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2010

## A Lose-Lose Situation: Analyzing the Implications of Investigatory Pretexting Under the Rules of Professional Responsibility

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### Recommended Citation

Jeannette Braun, *A Lose-Lose Situation: Analyzing the Implications of Investigatory Pretexting Under the Rules of Professional Responsibility*, 61 Case W. Rsrv. L. Rev. 355 (2010)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol61/iss1/13>

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## COMMENT

# A LOSE-LOSE SITUATION: ANALYZING THE IMPLICATIONS OF INVESTIGATORY PRETEXTING UNDER THE RULES OF PROFESSIONAL RESPONSIBILITY

### INTRODUCTION

Chief Deputy District Attorney Mark Pautler lied. He told William Neal that his name was “Mark Palmer” and that he was a public defender. This lie was not without admirable motivation; however, it secured the surrender of a man who allegedly killed three women with a wood-splitting maul.<sup>1</sup> Despite the fact that Pautler’s lies furthered the public’s safety, the Supreme Court of Colorado determined that Pautler’s deceit violated the Colorado Rules of Professional Responsibility and sanctioned him.<sup>2</sup>

Attorney Stephen P. Hurley also lied. He used the services of a private investigator to devise a sham computer research company so that he could obtain access to a complaining witness’ computer. He similarly had admirable motivations; he believed the computer contained information exonerating his client of all charges in a criminal case.<sup>3</sup> The Supreme Court of Wisconsin not only found that Hurley did not violate any Wisconsin Rules of Professional Conduct, it arguably implied that he may have violated the Rules if he *failed* to lie in this situation because he would not be zealously defending his client.<sup>4</sup>

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<sup>1</sup> *In re Pautler*, 47 P.3d 1175, 1176 (Colo. 2002).

<sup>2</sup> *Id.* at 1184.

<sup>3</sup> *In re Hurley*, No. 07 AP 478-D, 2008 Wisc. LEXIS 1181, at \*21 (Wis. Feb. 5, 2008).

<sup>4</sup> *Id.* at \*37 (noting the competing considerations that Hurley faced and concluding that not engaging in the deceit would “hand [the client] persuasive grounds for appeal, an ethics complaint, and a malpractice claim”).

Both attorneys utilized “pretexting” to gain access to something desired—either the surrender of a criminal or access to information. “Pretexting” is defined differently depending on the situation, but generally involves disguising one’s identity and purpose when approaching a target to obtain potentially significant information.<sup>5</sup> Technological advances, particularly with regard to the internet, are making it easier than ever for attorneys and investigators to disguise their identity and purpose in order to obtain potentially valuable information. As evidenced by *In re Pautler* and *In re Hurley*, however, it is not clear whether pretexting is a permissible tool under the Rules of Professional Conduct.

The Bar is a self-regulated entity, charged with establishing its own rules of professional conduct.<sup>6</sup> Pretexting is clearly not acceptable when it rises to the level of illegal activity, but its permissibility is unclear when the conduct is not criminal.<sup>7</sup> Although some State Bar Associations have addressed this issue, many have not, which is surprising because pretexting implicates two competing, yet significant policy considerations. Supporting the use of pretexting is the notion that attorneys should zealously advocate their clients’ positions and do everything in their power to obtain the information necessary to do so. Conversely, attorneys need to conduct themselves in a manner consistent with upholding the image of the bar. Engaging in deceit and misrepresentation does not improve the image of attorneys. Therefore, attorneys looking to gauge the potential implications of investigatory deceit must choose between zealous advocacy and the potential for sanctions without clear guidance.

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<sup>5</sup> See Will Hill Tankersley & Conrad Anderson IV, *Fishing with Dynamite: How Lawyers Can Avoid Needless Problems From “Pretextual Calling.”* 69 ALA. LAW. 182, 184 (2008) (defining “pretexting” as “a simple investigative tool: The investigator approaches the target and, under the ‘pretext’ of being someone else, obtains information that the target would ordinarily provide to such a person. It is this combination of a disguised identity and freely given information that makes pretexting a valuable, but potentially risky, technique.”); David J. Dance, Note, *Pretexting: A Necessary Means to a Necessary End?*, 56 DRAKE L. REV. 791, 792 (2008) (“The investigation industry defines pretexting broadly as almost any form of deception employed to obtain private information.”) (quoting Michael A. Hiltzik, *State’s HP Case May be Tough to Win*, L.A. TIMES, Sept. 15, 2006, at C1).

<sup>6</sup> See MODEL RULES OF PROF’L CONDUCT pmbl. (2009) (noting that the “legal profession is largely self-governing,” and that “[a]n independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice”).

<sup>7</sup> The use of pretexting to gather certain types of information is illegal under several federal statutes aimed at protecting consumers. See, e.g., Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.* (2006), as amended by Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (making it a crime to obtain customer information from financial institutions through false statements); Telephone Records and Privacy Protection Act of 2006, 18 U.S.C. §1039 (2006) (prohibiting obtaining confidential phone records through the use of false or fraudulent statements, representations or documents).

Part I of this Comment will examine the interests courts should consider when addressing this issue. First, it will examine the many Rules of Professional Conduct potentially implicated by pretexting. Then it will lay out several broad trends that can be extrapolated from the myriad of opinions issued on this subject. Finally, it will compare the amendments several state bars have made to their rules in an attempt to provide guidance. Part II will then examine the policies underlying pretexting. It concludes that in weighing the competing considerations, the scales tip in favor of upholding the image of the bar and prohibiting the use of pretexting.

### I. THE CURRENT RULES: AN UTTER LACK OF GUIDANCE

The American Bar Association (ABA) has not provided any direct guidance on the ethical implications of pretexting, although the language of several Model Rules of Professional Conduct (the “Rules”) may be violated depending on the circumstances surrounding the pretexting. In lieu of clear, uniform guidance by the ABA, some individual state bars have dealt with the permissibility of pretexting on a case-by-case basis or by proactively issuing a Bar Opinion or amending the Bar Rules. Although very few of the cases and opinions directly relate to pretexting activities on the internet, they provide a useful view of the broader policy considerations that are also implicated in the internet context.

#### A. *The ABA Model Rules of Professional Conduct*

Pretexting activities potentially violate the language of several Rules, regardless of whether the lawyer personally participates in the activities or merely oversees them. As explored below, nearly all pretexting conflicts with Rule 4.1 Truthfulness in Statements to Others, and Rule 8.4 Misconduct.<sup>8</sup> Additionally, the circumstances surrounding the pretexting could implicate several other Rules. The most significant of these include Rule 3.7 Lawyer as Witness; Rule 4.2 Communication with Person Represented by Counsel; Rule 4.3 Dealing with Unrepresented Person; and Rule 4.4 Rights of Third Persons.<sup>9</sup> Finally, lawyers could face liability stemming from nonlawyer assistants’ activities under Rule 5.3.<sup>10</sup> It is also important to note that some courts broadly impose sanctions when the attorney’s conduct reflects poorly on the profession, and do not necessarily

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<sup>8</sup> MODEL RULES OF PROF’L CONDUCT R. 4.1, 8.4 (2009).

<sup>9</sup> *Id.* at R. 3.7, 4.2, 4.3, 4.4.

<sup>10</sup> *Id.* R. 5.3.

require clear violation of a rule.<sup>11</sup> The fact that so many rules are potentially implicated indicates the risk involved in pretexting activities.

The most commonly cited rule in the pretexting context is Rule 8.4 Misconduct. The relevant text of the rule states:

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;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.<sup>12</sup>

Most significant to this situation is subsection (c) because pretexting necessarily involves various forms of deceit and misrepresentation. Additionally, Section (a) makes it clear that the lawyer cannot circumvent the prohibitions of the rule through the acts of another, which signifies that lawyers cannot rely on private investigators or nonlawyer assistants to obtain the information without violating the language of the rule.

In addressing the implications of pretexting under Rule 8.4, some commentators find Comment [2] significant. It states that “[t]raditionally, the distinction [between permissible and impermissible activities] was drawn in terms of offenses involving ‘moral turpitude.’”<sup>13</sup> Therefore, “[a]lthough a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.”<sup>14</sup> Some argue that the “gloss on the rule” contained in Comment [2] should apply to the entire rule, not just the section on criminal liability. Therefore, ethics sanctions should only apply in situations that indicate a lack of moral turpitude

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<sup>11</sup> See, e.g., *In re Malone*, 480 N.Y.S.2d 603, 606 (N.Y. App. Div. 1984), *aff'd*, 482 N.E.2d 565 (N.Y. 1985) (“It is clear that this court’s power to discipline an attorney ‘extends to misconduct other than professional malfeasance when such conduct reflects adversely upon the legal profession and is not in accordance with the high standards imposed upon members of the Bar’” (quoting *In re Nixon*, 385 N.Y.S.2d 305 (N.Y. App. Div. 1976))).

<sup>12</sup> MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. 2 (2009).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

rising to the level of a lack of fitness to practice law.<sup>15</sup> But this construction ignores the introductory language of Comment [2], which states that “[m]any kinds of illegal conduct reflect adversely on fitness to practice law,” indicating that Comment [2] applies solely to criminal conduct.<sup>16</sup> If this construction could be successfully argued to a judge, however, it could have significant ramifications on the ability of lawyers to conduct or supervise investigations involving pretexting.

Another significant provision applicable in nearly all pretexting situations is Rule 4.1 Truthfulness in Statements to Others. The relevant text in this Rule provides: “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 . . . .”<sup>17</sup> Comment [1] to the Rule clarifies: “A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false . . . [or] by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”<sup>18</sup> It is likely that any misleading or deceptive statements made in the course of pretexting are material,<sup>19</sup> so the issue under this Rule is whether they are in the course of representing a client. While this will depend on the specific circumstances surrounding the pretexting, it is likely that at least an argument could be made that this requirement is easily satisfied because the lawyer is typically engaging in pretexting activities to collect evidence that can be used to aid in the client’s case. Even if this rule is not implicated, however, Comment [1] states: “For dishonest conduct that does not amount to a false statement or

<sup>15</sup> See 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 GEO. J. LEGAL ETHICS 791, 816–18 (1995) (arguing that statutory construction principles “require that Rule 8.4(c) apply only to misrepresentations that manifest a degree of wrongdoing on a par with dishonesty, fraud, and deceit. . . . it should apply only to *grave* misconduct that would not only be generally reprov’d if committed by anyone, whether lawyer or nonlawyer, but would be considered of such gravity as to raise questions as to a person’s fitness to be a lawyer.”) (emphasis in original); Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 SEATTLE U. L. REV. 123, 127–28 (2008) (viewing Isbell & Salvi’s analysis to conclude that the Comment’s “language modifies Rule 8.4(c), which should accordingly be read to prohibit only that dishonesty, fraud, deceit, or misrepresentation that adversely affects a lawyer’s fitness to practice law” while also noting that several commentators disagree with this construction) (emphasis in original).

<sup>16</sup> MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. 2.

<sup>17</sup> *Id.* R. 4.1(a).

<sup>18</sup> *Id.* R. 4.1 cmt. 1.

<sup>19</sup> See Isbell & Salvi, *supra* note 15, at 813 (“[T]he misrepresentations made by undercover investigators and testers are in fact material [because] [t]he very premise of the misrepresentations . . . is that the party being investigated would have spoken or acted differently if he or she knew the true purpose or identity of the interlocutor.”).

for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4”); indicating that the pretexting could still violate Rule 8.4 even if Rule 4.1 is not technically violated.<sup>20</sup>

Depending on the circumstances, the pretexting could violate several other Rules. If the pretexting is directed at another party in the matter, Rule 4.2 Communication with Person Represented by Counsel (commonly referred to as the “anti-contact” rule) could be implicated. This Rule requires:

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.<sup>21</sup>

The key requirements in this Rule are that the lawyer *knows* the party is represented and that the discussion is about the subject matter of the representation. Pretexting will likely involve the subject matter of the representation because the primary goal is usually to collect evidence against the opposing party. Since the lawyer is targeting the party, he is likely to know that the party is represented by counsel. This rule also contains a prohibition against using another person to communicate with the other party, so lawyers cannot use investigators or nonlawyer assistants to circumvent the prohibition.<sup>22</sup> Although beyond the scope of this Comment, it is significant to note that government lawyers likely have more leeway with investigative practices under this rule in *some* jurisdictions.<sup>23</sup>

Another rule that may be implicated is Rule 4.3 Dealing with Unrepresented Person, which requires:

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<sup>20</sup> MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 1 (20).

<sup>21</sup> *Id.* R. 4.2 .

<sup>22</sup> *Id.* R. 4.2 cmt. 4. (“Alawyer may not make a communication prohibited by this Rule through the acts of another.”).

<sup>23</sup> See *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988) (“[A] prosecutor is ‘authorized by law’ to employ legitimate investigative techniques in conducting or supervising criminal investigations, and the use of informants to gather evidence against a suspect will frequently fall within the ambit of such authorization.”); MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 5 (2009) (“Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings”). Cf. *In re Pautler*, 47 P.3d 1175, 1179 (Colo. 2002) (rejecting the argument that “the Rules distinguish lawyers working in law enforcement from other lawyers, apart from additional responsibilities imposed upon prosecutors”).

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. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.<sup>24</sup>

This Rule is particularly significant because Comment [1] requires: "In order to avoid a misunderstanding, 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."<sup>25</sup> Pretexting necessarily involves withholding this information to obtain the desired evidence or information, and therefore may violate the rule.

Additionally, if the lawyer personally engages in the pretexting activities or is present when they are taking place, he could be required to withdraw from representing the client under Rule 3.7 Lawyer as Witness. This Rule directs that the "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness" unless certain narrow circumstances apply.<sup>26</sup> If the pretexting activities become an issue at some point during the representation, the lawyer may be a necessary witness and will therefore need to end the representation.

Finally, the pretexting activities may violate Rule 4.4 Respect for Rights of Third Persons if the target is not a party to the matter. The relevant text of this Rule requires: "In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of such a person."<sup>27</sup> The Rule recognizes that "[r]esponsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons."<sup>28</sup> Therefore, any lawyer

<sup>24</sup> MODEL RULES OF PROF'L CONDUCT R. 4.3 (2009).

<sup>25</sup> *Id.* R. 4.3 cmt. 1. (2009).

<sup>26</sup> *Id.* R. 3.7; *ee also id.* R. 3.7 cmt. 2 ("The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation.").

<sup>27</sup> *Id.* R. 4.4.

<sup>28</sup> *Id.* R. 4.4 cmt. 1 (noting that while "[i]t is impractical to catalogue all [rights of third

participating or overseeing pretexting needs to ensure that all rights of third persons are not violated.

One final rule to note is Rule 5.3 Responsibilities Regarding Nonlawyer Assistants. This Rule requires lawyers to make reasonable efforts to ensure that nonlawyer assistants do not engage in conduct prohibited by the Rules and makes the lawyer responsible for the person's conduct in certain situations.<sup>29</sup> Therefore, the lawyer cannot rely on nonlawyer assistants to take actions that would violate the Rules if performed by the lawyer directly.

The fact that pretexting implicates so many Rules of Professional Conduct mandates caution to any attorney wishing to engage in it. As attorneys Pautler and Hurley<sup>30</sup> illustrate, however, pretexting has great advantages in conducting investigations. Several attorneys that chose to supervise or conduct pretexting activities have faced the possibility of sanctions, which has forced the judiciary to examine the propriety of the issue under the Rules. Unfortunately, very little clear guidance has emerged.

#### *B. Judicial and Bar Opinions Only Add to the Uncertainty*

Although it appears from the language of the Rules that pretexting activities are likely not permissible, some courts and bar associations recognize implicit exceptions to the rules that permit deceit and misrepresentation in certain narrow circumstances. Others, however, are not willing to recognize any exceptions, leading to extraordinary confusion as to whether such activity is ever permissible. Courts in several jurisdictions have considered the possibility of exceptions to the Rules when determining whether pretexting activities that have already occurred merit sanctions.<sup>31</sup> Conversely, a number of state and

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persons],” such rights “include legal restrictions on methods of obtaining evidence from third persons”).

<sup>29</sup> *Id.* R. 5.3 (“[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 knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”).

<sup>30</sup> See *supra* notes 1–5 and accompanying text.

<sup>31</sup> See, e.g., *United States v. Parker*, 165 F. Supp. 2d 431 (W.D.N.Y. 2001), *aff'd*, 439 F.3d 81 (2d Cir. 2006) (not warranting sanctions); *Gidatex v. Campaniello Imports*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999) (not warranting sanctions); *Apple Corps. Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456 (D.N.J. 1998) (not warranting sanctions); *In re Pautler*, 47 P.3d 1175 (Colo. 2002) (warranting sanctions); *In re Malone*, 480 N.Y.S.2d 603, 606 (N.Y. App. Div. 1984), *aff'd*, 482 N.E.2d 565 (N.Y. 1985) (finding censure an appropriate sanction); *In re Gatti*, 8 P.3d 966 (Or. 2000) (warranting public reprimand).

local bar associations have addressed this issue in an attempt to provide guidance prior to any pretexting activities occur.<sup>32</sup> Although these opinions fail to provide a uniform analysis for determining whether pretexting is ever permissible under the Rules, some broad trends have emerged.

Several Bar Opinions recognize that the Rules implicated by pretexting activities contain an implicit exception, but it is quite limited. Generally, the prohibitions in Rules 4.1 and 8.4(c) do not apply to “misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes” that do not rise to the level of fraud.<sup>33</sup> In drawing the line between permissible misrepresentations and impermissible actions rising to the level of fraud, these Opinions focus on the “gloss on the rule” contained in the Comment to Rule 8.4.<sup>34</sup> Under this analysis, pretexting will only violate the Rules when the conduct “calls into question a lawyer’s suitability to practice law.”<sup>35</sup>

Some courts use another analysis to draw the line between permissible and impermissible pretexting. Under this analysis, they examine both at the type of information gathered and how it was gathered. The courts permit pretexting activity primarily when objective information was gathered under routine circumstances.<sup>36</sup>

<sup>32</sup> See, e.g., D.C. Bar, Ethics Op. 323 (March 29, 2004), available at [http://www.dcbbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion323.cfm](http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion323.cfm) (“Lawyers . . . who act in a . . . manner they reasonably believe to be authorized by law do not violate Rule 8.4 if . . . they make misrepresentations that are reasonably intended to further the conduct of their official duties.”); Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2009-02 (March 2009), available at [http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion\\_2009-2.pdf](http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf) (holding that deceptively accessing witness’s FaceBook and MySpace website is properly addressed under Rule 8.4); Utah State Bar Ethics Advisory Op. Comm., Op. 02-05, at ¶ 2 (March 18, 2002), available at [http://www.utahbar.org/rules\\_ops\\_pols/ethics\\_opinions/op\\_02\\_05.html](http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_02_05.html) (“[A] governmental lawyer who participates in a lawful covert governmental operation . . . for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct.”).

<sup>33</sup> *Apple Corps. Ltd.*, 15 F.Supp. 2d at 475.

<sup>34</sup> See *supra* notes 13–15.

<sup>35</sup> D.C. Bar, Ethics Op. 323 (2004), available at [http://www.dcbbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion323.cfm](http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion323.cfm). The opinion concludes that conduct that “cannot be seen as reflecting adversely on [the lawyer’s] fitness to practice law; . . . will not violate the prohibition in Rule 8.4(c).” *Id.* (quoting Va. Legal Ethics Op. 1738 (2000)). See also *Apple Corps. Ltd.*, 15 F. Supp. 2d at 476 (using statutory construction principles to conclude that Rule 8.4(c) should “apply only to misrepresentations that manifest a degree of wrongdoing on a par with dishonesty, fraud and deceit. . . . [I]t should apply only to grave misconduct that would not only be generally reprovved if committed by anyone, whether lawyer or nonlawyer, but would be considered of such gravity as to raise questions as to a person’s fitness to be a lawyer.”).

<sup>36</sup> See *Gidatex*, 82 F. Supp. 2d at 126 (finding no violation because “Gidatex’s investigators did not interview the sales clerks or trick them into making statements they otherwise would not have made. Rather, the investigators merely recorded the normal business routine in the Campaniello showroom and warehouse.”); *Apple Corps. Ltd.*, 15 F. Supp. 2d at

Conversely, courts that found the pretexting activities violated the Rules usually analyzed conduct aimed at eliciting information that would not normally be divulged; frequently some kind of statement that can be used as an admission of guilt.<sup>37</sup>

The use of pretexting in certain types of cases is more likely to be permissible than in others. In particular, courts are more likely to recognize an exception to the Rules where attorneys looking to enforce civil or intellectual property rights are forced to resort to pretexting techniques because “it would be difficult to discover the violations by other means.”<sup>38</sup> One court noted that limiting attorneys’ evidentiary techniques so as to ban pretexting “would preclude, prior to litigation, the gathering of the necessary factual information to determine if a valid claim for relief could be maintained and in its most exaggerated context leave a party without a factual basis to assert an avenue of redress.”<sup>39</sup> Additionally, pretexting is likely permissible in situations where public lawyers are conducting official government investigations.<sup>40</sup> The court in *In re Hurley*<sup>41</sup> even

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474–75 (noting that the prohibitions of the Rule of Professional Conduct 4.2 “cannot apply where lawyers and/or their investigators . . . act as members of the general public to engage in ordinary business transactions”).

<sup>37</sup> See *In re Pautler*, 47 P.3d at 1178 (finding Colorado’s Rules of Professional Conduct violated where the attorney used pretexting tools to obtain the surrender of an axe-murderer); *In re Gatti*, 8 P.3d 966, 976 (Or. 2000) (finding the rules of professional conduct violated where the attorney pretended to be a chiropractor to elicit statements proving fraud).

<sup>38</sup> *Apple Corps. Ltd.*, 15 F. Supp. 2d at 475 (“Undercover agents in criminal cases and discrimination testers in civil cases, acting under the direction of lawyers, customarily dissemble as to their identities or purposes to gather evidence of wrongdoing. This conduct has not been condemned on ethical grounds by courts, ethics committees or grievance committees.”); see also *Gidatex*, 82 F. Supp. 2d at 124 (“[E]nforcement of the trademark laws to prevent consumer confusion is an important policy objective, and undercover investigators provide an effective enforcement mechanism for detecting and proving anti-competitive activity which might otherwise escape discovery or proof.”). But see *In re Gatti*, at 8 P.3d at 976 (concluding that “[f]aithful adherence” to the language of the rules of professional conduct and case law “does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements.”) (emphasis in original).

<sup>39</sup> *Apple Corps. Ltd.*, 15 F. Supp. 2d at 474 (quoting *Weider Sports Equip. Co. v. Fitness First, Inc.*, 912 F.Supp. 502, 508 (D. Utah 1996)). In this case, “Plaintiffs could only determine whether Defendants were complying with the Consent Order by calling [them] directly and attempting to order the Sell-Off Stamps. If Plaintiffs’ investigators had disclosed their identity and the fact that they were calling on behalf of Plaintiffs, such inquiry would have been useless to determine [the Defendants’] day-to-day practices in the ordinary course of business.” *Id.* at 475.

<sup>40</sup> See *United States v. Parker*, 165 F. Supp. 2d 431, 476 (W.D.N.Y. 2001) (“[O]pinions of state and local bar associations hold [Rule 8.4(c)] do[es] not apply to prosecuting attorneys who provide supervision and advice to undercover investigations.”); D.C. Bar, Legal Ethics Op. 323 (2004), available at [http://www.dcb.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion\\_323.cfm](http://www.dcb.org/for_lawyers/ethics/legal_ethics/opinions/opinion_323.cfm) (concluding that, although Rule 8.4(c) does not contain an “authorized by law” exception, there is a “general approval of lawful undercover activity by government agents”); Utah State Bar Ethics Advisory Op. Comm., Op. 02-05, ¶ 9 (2002), available at <http://www.>

extended the exception that was previously recognized for government attorneys to all attorneys in criminal cases because it determined that there was no support for the distinction between the government and criminal defense attorneys.<sup>42</sup>

Conversely, other courts and bar associations refuse to recognize any exception to the rule, regardless of the extent of the misrepresentations or the type of case involved.<sup>43</sup> In justifying this conclusion, courts point to the image of the Bar and the need to uphold the highest ethical standards.<sup>44</sup> Additionally, several courts specifically uphold the prohibitions contained in the Rules for public attorneys conducting official government investigations.<sup>45</sup> It is significant to note, however, that although the court in *In re Friedman*<sup>46</sup> determined that the attorney violated the Rules of

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utahbar.org/rules\_ops\_pols/ethics\_opinions/op\_02\_05.html (concluding that a government attorney's use of pretexting "does not violate Rule 8.4(c)" as long as it is part of an "otherwise lawful government operation"). *But see In re Pautler*, 47 P.3d at 1179 (finding that the Rules do not "distinguish lawyers working in law enforcement from other lawyers, apart from additional responsibilities imposed upon prosecutors").

<sup>41</sup> No. 07AP478-D, 2008 Wisc. LEXIS 1181, at \*41 (Wis. Feb. 11, 2009).

<sup>42</sup> *Id.* at \*28 ("Dane County District Attorney Brian Blanchard, who filed the grievance against Attorney Hurley, admitted that prosecutors frequently supervise a variety of undercover activities and sting operations carried out by nonlawyers who use deception to collect evidence, including misrepresentations as to identity and purpose. . . . but was unable to point to any rule, statute, ethics opinion, or Wisconsin case that drew this distinction between prosecutors and other attorneys.").

<sup>43</sup> *See In re Pautler*, 47 P.3d at 1175; *In re Friedman*, 392 N.E.2d 1333, 1335 (Ill. 1979); *In re Malone* 480 N.Y.S.2d 603, 604–06 (N.Y. App. Div. 1984), *aff'd*, 482 N.E.2d 565 (N.Y. 1985); *In re Gatti*, 8 P.3d 966, 969 (Or. 2000); Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2002), available at [http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion\\_2009-2.pdf](http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf).

<sup>44</sup> *E.g.*, *In re Pautler*, 47 P.3d at 1176 (stating that "members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive."); *Id.* at 1178 ("A consequent obligation of lawyers is to maintain the highest standards of ethical conduct. The jokes, cynicism, and falling public confidence related to lawyers and the legal system may signal that we are not living up to our obligation; but, they certainly do not signal that the obligation itself has eroded.") (internal citations omitted).

<sup>45</sup> *In re Pautler* provides a shocking example of a court finding no exception to the rules for government attorney. The court in that case determined that a district attorney violated the Rules when he lied about his identity to obtain the surrender of an axe-murderer. 47 P.3d at 1175–78. Despite the fact that the attorney used pretexting to protect the general public's safety, the court concluded that "the Rules [do not] distinguish lawyers working in law enforcement from other lawyers, apart from additional responsibilities imposed upon prosecutors." *Id.* at 1179; *see also In re Malone*, 480 N.Y.S.2d at 606 ("[A] lawyer who holds public office must not only fulfill the duties and responsibilities of that office, but must also comply with the Bar's ethical standards"); *In re Friedman*, 392 N.E.2d at 1335–36 ("Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. . . . To declare that in the administration of criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution." (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting))).

<sup>46</sup> 392 N.E.2d 1333.

Professional Responsibility by conducting pretexting activities, it declined to impose any sanctions because the lack of uniformity on the permissibility of pretexting under the Rules afforded the attorney no guidance.<sup>47</sup>

Although this analysis provides a rough sketch of how courts and bar associations view pretexting under the Rules, a large number of jurisdictions have yet to even address the issue. Attorneys in those jurisdictions have to determine whether pretexting is available as an investigatory tool without any guidance whatsoever from their own jurisdiction, and without any uniform trends in other jurisdictions. As technological advances improve the ability to disguise one's identity on the internet, more of these jurisdictions should consider addressing the issue upfront, before having to determine its merits in a sanctions hearing.

### C. Rule Amendments

As lawyers have very little guidance regarding the implications of pretexting activities, and courts struggle to apply the Rules to challenged activities, several state bars have modified the language of the Rules to clarify the permissible scope of pretexting. For example, Alabama, Florida, Iowa, Oregon, and Virginia have created safe harbors in certain circumstances for lawyers that participate in pretexting activities.<sup>48</sup> Additionally, New York issued a new rule to provide guidance as to when pretexting is permissible.<sup>49</sup> Like the court and bar opinions previously discussed, however, there is no uniformity in either the scope of permissible pretexting or how the various bars address it in the Rules.

Oregon, for instance, adopted a safe harbor to Rule 8.4 in response to the court's rejection of any exception to the Rules in *In re Gatti*.<sup>50</sup> The safe harbor is fairly broad, permitting lawful "covert activity" in cases involving civil law, criminal law, or constitutional rights.<sup>51</sup>

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<sup>47</sup> *Id.* at 1336 (declining to impose sanctions "[b]ecause respondent acted without the guidance of precedent or settled opinion and because there is apparently considerable belief . . . that he acted properly in conducting the investigations").

<sup>48</sup> See ALA. RULES OF PROF'L CONDUCT R. 3.8(2) (2010); FL. RULES OF PROF'L CONDUCT R. 4-8.4(c) (2010); IOWA RULES OF PROF'L CONDUCT R. 32:8.4, cmt. 6 (2005); OR. RULES OF PROF'L CONDUCT R. 8.4(b) (2009); VA. RULES OF PROF'L CONDUCT R. 8.4(c) (2009).

<sup>49</sup> See N.Y. Cnty. Lawyers' Ass'n. Comm. on Prof'l Ethics, Form. Op. 737 (2007).

<sup>50</sup> Or. State Legal Ethics Comm., Form. Op. 2005-173, 481 n.1 (2005) ("Oregon RPC 8.4(b) . . . was adopted in response to *In re Gatti*, in which the Oregon Supreme Court stated that the then-existing rules against deceitful conduct applied to all lawyers, including those in the public sector who engage in or supervise others in undercover investigations of illegal activity.") (internal citations omitted).

<sup>51</sup> OR. RULES OF PROF'L CONDUCT R. 8.4(b) (2009). The applicable text of the rule states: "[I]t shall not be professional misconduct for a lawyer to advise clients or others about or to

“Covert activity” is defined as “an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge,” and therefore clearly applies to pretexting.<sup>52</sup> Pretexting activities may only be commenced, however, “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.”<sup>53</sup> In a Bar Opinion issued to clarify the changes to the rule, the Oregon State Legal Ethics Committee clarified:

[I]t is evident that Oregon RPC 8.4(b) requires both an honest subjective belief in the possibility that unlawful activity ‘has taken place, is taking place or will take place in the foreseeable future,’ and some rational basis for that belief. The rule does not encompass a good-faith belief merely in a ‘possibility’ of unlawful activity, but a good-faith belief in a ‘reasonable possibility’ of such activity.<sup>54</sup>

Therefore, although the safe harbor applies to a broader group of attorneys, it may be limited by the circumstances of the particular case.

The Florida Bar Association similarly added a safe harbor to Rule 4-8.4 that permits pretexting activities in certain narrow circumstances.<sup>55</sup> The safe harbor does not apply the Rule’s prohibitions against the use of dishonesty, fraud, deceit and misrepresentation to a lawyer working for a criminal law enforcement or regulatory agency.<sup>56</sup> The Rule’s Comment clarifies the scope of the safe harbor: “The exception acknowledges current, acceptable practices of these agencies. Although the exception appears in this rule, it is also applicable to Rules 4-4.1 and 4-4.3,” which deal with truthfulness in statements to others, and dealing with unrepresented persons.<sup>57</sup> Therefore, Florida’s safe harbor takes a narrower approach

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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.” *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Or. State Legal Ethics Comm., Form. Op. 2005-173, 485 (2005).

<sup>55</sup> See FL. RULES OF PROF’L CONDUCT R. 4-8.4(c) (2010).

<sup>56</sup> *Id.* (“[I]t 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, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.”).

<sup>57</sup> FLORIDA RULES OF PROF’L CONDUCT R. 4-8.4, cmt. (2010).

than Oregon's, applying only to government lawyers as opposed to anyone participating in certain types of cases.

The Alabama Bar Association chose to add a safe harbor to Rule 3.8 Responsibilities of a Prosecutor, rather than in Rule 8.4.<sup>58</sup> The Rule requires prosecutors to follow all rules that apply to lawyers generally, but then allows prosecutors to supervise activities not prohibited by law, as long as the lawyer does not "personally act in violation of these Rules."<sup>59</sup> The Rule's Comment clarifies that this safe harbor applies to pretexting activities by permitting the lawyer to directly participate in activities that other lawyers may participate in, but requires the lawyer only supervise activities that are prohibited in the Rules.<sup>60</sup> The Comment justifies the limited safe harbor by noting the need to "preserve the integrity of the profession of law."<sup>61</sup> Additionally, although the safe harbor applies only to prosecutors, an Alabama Ethics Opinion clarified that private attorneys in IP cases may participate in pretexting activities *prior* to filing a case.<sup>62</sup> Since the target of the pretexting is not yet a party to any case and the lawyer is technically acting as an investigator as opposed to a lawyer:

[I]n the pre-litigation context a private lawyer may use an undercover investigator to investigate possible infringement of intellectual property rights . . . and may misrepresent their identity and purpose as long as their contact with suspected

<sup>58</sup> ALA. RULES OF PROF'L CONDUCT R. 3.8(2) (2010).

<sup>59</sup> *Id.* Specifically:

The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except: (a) notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of the government, and may cause nonlawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above, and (b) to the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.

*Id.*

<sup>60</sup> ALA. RULES OF PROF'L CONDUCT R. 3.8(2), cmt. ("Paragraph (2) deals with situations in which the ethical obligation of the prosecutor as lawyer might prevent the government from taking action that would not otherwise be prohibited by law. For example, in undercover and sting operations, the making of false statements is the essence of the activity. . . . In order to make clear that the prosecutor may cause the government to act in the fight against crime to the fullest extent permitted to the government by existing law, paragraph (2)(a) makes clear that the prosecutor may order, direct, encourage and advise with respect to any lawful governmental action. However, where lawyers generally are prohibited by the Rules from taking an action, the prosecutor is likewise prohibited from personally violating the Rules.").

<sup>61</sup> *Id.*

<sup>62</sup> See Ala. State Bar Office of Gen. Counsel, Form. Op. 2007-05 (2007).

infringers occur in the same manner and on the same basis as those of a member of the general public seeking such services.<sup>63</sup>

This opinion is specifically addressed to the IP context, however, so it is not clear whether it applies to private lawyers in other areas of law.

Iowa chose to add a comment to Rule 8.4 rather than amend the rule itself. However, the exception to the Rule is fairly broad and virtually mirrors Oregon's safe harbor provision. It reads:

It is not professional misconduct for a lawyer to advise clients or others about or to supervise or participate in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity, provided the lawyer's conduct is otherwise in compliance with these rules.<sup>64</sup>

Further, the Rule's Comment defines "covert activity" as "an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge," which clearly applies to pretexting.<sup>65</sup> Like Oregon's safe harbor provision, the covert activity can only be used 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."<sup>66</sup> The Comment applies the standard broadly to government lawyers, finding no violation of the Rules when the lawyer supervises or participates in routine law-enforcement investigations.<sup>67</sup>

Finally, Virginia slightly modified Rule 8.4(c) and issued a Legal Ethics Opinion to clarify how the modification to the rule might affect pretexting activities. In 2003, Rule 8.4(c) was amended to only prohibit engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation *which reflects adversely on the lawyer's fitness to practice law.*"<sup>68</sup> In a Legal Ethics Opinion, the Virginia State Bar Standing Committee on Legal Ethics applied this additional language to pretexting activities conducted by federal government lawyers and concluded that these activities do not reflect adversely on the lawyer's

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<sup>63</sup> *Id.*

<sup>64</sup> IOWA CODE OF PROF'L RESPONSIBILITY R. 32:8.4, cmt. 6 (2005).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (clarifying that "a government lawyer who supervises or participates in a lawful covert operation which involves misrepresentation or deceit for the purpose of gathering relevant information, such as law enforcement investigation of suspected illegal activity or an intelligence-gathering activity, does not, without more, violate this rule.")

<sup>68</sup> VA. RULES OF PROF'L CONDUCT. R. 8.4(c) (2009) (emphasis added).

fitness to practice law and therefore do not violate the rule.<sup>69</sup> Although this Legal Ethics Opinion specifically addressed government attorneys, it also noted that prior Virginia Legal Ethics Opinions provide exceptions for the use of tape recording for housing discrimination testers and “the threat or actual commission of criminal activity where the attorney is the victim,” while noting that this list is not necessarily exhaustive.<sup>70</sup> Although these exceptions only apply to tape-recording conversations, the Committee extended the exception to pretexting activities in general for government attorneys; therefore, it may apply to these other categories of lawyers as well. Since the language in the rule lacks the clarity of other Bars, more guidance is needed to fully understand what the boundaries of the exception are in Virginia.

Addressing whether a non-government lawyer can employ the services of an investigator who uses dissemblance as an evidence-gathering technique, the New York County Lawyers’ Association formulated a rule to provide more guidance on the issue.<sup>71</sup> The Association concluded that “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.”<sup>72</sup> In concluding that some dissemblance may be ethically permissible, the Association noted that anything that rises to the level of fraud or perjury or that violates the rights of third parties violates the Rules.<sup>73</sup> In an attempt to provide greater guidance, the Association issued a rule to determine when pretexting by a non-government attorney is ethically permissible:

- (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably and

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<sup>69</sup> Va. Continuing Legal Educ. Comm., Legal Ethics Op. 1765 (2003) (“[W]hen an attorney employed by the federal government uses lawful methods, such as the use of ‘alias identities’ and non-consensual tape-recording, as part of his intelligence or covert activities, those methods cannot be seen as reflecting adversely on his fitness to practice law; therefore, such conduct will not violate the prohibition in Rule 8.4(c).”).

<sup>70</sup> *Id.*

<sup>71</sup> See N.Y. Cnty. Lawyers’ Ass’n. Comm. on Prof’l Ethics, Form. Op. 737 (2007).

<sup>72</sup> *Id.* at 1.

<sup>73</sup> *Id.* at 2–3 (stating that “[d]issemblance ends where misrepresentations or uncorrected false impressions rise to the level of fraud or perjury, communications with represented and unrepresented persons in violations of the Code . . . or in evidence-gathering conduct that unlawfully violates the rights of third parties.”).

readily available through other lawful means; and (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the New York Lawyer's Code of Professional Responsibility (the "Code") or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. Moreover, the investigator must be instructed not to elicit information protected by the attorney-client privilege.<sup>74</sup>

While pointing out that there is no nationwide consensus on the ethical implications of pretexting, the Association noted that Rules must be "applied in the light of reason and experience," and that the limited use of pretexting "is most consistent with the overall purposes of the Disciplinary Rules and conforms to professional norms and societal expectations."<sup>75</sup> This opinion is specifically limited to non-government attorneys supervising investigators, however, and does not address whether government attorneys may direct investigations by law enforcement personnel or whether attorneys may directly engage in pretexting activities.<sup>76</sup>

Although several of these amendments and rules provide limited guidance on the issue, at least they provide some direction for an attorney analyzing his options *prior* to acting. This is of course preferable to addressing the issue after the activity has occurred because it provides more notice and enables attorneys to make more of an educated choice on the matter. One issue to note, however, is that every amendment or rule listed here *permits* pretexting; it does not appear that any bar prohibiting pretexting has made that clear in any rule. More bars should consider proactively amending the rules to make it clear one way or the other what is permissible.

## II. BALANCING THE POLICY CONSIDERATIONS: ZEALOUS ADVOCACY VERSUS PROFESSIONAL IMAGE

The area of Professional Responsibility is subject to differing views, competing considerations, the ever-evolving public perception of the legal profession, and changing technology. Therefore, clear guidance on the subject is likely an unattainable goal. Certain issues within Professional Responsibility have such far-reaching implications, however, that they merit as much guidance as possible.

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<sup>74</sup> *Id.* at 5–6.

<sup>75</sup> *Id.* at 5.

<sup>76</sup> *Id.* at 3.

In its analysis of pretexting, the referee in *In re Hurley*<sup>77</sup> noted the challenges facing attorneys in the criminal context:

Mr. Hurley was faced with a very difficult decision, with concurrent and conflicting obligations: should he zealously defend his client, fulfill his constitutional obligation to provide effective assistance of counsel, and risk breaking a vague ethical rule that, according to the record, had never been enforced in this way? Or should he knowingly fail to represent Mr. Sussman in the manner to which he was entitled and hand him persuasive grounds for appeal, an ethics complaint, and a malpractice claim? The Sixth Amendment seems to have broken the tie for Mr. Hurley.<sup>78</sup>

Although pretexting occurs in other areas of the law and does not always implicate constitutional rights, it has a direct impact on the public's perception of the legal profession. And as the internet has improved the ability to dissemble one's identity and purpose in collecting evidence, pretexting is likely to become more routine. Therefore, it is surprising that so many state bars have failed to clearly address the issue.

Looking beyond the obvious constitutional implications, at the heart of the issue are the competing policy considerations. On one hand, lawyers are charged with zealously advocating for their clients within the bounds of the legal system.<sup>79</sup> On the other, lawyers are expected to approach the practice of law in a manner that instills public confidence in the profession.<sup>80</sup> This is why those charged with leading the Bar should provide guidance. The Preamble to the Model Rules of Professional Conduct notes that when "conflicting responsibilities are encountered" in the practice of law, they should be "resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."<sup>81</sup> Without adequate guidance, however, lawyers have to face two very significant yet competing considerations and later face the consequences.

<sup>77</sup> No. 2007AP478-D, 2008 Wisc. LEXIS 1181 (Wis. Feb. 5, 2008).

<sup>78</sup> *Id.* at \*36.

<sup>79</sup> See MODEL RULES OF PROF'L CONDUCT, pmb. (2009) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.")

<sup>80</sup> See *id.* at [6] ("[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.")

<sup>81</sup> *Id.* at [9].

It is clear that more guidance is needed for attorneys that wish to conduct pretexting activities on the internet. In analyzing the myriad of approaches taken by the judiciary and bar associations, several are clearly deficient. If there is to be adequate guidance on this issue, uniformity and clarity are essential to whatever standard is established.

First, drawing a distinction between certain types of cases is nonsensical. Perhaps the use of pretexting in certain types of cases is easier to justify based on policy considerations, but as history shows, situations change. New areas of the law develop over time and circumstances change. Drawing a rule based on the current situation necessarily results in another outdated rule in the near future. Similarly, drawing a line based on the type of lawyer involved only leads to an arbitrary and unfair distinction, especially when the line is drawn between government and private attorneys. Permitting the government's attorney to use deceit and misrepresentation against a potential defendant but not permitting the defendant's attorney to do the same against potential witnesses or suspects gives the government an unfair advantage. If one party is permitted to engage in deceit, so should the other.

Additionally, recognizing a "gloss on the rule" that permits certain activities that seemingly violate the Rules is far too subjective to actually provide guidance. A lawyer who believes that his actions are appropriate under this standard will later be judged by someone with 20/20 hindsight and perhaps a different set of ethical beliefs. Such a rule cannot possibly be applied evenly. Furthermore, this rule provides no guidance to the public. If a person is trying to understand when his Facebook page may be accessed for evidentiary purposes, this standard does nothing to clarify when or how pretexting may be utilized. Since fostering public in the legal profession is one of the primary public policies under consideration, this standard cannot hold muster.

Finally, it is unacceptable to permit certain activities that violate the plain text of the Rules based on finding an "implied" exception. This utterly fails to provide any guidance on permissible activity and opens the door to more egregious behavior, as lawyers may believe that they can justify violations of the rules by arguing that there is an implied exception. The language of the Rules should be the guiding force, without exception. If pretexting is to be permissible under the Rules, it should be expressly permissible.

The remaining analysis boils down to whether pretexting should be uniformly permissible under the Rules, and if so, under what

circumstances. This can be determined by weighing the competing considerations: zealous advocacy versus upholding the public image of the bar. No clear consensus on this issue will ever be reached, but that is typically the case in the area of professional responsibility. In my view, however, the scales tip in favor of encouraging public faith in the bar. Although zealous advocacy is certainly necessary, and at times strikes at the heart of constitutional rights, our system of justice cannot function properly without faith in the legal profession. As Justice Kourlis wrote in the *In re Pautler*<sup>82</sup> opinion:

Lawyers themselves are recognizing that the public perception that lawyers twist words to meet their own goals and pay little attention to the truth, strikes at the very heart of the profession—as well as the heart of the system of justice. Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest.<sup>83</sup>

If the rules of evidence need to be improved to provide better tools for discovery, then perhaps that should be addressed so that pretexting is not necessary. The image of the Bar cannot be improved by anything other than the actions of its members, however, so it must be the focus.

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<sup>82</sup> 47 P.3d 1175 (Colo. 2002).

<sup>83</sup> *Id.* at 1179.

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