motive, but it would be odd for the terminology of a specific company or platform to determine the ethics of an action. On LinkedIn users "connect" with other users instead of becoming "friends." On Twitter one user "follows" another user. Many users of social networking websites, especially those that accept all or nearly all friend requests, would readily admit that many of their "friends" on a social networking website are more properly acquaintances, or even strangers.

iv. Rule 4.1 – Truthfulness in Statements to Others

Rule 4.1 prohibits false statements of material facts to a third person. The Philadelphia Committee concludes that the omission of intent is a false statement of material fact. However, the comments to the rule state that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts." This is more consistent with the New York City Committee opinion, which found that 4.1 was not implicated unless the investigator used a fake profile.

Omitting the intention behind a friend request is unlikely to be a violation of Rule 4.1.

A false statement of material fact is something that would have changed the way the other person behaved. Although most people might behave differently if they knew they were talking to a lawyer, the IP infringement cases and discrimination cases can be read as saying that it is not a material misrepresentation if the information elicited by the deception was otherwise generally publicly available. Additionally, the ABA found there were no false statements of material fact in not informing third parties when telephone calls are recorded.

Finally, Rule 8.4 is intended to be more inclusive than Rule 4.1, and as discussed in the previous section Rule 8.4 likely permits friend requests.

263. BLACK'S LAW DICTIONARY 998 (9th ed. 2009) (defining "material" as "[o]f such a nature that knowledge of the item would affect a person's decision-making").
265. See MODEL RULES OF PROF'L CONDUCT ANN. R. 4.1 cmt. 1 (2007) ("for dishonest conduct that does not amount to a false statement . . . see Rule 8.4," implying that Rule 8.4 is broader than Rule 4.1).
v. Rule 4.2 – Communication with Person Represented by Counsel

Making a friend request to a represented party is probably a violation of Rule 4.2. The New York Committee opinion only found it ethical to send friend requests to unrepresented parties, noting that Rule 4.2 prohibits communications by a lawyer or her agents with a represented party without the prior consent of the party’s lawyer.266

Communication has been broadly defined. In In the Matter of Howes, a U.S. attorney was publicly censured for repeatedly accepting collect phone calls and then listening to a criminal defendant talk at him about a case.267 The state supreme court found that he had violated New Mexico’s equivalent of Rule 4.2 when he “simply listened” to the party.268 The court rejected the lawyer’s contention that this was not communication.269 Although the act of merely listening is similar to what an investigator would do in reading an individual’s social network profile, the type of communication in Howes was much more intimate. This difference suggests an argument in favor of allowing friend requests to opposing parties.

A number of courts have relied upon a slightly different standard, asking whether the individual was “tricked into making statements [he] otherwise would not have made.”270 Under this standard, videotaping employees conducting their normal business is allowed, but tricking them into acting in a way that advantages one party is not.271 Lawyers are not supposed to take advantage of their more sophisticated position to elicit admissions from individuals. Friend requests are not attempts to elicit comments from individuals; they are attempts to collect evidence that already exists.

The point remains that the goal of Rule 4.2 is to protect a layperson from being taken advantage of by a more sophisticated adverse counsel.272 Judges are unlikely to look favorably upon

268. See id. at 165. See also People v. Green, 274 N.W.2d 448, 449 (Mich. 1979) (finding a violation of the equivalent of Rule 4.1 for listening and taking notes on suspect’s statement at suspect’s request). See generally Suarez v. State, 481 So. 2d 1201 (Fla. 1985) (similar).
269. See Howes, 940 P.2d at 165.
lawyers who trick opposing parties into accepting friend requests.

vi. Rule 4.3 – Dealing with an Unrepresented Person

Rule 4.3 is the ethical rule that most clearly requires proactive measures on the part of the lawyer or investigator. The rule requires ensuring that the unrepresented person understands the lawyer’s role in communicating with her. The comments add that a lawyer will “typically need to identify the lawyer’s client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.”\(^{273}\) The Philadelphia Committee determined that Rule 4.3 did not apply, arguing that “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.”\(^{274}\) In *Apple Corps Ltd. v. International Collectors Society*, the court concluded that Rule 4.3 did not apply because the lawyers and investigators were “testing compliance” and were not “dealing on behalf of a client.”\(^{275}\) Much of the language in the rule and comments is targeted toward negotiations with unrepresented parties, not data collection, suggesting it does not apply.

E. Conclusions on Using Social Networking Websites

Each jurisdiction has adopted and interpreted the Model Rules in slightly different ways, making it impossible to provide a definitive answer. Indeed, many of these issues are ethically ambiguous. Nevertheless, proactively lying or using deceptive techniques is probably unethical except when done by prosecutors. Publicly available information that requires no direct contact with a person of interest is ethically accessible by lawyers. Most courts will find friend requests using only truthful information to be ethical, although some will hold otherwise. Although a lawyer will be able to make a strong argument that making friend requests without overt deception is ethical, at this point a lawyer cannot confidently determine in advance

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\(^{273}\) *MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt. 1 (2010).*


\(^{275}\) *See Apple, 15 F. Supp. 2d at 476.*
whether an ethics committee would agree.

Before using social networks to informally collect information, lawyers must weigh the risks, the likelihood of obtaining valuable evidence, and whether alternative ways of obtaining the information exist.

V. PROPOSAL

The rules governing covert investigations and investigations on social networks in particular are not clear. Due to the low cost of obtaining valuable information from these websites, their use as data collection tools is significantly increasing. Both practitioners and individuals need guidance as to what is legal and ethical.

All jurisdictions should adopt the clarification from the comments to the Model Rules, stating that only deception that "reflects adversely on the lawyer's fitness to practice law" is unethical.\(^{276}\) Some jurisdictions have already adopted this modification.\(^{277}\) Whether a deception reflects adversely on a lawyer's fitness should be determined by a balancing test that weighs the value of the additional information against the cost and harm of obtaining it. Determining the value of the information should include (1) the likelihood it exists, (2) its importance to the case, (3) whether it could be obtained by any other means, and (4) the importance of the case to broader societal values such as justice and security. These factors should be balanced against the costs which include (1) the seriousness of the invasion of privacy and (2) the amount of trickery or deception involved which may reflect poorly on the lawyer and on the profession. Generally, lawyers should avoid any form of deception or trickery or even the appearance of it. In order to justify even the appearance of trickery, the value of the information must be high and the information must not be otherwise available.

Cases recognizing status-based exceptions have considered the same issues outlined above—sometimes explicitly, sometimes implicitly—and have justified some undercover operations. IP infringement and civil rights cases both involve specific situations where the balancing factors usually weigh in favor of allowing covert information gathering. In these cases, the information is highly valuable and is difficult, if not impossible, to otherwise obtain. In addition, the harms caused by obtaining the information are minimal.

\(^{276}\) See MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 2 (2007).

The investigators do not seriously invade the defendant's privacy because the defendant is a business, with only a minimal privacy interest, and the information sought is generally available to any customer. Finally, lawyers do not have to use much deception to obtain the information, only concealing their motive for asking the same questions normal customers might ask.

Although the traditional exceptions provide valuable guideposts, ethical lines should not be based upon rigid categories. Rather, the legal profession should adopt the more flexible principles that underlie the traditional categories, which were outlined above as proposed factors. These factors provide fairly clear rules for civil and government attorneys that want to collect information on social networking websites.

A. Lawyers in Criminal Cases Should Generally Be Allowed to Use Deceptive Techniques

Society has long granted law enforcement a limited right to invade privacy in order to promote security. The prosecutorial exception, which recognizes that government lawyers can ethically oversee undercover operations, is well established and should not be substantially changed. However in order to minimize the privacy harms, undercover operations should only be used when the information cannot be otherwise obtained and the government has reason to believe the targeted individual has the desired information.278

Although the proposed factors generally comport with the traditional categories, they also suggest an additional category of situations for which lawyers should, for the most part, be allowed to use deception: criminal cases. Prosecutors already have an established exception, but many of the same justifications for the prosecutorial exception apply to criminal defense, including the protection of society and serving justice. A defendant who faces the possibility of deprivation of her liberty by the state should have access to all of the same tools to defend herself that the government possesses to prosecute her. The Supreme Court of Tennessee and the Kentucky Bar Association reached this conclusion regarding covert recordings of conversations.279 The Tennessee court wrote that “[t]he use of

278. Ideally there would be formal oversight and reporting requirements to reduce the opportunities for abuse, but these suggestions are beyond the scope of ethical guidelines.

evidence is geared toward eliciting the truth. Truth is absolute and takes no sides. The defense should be given the same opportunity to assume its attainment."^{280}

The balance of the factors outlined in this proposal will typically weigh in favor of allowing a lawyer in a criminal case to ethically use covert methods. In criminal cases, the liberty of the individual is being threatened to protect the security of the state. Security and liberty are both foundational societal values and thus the correct balancing of them is of the highest societal importance. Therefore, information that is materially relevant to the outcome of a criminal case will usually be significant enough to outweigh other considerations and justify undercover investigations. Information gathering that does not require overt deception should be ethical for both sides in criminal cases when other practical ways of obtaining the information do not exist and there is a reasonable belief that the relevant information exists on the targeted person’s profile. Information collection that requires overt deception should not per se be unethical. Rather, a lawyer must carefully weigh the factors, but generally overt deception will be justified in criminal cases more frequently than in civil cases.

For example, in the hypothetical situation from the introduction, if the controversy were a criminal investigation into a gang related assault at the party and the witness provided testimony for the government, obtaining the pictures and comments on the witness’s Facebook profile could be the key to proving the defendant’s innocence. The defendant’s attorney should ethically be able to pursue that information based upon a reasonable belief that it exists and is relevant.

B. Civil Litigants Should Generally Not Be Allowed to Use Deception to Obtain Information on Social Networks

In most civil cases, the balance will tilt the other way, especially for cases that involve information on social networking websites. Because people record intimate details, participate in political activism, and express their beliefs on social networks, obtaining information from such sources is a significant invasion of privacy. If such information collection were common, it might also create a chilling effect on speech. Because of the personal nature of information on social networks, the balance of factors will typically

\footnote{280. Tenn. Bar Ass’n Ethics Comm., Formal Op. 86-F-14(a) (1986).}
weigh against finding it ethical to obtain the information. Furthermore, much of the information on social networking websites is known to a community of people, thus increasing the likelihood that other means of obtaining the information exist.281 This general conclusion is consistent with the reasoning behind the traditional exceptions, which involve businesses, and thus different privacy interests.

Although the outright deception involved in using a fake profile to obtain information would usually be unethical in civil cases, making a friend request with a truthful profile, as described in the example, would sometimes be ethical because of the lack of deception and trickery. Obviously, the most ethical approach would be to fully disclose the reasons for the request in the friend request message. If a lawyer fully and clearly discloses who she is and the reason for the request, the behavior is ethical. If a lawyer makes a friend request without any disclosures, she must be able to articulate a need that justifies the potential invasion of privacy including a reasonable belief that specific, valuable information exists on the profile that would be difficult to otherwise obtain. Without full disclosure, lawyers should not be allowed to go on fishing expeditions to collect personal information about any party of interest based upon the mere hope that they will find useful information.

VI. CONCLUSION

With increased use of social networks, the rules of access need to be clear to protect both lawyers and the public. If users are aware that investigators may engage in deception to obtain information, they can act appropriately with reasonable expectations regarding their privacy on the medium. Lawyers need to know the rules so they do not commit ethical violations in the course of zealously representing their clients.

Moreover, society as a whole needs to consider these questions. The norms of private and public information are changing. As the realm of semi-public information expands, expectations of what can be done with that information may simultaneously need to contract to

281. Just because some people may have access to certain information does not necessarily decrease the privacy interest an individual has in the information. Control as well as the context of the use of that information is an important aspect of privacy. See, e.g., Helen Nissenbaum, Protecting Privacy in an Information Age: The Problem of Privacy in Public, 17 LAW & PHILOSOPHY 559 (1998), available at http://www.jstor.org/stable/3505189. Forcing lawyers to use other means when possible also reduces the amount of unrelated personal information that would be disclosed.
maintain a balance between public and private lives. Information is shared on social networks—which are simultaneously public and private forums—as a means of expression and method of communication. The degree to which that information should be used for unintended purposes should be carefully considered in the larger context of the repercussions for evolving means of self-expression and communication.