

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 8.4. **Misconduct** provides in part that,

It is professional misconduct for a lawyer to:

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

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

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

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

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

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

Rule 4.1. **Truthfulness in Statements to Others** provides in part that,

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

(a) make a false statement of material fact or law to a third person; ...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. 'Covert activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. 'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future. "

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

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

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

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