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DISSEMBLANCE IN THE FRANCHISE INDUSTRY: THE ART (AND ETHICS) OF DECEPTION

Defining the ethical limits of acceptable deception during a pre-suit investigation or pending litigation is not an easy task. Most franchise lawyers assume that there is such a thing as acceptable deception, but wonder where the line is drawn. The American Bar Association Model Rules of Professional Conduct (Model Rules), which have been adopted in whole or part by every state in the nation, generally proscribe conduct involving dishonesty, misrepresentation, or deception. Despite this language, the ABA, state and local bar associations, and courts across the country have long recognized the lawful use of attorneysupervised undercover investigations.

Franchise lawyers, in particular, are often called upon to supervise and direct undercover operations aimed at uncovering, among other things, brand misuse, intellectual property infringement, unfair competition, and violations of franchise policies. A typical example is when a franchisor, suspecting a current or former franchisee is using intellectual property in an unauthorized manner, wants to covertly investigate. In situations like these, what are the limits on the ability of a franchisor's counsel to conduct an investigation to confirm or dispel this suspicion? May the attorney don his best fake mustache and glasses to pose as a customer seeking to purchase goods or services? May counsel recruit another to do the same?

When investigating a potential breach of a franchise agreement, the parties and their counsel want to gather as much relevant information as possible. This article addresses the scope of ethically and legally permissible conduct when gathering this information. Part I identifies the principal sources of legal and ethical boundaries within which all investigations should remain. ***526** Part II describes a few of the various modes of theatrical investigations, ranging from undercover sting operations to dumpster diving. Part III discusses practical strategies and guidelines for conducting a covert investigation.

I. Overview of Ethical Guidelines and Legal Mandates

Under any set of rules or guidelines, making affirmative misrepresentations with the intent to induce another to act, or refrain from acting, can lead to disbarment. The material risk of disbarment or license suspension is illustrated by two Massachusetts cases, *In re Curry* and *In re Crossen*, [1] in which two lawyers were disbarred because of the tactics they used in an investigation of a judge who ruled against their clients. The lawyers lured the judge's clerk with a fictitious job offer and then questioned him about the judge's conduct. [2] During the fake interview, the attorneys threatened to expose alleged misrepresentations made by the clerk on his bar application unless the clerk agreed to make statements regarding the judge's bias against their client. [3] Ultimately, both attorneys were disbarred for hatching a plot "border[ing] on outright extortion." [4] These extraordinary cases, while clearly examples of outrageous conduct, are a stark reminder of the dangers lurking for those choosing to engage in deceptive conduct.

The Model Rules, state laws incorporating these rules, various state and local bar association guidelines, and case law together provide guidance to the franchise lawyer who is analyzing whether a covert conduct will cross the ethical line. When interpreting the text of the Model Rules and state equivalents, courts have differed widely regarding the boundaries between acceptable and unacceptable forms of deception. Some jurisdictions allow more leeway depending on the rights to be vindicated. For example, some jurisdictions are more lenient for criminal matters and stricter with regard to civil disputes. Others, however, have zero tolerance regardless of the nobility of the underlying motive.

The differing approaches taken by courts across the country necessitate first, an understanding of the Model Rules, and second, an understanding of the state-by-state variations of the model rules and applicable case law.

A. *Model Rules*

When analyzing counsel's use of covert investigations, courts have focused primarily on Rule 8.4, Rule 5.3, and Rule 4.2.

*527 1. Rule 8.4

Model Rule 8.4 provides in pertinent part as follows:

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; and
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation. [5]

Model Rule 8.4(c) specifically prohibits lawyers from engaging in conduct involving "dishonesty, fraud, deceit, or misrepresentation." [6] Based on the comments to Model Rule 8.4, [7] some commentators have argued that the prohibition on deceit is limited only "to grave misconduct that would not only be generally reproved 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." [8] Consistent with this, some courts have deemed acceptable the use of deception to expose political corruption, racial discrimination, and intellectual property infringement. [9]

2. Rule 5.3

Model Rule 5.3 holds lawyers responsible for the conduct of non-lawyers under their supervision. For example, a lawyer who hires an investigator "shall make reasonable efforts to ensure that the [investigator's] conduct is compatible with the professional obligations of the lawyer." [10] Thus, a lawyer cannot circumvent Model Rule 8.4 by commissioning another to commit acts of dishonesty. [11] Lawyers may even be disciplined for action taken by an investigator without their knowledge if they supervise the investigator or subsequently ratify the conduct. [12]

*528 3. Rule 4.2

Cases involving Model Rule 8.4 often involve Model Rule 4.2, also known as the "no contact" rule. Model Rule 4.2 prohibits an attorney from communicating with an opposing party that is represented by counsel. [13] Contacting, even indirectly, opposing parties while litigation is pending or if the party is represented by counsel in anticipation of litigation may violate both Model Rule 8.4 and Model Rule 4.2.

Midwest Motor Sports v. Elliot Power Sports, Inc., [14] in which the Eighth Circuit upheld a South Dakota district court's sanctions related to a covert investigation, illustrates the interplay of these rules. Notably, the conduct at issue occurred while litigation was ongoing and all parties were represented by counsel. In this case, a terminated franchisee filed suit, claiming it was unfairly treated and terminated in favor of another franchisee. [15] The franchisor and both franchisees were

parties to the lawsuit. During discovery, the franchisor's attorneys hired a private investigator to surreptitiously record conversations with franchisees' employees and simultaneously served a Federal Rule of Civil Procedure 34 request for inspection seeking to inspect, photograph, and videotape the franchisees' dealerships. [16]

The district court determined that the covert recordings violated Rules 8.4 and 4.2 and sanctioned both the franchisor and its counsel. The attorney was personally found to have violated Rule 4.2 by crafting questions and attempting to elicit specific admissions that he wanted the investigator to obtain from the franchisees' employees. According to the district court, the undercover ruse fell squarely within the prohibition of Rule 8.4(c) of "conduct involving dishonesty, fraud, deceit or misrepresentation." [17] Notably, however, the district court refused to grant any monetary sanctions against either the franchisor or its attorney.

4. Model Rules Are Merely Guidelines

The Model Rules are only recommendations for the standards of legal ethics: they are not binding. Each state enacts its own code of legal ethics, which provides the governing law in disciplinary proceedings and courts of law. Thus, although the Model Rules provide some uniformity to a discourse on legal ethics, each state may, and many do, deviate from the Model Rules in substance or interpretation.

*529 B. *State Law Equivalents to the Model Rules*

Every jurisdiction has adopted some version of the ABA Model Rules, [18] except California whose Rules of Professional Conduct are structured differently. [19] However, every state, including California, has adopted some version of Model Rule 8.4(c). [20] Many have adopted the rule verbatim or with minor revisions, but a few states have substantially revised the rule. [21] Notwithstanding, jurisdictions interpret the rule in vastly differently ways. Oregon appears to be the most permissive state, explicitly permitting ethically conducted covert investigations, irrespective of subject matter or the parties' status. On the opposite end of the spectrum, Colorado appears to impose an outright prohibition of deceptive tactics by lawyers. [22] In the middle are states like Florida and Missouri, which have adopted rules that expressly permit covert investigations in limited circumstances.

1. Expansive Oregon Rule

In 2002, Oregon amended its ethics rules to provide that a lawyer may not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's

fitness to practice law."[23] Oregon, however, explicitly permits lawyers to ethically supervise undercover investigations in which they themselves do not directly participate:

> [I]t 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 disciplinary rules. " "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.[24]

This rule applies only "when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or ***530** will take place in the foreseeable future."[25] The Oregon rule appears to be the most permissive variation of Model Rule 8.4.

Iowa adopted the substance of the Oregon Rule 8.4(b) in 2005 by incorporating its language in a comment to Rule 32:8.4(c) of the Iowa Rules of Professional Conduct, permitting both criminal and civil lawyers to supervise or participate in lawful covert activity in certain circumstances, regardless of the nature of the claim.[26]

2. Prohibitive Colorado Rule

Colorado has declined to create any exception for the use of deception by an attorney. In In re Pautler, Mark Pautler, a former chief deputy district attorney, impersonated an attorney with the county's public defender's office in a telephone conversation with William Neal, who had previously confessed to multiple murders.[27] Neal told police that he was armed and made vague threats about killing other people, but refused to surrender before speaking to a public defender. After his conversation with Pautler, Neal surrendered to law enforcement without incident.[28]

The Attorney Regulation Counsel charged Pautler with violating Rules 4.3 and 8.4(c) of the Colorado Rules of Professional Conduct.[29] A hearing board suspended his license after finding that Pautler violated those rules.[30] Ultimately, the Colorado Supreme Court upheld the discipline: "[E]ven a noble motive does not warrant departure from the Rules of Professional Conduct ... purposeful deception by lawyers will not go unpunished [and] prosecutors cannot involve themselves in deception, even with selfless motives."[31]

The Pautler case demonstrates the need for every lawyer to understand the ethical rules of the jurisdiction where the covert activity may take place. It is a dangerous assumption to act merely on the belief that the end justifies the means.

3. Jurisdictions Permitting Undercover Investigations in Limited Circumstances

Most jurisdictions permit undercover investigations in limited circumstances, but provide little textual guidance. For example, most jurisdictions impliedly permit the limited use of covert investigations to gather evidence ***531** prior to the filing of a lawsuit. Further, most jurisdictions permit governmental lawyers to participate in or supervise limited undercover activities. For example, in Florida:

> A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except 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, 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. [32]

Missouri has adopted a rule with similar wording. [33] The Utah Bar has opined that "[o]n its face, Rule 8.4(c) would seem to make it professional misconduct for a lawyer to engage in any kind of misrepresentation," but it "was not intended to prevent state or federal prosecutors or other government lawyers from taking part in lawful, undercover investigations." [34]

Michigan, Virginia, and North Dakota have adopted variations of Model Rule 8.4, which impliedly contemplates the ethical use of deception. [35] Michigan Rule 8.4(b) states: "It is professional misconduct for a lawyer to: engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer."

Presumably, a franchise lawyer's use of innocuous misrepresentations in some undercover scenarios (e.g., mystery shoppers) would not necessarily reflect adversely on professional fitness.

4. Bar Association Guidelines

Some state and local bar associations have issued nonbinding guidelines and opinions regarding the ethical limits of certain types of covert investigations. ***532** For example, the New York County Lawyer's Association (NYCLA) has addressed the issue through a formal opinion, [36] while the Association of the Bar of the City of New York has addressed it through a proposed amendment

to Rule 8.4 of the New York Rules of Professional Conduct. [37] New York State, however, has not expressly addressed the application of the Model Rules to deceptive investigations.

In its formal opinion, the NYCLA attempts to provide guidance and asserts that covert activity should be permitted in limited circumstances where:

> (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 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 Code (including, but not limited to, DR 7-104, the "no contact" rule) or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. [38]

The New York City Bar Association's report and proposal refers to the NYCLA opinion and expresses concern that its acceptance of undercover investigations in limited circumstances is not supported by the clear language of Rule 8.4(c).

Another example is the State Bar of Arizona, which has issued many opinions related to its interpretation of ethical guidelines for lawyers, including opinions related to covert investigations. [39] Ethics Opinion 99-11 addresses Arizona's Rule 8.4 equivalent and states that "a private practice lawyer ethically may direct a private investigator or tester to misrepresent [his] identity or purpose in contacting someone who is the subject of the investigation, only if the misrepresentations are for the purpose of gathering facts before filing suit." [40]

5. Jurisdictions Applying a Case-by-Case Analysis

The vast majority of jurisdictions adopt the exact wording of ABA Model Rule 8.4, [41] but provide little guidance regarding its application to specific examples of undercover investigations of interest to franchise attorneys. A nationwide review of comments, ethics opinions, and case law illustrates that very little has been written about the subject. Thus, it may be difficult to determine the precise boundaries between permissible dissemblance and impermissible "dishonesty, fraud, misrepresentation, and deceit" in relation to specific franchise disputes.

*533 6. Road Map--Where to Begin Your Analysis

For the lawyer contemplating a theatrical investigation, the jurisdiction's version and interpretation of its Model Rule 8.4 is the starting point. The jurisdiction's versions and interpretations of

Rules 4.2 and 5.3 also must be identified and analyzed. Counsel should also determine whether there are any cases related to the particular type of covert activity contemplated and look for informal opinions or guidelines developed by the relevant state or county bar. These guidelines may provide insight into the likely application by judges of the particular state's rule to the facts and contemplated investigative tactics.

Part II discusses several types of investigatory techniques and how courts have applied the rules to those techniques.

II. Theatrical Investigations

On one end of the spectrum of deceptive techniques are undercover stings and setups designed to induce certain conduct or elicit specific admissions. Generally, only criminal law enforcement authorities are authorized to employ these techniques. On the opposite end of the spectrum are non-intrusive searches of information in the public domain, such as social media profiles, property records, or criminal history. Although there are clear limits on the ability of a franchise lawyer to search private information, there seems to be no question that accessing publicly available information is permissible.

Between these two poles is a large gray area where many franchise lawyers and their clients must analyze whether the specifically contemplated use of false pretenses to monitor an individual or entity in the ordinary course of business is permitted. The propriety of these investigations depends on many factors, including the timing of the investigation and the extent of the misrepresentation. The recent trend is to permit lawyers to participate in undercover investigations where the goal is to expose violations of intellectual property rights because courts are increasingly recognizing the difficulty in uncovering these violations by other means. [42]

A. *Undercover Stings and Setups*

A sting operation, i.e., an intentionally deceptive plan designed to elicit specific admissions, is fraught with ethical concerns. As noted by a Second Circuit jurist, "the private lawyer who participates in a sting operation almost necessarily runs afoul of the canons of legal ethics." [43] Society generally accepts the use of non-coercive sting operations by the government to expose criminal conduct, such as when an undercover officer poses as someone ***534** seeking illegal drugs to catch a supplier. [44] However, jurisdictions seem unwilling to tolerate grand deception to the extent of a sting-type operation in franchise disputes, regardless of the nobility of the underlying motive and the status of the lawyer.

B. *Hidden Recordings and Surveillance*

There is no blanket legal prohibition on secretly video recording the activities of individuals. A franchise lawyer is probably safe having an investigator secretly videotape or photograph a witness, provided the investigator does not trespass or otherwise engage in criminal activity. Jurisdictions have differed, however, regarding the question of whether hidden audio recordings inherently constitute "dishonesty, fraud, deceit or misrepresentation."

For nearly thirty years, the ABA interpreted the Model Rules as prohibiting secret audio recordings, reasoning that secret recordings would be tantamount to dishonesty or misrepresentation.[45] In 2001, the ABA altered its position and issued a revised statement that "[a] lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules."[46] Many states have followed the lead of the ABA and removed the per se ethical bar against lawyers secretly recording conversations.[47]

In most states, there is a clear distinction based on the timing of the surreptitious recording. Even in states where there is no per se ethical bar of audio recordings, some courts have imposed sanctions against a party for recording conversations during ongoing litigation.[48] Conversely, in *Turfgrass* ***535** *Group, Inc. v. Northeast Louisiana Turf Farms, LLC*,[49] a Louisiana district court concluded a lawyer did not violate the Model Rules for using an undercover investigator to collect covert audio recordings before suit was filed. The court accepted plaintiff's counsel's argument that the use of an undercover investigator was essential to uncover evidence before suit was filed.[50]

However, the timing of the recording will not always be the lawyer's saving grace. Twelve states do not permit attorneys or others to record telephone calls, in-person conversations, or both without the consent of all parties to the conversation--California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, South Carolina, and Washington.[51]

C. *Pretexting and the Ethical Limits of Mystery Shopping*

Maintaining the integrity of the brand and adherence to the franchise agreement are critical to both franchisor and franchisee. Mystery shopping is one method by which franchisors frequently monitor compliance and expose breaches of the franchise agreement. Mystery shoppers provide reports or testimony about their experiences after engaging in certain conduct such as purchasing a product or service, asking questions, or behaving in a certain way. Whether an attorney has ethically utilized mystery shopping often depends upon the timing of the investigation and the extent of the deception.

Pre-dispute mystery shopping is widely used in the franchise industry, and many franchise agreements contain provisions permitting mystery shopping.[52] Texaco, for example, requires

franchisees to participate in a mystery shopper program where branded stations are visited twice a year by an anonymous individual who purchases gasoline and checks the premises for compliance with brand standards in sixty-nine designated areas.[53] In Jamison v. Morris, the South Carolina Supreme Court concluded, "nothing in [Texaco's] Mystery Shopper Program exceeded the scope of the ordinary franchisorfranchisee relationship."[54]

After a dispute has arisen or a lawsuit has been filed, courts more closely scrutinize counsel's direction of mystery shopping operations. Lawyers deploying mystery shoppers with a script designed to elicit specific admissions for use in legal proceedings, especially after litigation commences, may very ***536** well violate Model Rules 4.2 and 8.4.[55] In *Midwest Motor Sports*, franchisor's counsel was sanctioned for using an investigator to obtain admissions regarding sales from a franchisee's employees while a lawsuit was pending.[56] The attorneys planned to use the information to prove the franchisor's damages at trial and proceeded with the covert tactic rather than using discovery methods permitted by the Federal Rules of Civil Procedure.[57] The Eighth Circuit upheld the district court's ruling that the franchisor should have obtained this information through the use of formal discovery techniques, finding it inappropriate for counsel to resort to "self-help remedies that violate the ethical rules."[58]

Even when a lawsuit has been filed, mystery shopping is not necessarily prohibited, particularly when the misrepresentation is limited to the investigator's identity and purpose. In *Apple Corps Ltd. v. International Collectors Society*,[59] defendant ICS executed a consent decree and agreed to limit distribution of commemorative Beatles postage stamps to members of a specific fan club. When monitoring compliance with the consent decree, plaintiff's counsel telephoned ICS's public, toll-free telephone number and inquired as to the availability of the stamps.[60] The lawyer did not identify herself as counsel and used a pseudonym to avoid suspicion.[61] Although she was not a member of the fan club and not eligible to receive the stamps, ICS complied with her request.[62] At her direction, other non-member callers, including a legal secretary, investigators, and the attorney's husband, also ordered stamps from ICS.[63]

The district court found that the sale of the stamps to non-members violated the consent decree and further found that plaintiff's counsel did not violate ethical restrictions on contacting represented parties or engaging in deceit.[64] Significantly, plaintiff's investigators did not lie about their status as non-members or ask any substantive questions other than whether they could order the stamps.[65] The court held that "RPC 4.2 cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation."[66] The court similarly found there was no "dishonesty, fraud, deceit or misrepresentation," because Rule 8.4 "does not apply to misrepresentations ***537** solely as to identity or purpose and solely for

evidence gathering purposes."[67] Mystery shoppers "do no more than conceal their identity or purpose to the extent necessary to gather evidence."[68]

Courts across the country have similarly held that mystery shopping is ethically permissible when the deception is limited to identity and purpose.[69] This is particularly true in the context of franchise disputes, regardless of when the mystery shopping event takes place.[70] Even in Colorado, mystery shopping is permissible before and after the commencement of litigation when the investigation is simply to view and record public-facing information. For example, in *Winmark Corp. v. Schneeberger*[Winmark Corp. v. Schneeberger](), [71] the franchisor hired a private investigator to visit a franchisee's store after litigation was commenced to view publicly available information, including signs and logos visible throughout the store, purchase a gift card, and ask questions without misrpresenting his identity.[72]

Courts analyzing mystery shopping activities conclude that it is more akin to innocuous surveillance than to unethical coercive sting operations.[73] Lawyers cross the blurry line between ethical and unethical conduct when they go beyond monitoring compliance and design an investigation to cause another to do or say something that he or she ordinarily would not have done or said, or when the investigator makes contact with a party represented by counsel where the lawyer would have been constrained from making the same contact.

*538 D. *Dumpster Diving*

When a person throws something out, it is generally considered to have been placed into the public domain and no longer confidential information. However, the prudent franchise lawyer should not assume that it is always permitted to access and take possession of documents merely because the documents happen to be in a trash container.

In *California v. Greenwood*, the U.S. Supreme Court addressed the issue of whether a warrantless search and seizure of garbage bags left at the curb violated the Fourth Amendment.[74] The Court held the respondents failed to demonstrate a reasonable expectation of privacy in their garbage, finding that "[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public."[75]

Years later, however, discovery abuses in the context of well-documented litigation between Stephen Slesinger, Inc. and Walt Disney Co. helped to define ethical limits on dumpster diving.[76] Slesinger hired a private investigator who obtained confidential documents from Disney's private offices, trash dumpsters, and the facility of a contracted document disposal company.[77] Many documents were variously labeled "confidential-internal use only," "privileged and confidential,"

and "attorney work product--created at the request of counsel." [78] Disney moved for sanctions. The trial court found that Slesinger had taken confidential documents from these locations and that the plaintiff and its attorney had authorized and attempted to conceal the activities. [79] The district court took a strong position and dismissed the lawsuit a decision approved by the appellate court. [80]

E. *Social Media*

Social media, i.e., interactive websites that allow users to connect, communicate, and share information, are platforms where individuals choose to put personal information in the public domain. [81] Social media users may control access to their personal information through the use of various privacy settings. Just as there is no reasonable expectation of privacy in trash left at the curb, there can be no reasonable expectation of privacy for unprotected information on a Facebook page or Twitter account.

"Social media sites have increasingly found a place in the litigation process because they contain a wealth of personal information and can be either ***539** a 'goldmine or smoking gun, depending on [the] perspective.'" [82] Unfortunately, again, the parameters of ethical conduct for investigations on social media sites vary by jurisdiction. For example, in California, at least one local bar association has concluded that a lawyer or lawyer's agent may send a Facebook "friend request" to an unrepresented party only after providing full disclosure of the purpose for the request. [83] In New York City, lawyers or their agents can ethically use their real identity and social networking profile to send a "friend request" to an unrepresented person "without also disclosing the reasons for making the request." [84]

As technology evolves, so do the rules of ethics. The fundamental principles at the heart of the Model Rules still provide significant guidance for attorneys seeking to fully and ethically develop the facts of each case. The prohibition against contacting represented parties, for instance, likely applies whether the contact is via smoke signals, courier pigeon, electronic mail, or teleportation. Under the current state of the law, the prudent approach requires anything beyond a review of public information on social media sites to be accompanied by a forthright declaration of identity and purpose. When conducting social media investigations, counsel should avoid using, or asking others to use, faux accounts with false names to obtain access to potential witnesses' accounts.

III. Suggested Strategy for Covert Investigations

Practically speaking, the legal authorities can be synthesized in a relatively straightforward fashion on the issue of pretexting: Lawyers can expect that a court or disciplinary counsel will be significantly more likely to impose sanctions where they or their agents employ deception to cause people to do or say something they otherwise would not have said or done.

In the absence of exigent circumstances, thorough pre-suit investigations are preferable to in-suit investigations, because courts tend to be more lenient when counsel's access to formal discovery is limited.

A. *Hiring an Investigator*

If and when to hire an investigator depends, of course, on the facts and circumstances of each case. As a general matter, private investigators have more experience conducting field interviews and gathering information out- ***540** side of controlled environments where procedural and substantive rules of law apply. Lawyers often have little experience using resources to uncover assets, find people, and discover other important information.

In civil litigation, computer forensics play an important role. Any litigation matter that involves digital evidence, whether located in a computer, laptop, tablet computer, smart phone, thumb drive, portable drive, or SD card is fertile ground for discoverable evidence. An investigator skilled in computer forensics can examine digital evidence, some of which may be deleted or hidden, and spoliation can lead to the imposition of costly sanctions. Few firms have the expertise, capability, or desire to internally process a production of electronically stored information, much less conduct an analysis of metadata on a cloned hard drive. If properly utilized, private investigators can create a significant advantage over an opponent.

B. *Pre-Suit Investigations*

As discussed earlier, a lawyer may be less likely to violate ethical rules when conducting pre-suit investigations, as opposed to conducting investigations while suit is pending. [85] Before filing suit, a lawyer may not know or have reason to know whether a potential defendant is represented by counsel. Moreover, attorney-directed investigations are often the primary means for gathering information because formal discovery is limited pre-suit.

Searching public records will allow an attorney to obtain evidence of business relationships, stock ownership holdings, or other financial interests. An important factor many clients will consider is whether the putative defendant has assets to satisfy a judgment. A pre-suit asset search is prudent and may also be necessary to protect the interests of both the attorney and client.

In *Gillin v. Patterson, Belknap, Webb & Tyler*, a law firm was sued for malpractice by its client for failing to make a pre-suit determination of the opposing party's assets. [86] On the advice of her attorneys, Agneta Gillin accepted her husband's offer of $8 million plus interest from a $17 million trust to settle divorce proceedings. [87] Subsequently, she learned her ex-husband was worth $250 million at the time of settlement. [88] According to Agneta, the failure to confirm the nature of her ex-husband's estate resulted in a $100 million loss. [89]

The development of the factual basis for a lawsuit before commencing suit is generally accepted due to a lawyer's obligation to avoid filing frivolous litigation.[90] A benefit of permitted pre-suit investigations are the development ***541** of information, which may provide counsel with leverage for pre-suit settlement negotiations. Likewise, counsel for a putative defendant can develop evidence to defend the action or support counterclaims before suit is filed. In sum, "victory loves preparation."[91]

C. *Investigations Involving Social Media*

The following best practices can be distilled from the current precedent interpreting the Model Rules and their state equivalents:

> (a) Lawyers may review information available to the public on a person's social media site.
>
> (b) Absent a clear pronouncement from the relevant governing authority to the contrary, lawyers should not use false identities and fabricated profiles to access information contained on social media sites.
>
> (c) Lawyers using their true identities may request "friend" or "follower" status of an unrepresented person, but should include with the request a statement disclosing the purpose of the request. The same rule applies for a lawyer enlisting another to do the same.
>
> (d) Lawyers should not request "friend" or "follower" status of a represented person's profile.

When confronted with other scenarios, attorneys should err on the side of caution and, if appropriate, utilize formal discovery tools. However, courts will not condone fishing expeditions related to a party's social media use.[92] A party seeking discovery of social media must be prepared to establish that a prior investigation of publicly available social media or some other basis gives reason to believe requests for non-public data contained on social media are reasonably calculated to lead to the discovery of admissible evidence.[93]

IV. Conclusion

Attorney-supervised undercover operations are commonly used tools in the management of the franchisor-franchisee relationship. However, the rules for conducting covert investigations are far from uniform. Reliance on the plain text of the Model Rules or state equivalents is not sufficient to manage the risk associated with these activities. To avoid the propagation of potentially ambiguous rules, states should consider revising their rules of professional conduct to clarify the scope of activities permitted and any intended ***542** safe harbor provisions.[94] Given the current conflicting interpretations of the Model Rules, the prudent attorney must endeavor to obtain a complete understanding of the boundaries imposed by the relevant jurisdiction. Despite the mandate to zealously represent one's client, the end does not necessarily justify the means.

Footnotes

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1 *In re Curry*, 880 N.E.2d 388, 392 (Mass. 2008); *In re Crossen*, 880 N.E.2d 352 (Mass. 2008).

2 *In re Curry*, 880 N.E.2d at 403-04.

3 *Id.* at 399.

4 *In re Crossen*, 880 N.E.2d at 375.

5 MODEL RULE 8.4(a)--(c).

6 *Id.* at R. 8.4(c).

7 *Id.* at R. 8.4(c) cmt. 2 ("Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving 'moral turpitude.'").

8 David Isbel & Lucantonio Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers*, 8 GEO. J. LEGAL ETHICS 791 (1995).

9 See, e.g., Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983) (approving of the use of testers to expose racial discrimination in the housing industry: "[D]eception was a relatively small price to pay to defeat racial discrimination."); Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475 (D.N.J. 1998) ("[L]imited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil rights law enforcement."); Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 123 (S.D.N.Y. 1999) ("The 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.").

10 MODEL RULE 5.3(b).

11 *Id.* at R. 5.3 cmt. 1.

12 *Id.* at R. 5.3(c).

13 *Id.* at R. 4.2. The ABA Standing Committee on Ethics and Professional Responsibility has recently concluded that Model Rule 4.2 does not prohibit a lawyer from assisting the client regarding the substance of any proposed communication between the client and opposing party. A lawyer may, therefore, "review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary." ABA Formal Op. 11-461 (2011).

14 347 F.3d 693, 694 (8th Cir. 2003).

15 *Id.*

16 *Id.*

17 *Id.*

18 *See State Adoption of the ABA Model Rules of Professional Conduct*, ABA Ctr. for Prof'l Resp., available at http:// www.americanbar.org/ groups/professional_responsibility/publications/model_ rules_of_professional_conduct/ alpha_list_state_adopting_model_rules.html (last visited Feb. 18, 2014).

19 CALIFORNIA RULES OF PROF'L CONDUCT (Jan. 1, 2013), available at: rules.calbar.ca.gov/Portals/10/documents/2013_ CaliforniaRulesofProfessionalConduct.pdf

20 See ABA Center for Professional Responsibility Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct, available at www.americanbar.org/content/dam/aba/administrative/ professional_ responsibility/mrpc_8_4.authcheckdam.pdf.

21 *See* FLORIDA RULES OF PROF'L CONDUCT R. 4-8.4(c) (2006); MICHIGAN RULES OF PROF'L CONDUCT R. 8.4(b) (1988); MISSOURI RULES OF PROF'L CONDUCT R. 4-8.4(c); OREGON RULES OF PROF'L CONDUCT R. 8.4(a)(3), 8.4(b) (2006); SOUTH CAROLINA RULES OF PROF'L CONDUCT R. 8.4(c) (2005); VERMONT RULES OF PROF'L CONDUCT R. 8.4(c) (2009).

22 *In re Pautler*, 47 P.3d 1175, 1176-77 (Colo. 2002) ("This sanction reaffirms for all attorneys, as well as the public, that purposeful deception by lawyers is unethical and will not go unpunished.").

23 OREGON RULES OF PROF'L CONDUCT R. 8.4(a)(3) (2006).

24 *Id.* at R. 8.4(b).

25 *Id.*

26 Other states permit attorneys to supervise undercover operations, but provide little textual guidance. As an example, New York, Florida, and Missouri expressly permit undercover investigations in limited circumstances, such as when the investigator is commissioned by law enforcement (*infra*, notes 32, 33, 36, 37). Michigan and Virginia have adopted a case-by-case analysis to determine whether "conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer" (*infra*, note 35).

27 *In re* Pautler, 47 P.3d 1175, 1176-77 (Colo. 2002).

28 *Id.* at 1178.

29 *Id.*

30 *Id.*

31 *Id.* at 1180.

32 FLORIDA RULES OF PROF'L CONDUCT R. 4-8.4(c). A colorable argument can be made that the text of Florida R. 4-8.4(c) is ambiguous. The rule can be interpreted to provide a safe harbor for a lawyer employed in a capacity other than as a lawyer "by a criminal law enforcement agency," such as a private, nongovernmental attorney in a civil matter. Alternatively, the rule can be interpreted to provide a safe harbor for a lawyer employed in a capacity "other than as a lawyer" by a criminal law enforcement agency, such as an attorney who is assisting the government in an undercover investigation but is not acting as a lawyer for the government. The comments to this rule focus only on governmental lawyers and do not mention any application to nongovernmental lawyers. See id. at R. 4-8(c) cmt.

33 MISSOURI RULES OF PROF'L CONDUCT R. 4-8.4(c) ("It shall not be professional misconduct for a lawyer for a criminal law enforcement agency, regulatory agency, or state attorney general to advise others about or to supervise another in an undercover investigation if the entity is authorized by law to conduct undercover investigations, 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, regulatory agency, or state attorney general to participate in an undercover investigation, if the entity is authorized by law to conduct undercover investigations.").

34 Utah State Bar Ethics Advisory Op. Comm., Op. No. 02-05 (2002).

35 MICHIGAN RULES OF PROF'L CONDUCT R. 8.4(b) (emphasis added); *see also* VIRGINIA RULES OF PROF'L CONDUCT R. 8.4(c) ("It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law."); NORTH DAKOTA RULES OF PROF'L CONDUCT R. 8.4(c) (same).

36 N.Y. County Lawyer's Ass'n Comm. on Prof'l Ethics, Formal Op. 737 (2007).

37 Ass'n of the Bar of the City of New York, Proposed Amendment to Rule of Professional Conduct 8.4 Regulating Lawyers' Supervision of Undercover Investigations (Aug. 2011).

38 *Id.*

39 State Bar of Arizona, Ethics Opinions, *accessible at*: http:// www.azbar.org/ethics/ethicsopinions.

40 Arizona Ethics Op. 99-11 (1999) (Misrepresentation; Investigations; Employees of Lawyers).

41 MODEL RULE 8.4(c) ("It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

42 Teige P. Sheehan, *The Ethical Quandary of Pretext Investigations in Intellectual Property Practice and Beyond*, 19 NYSBA BRIGHT IDEAS 8-46 (Winter 2010).

43 Vuitton et Fils S.A. v. Klayminc, 780 F.2d 179, 187 (2d Cir. 1985) (Oakes, J. dissenting).

44 *See, e.g.*, FLORIDA RULES OF PROF'L CONDUCT R. 4-8.4(c) ("[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.").

45 ABA Ethics Op. 337 (1974).

46 ABA Ethics Op. 01-422 (2001).

47 *See, e.g.*, Alaska Ethics Op. No. 2003-1 (2003) (electronic recording of a telephone conversation by a lawyer without consent of the other participant(s) to the conversation is not per se unprofessional conduct if the recording is not prohibited by law or regulation); Arizona Ethics Op. No. 2000-04 (2000) (attorney may ethically advise a client that the client may tape record a telephone conversation in which one party to the conversation has not given consent to its recording, if the attorney concludes that such taping is not prohibited by federal or state law); Idaho Ethics Op. No. 130 (1990); Kansas Ethics Op. No. 96-9 (1997); Kentucky Ethics Op. No. E-279 (1984); Maine Ethics Op. No. 168 (1999); Michigan Ethics Op. No. RI-309 (1998); Netterville v. Miss. State Bar, 391 So. 2d 878 (Miss. 1981); N.Y. City Ethics Op. No. 80-95; N.Y. County Ethics Op. No. 696 (1993); Oklahoma Ethics Op. No. 307 (1994); Oregon Formal Ethics Op. No. 2005-156 (2005) (attorney may tape record

telephone conversations with an individual without consent, but may not record private, in-person conversations without informing individual of the recording; decision based on Oregon statutes); Tennessee Ethics Op. No. 81-F-14 (1986); Utah Ethics Op. No. 96-04 (1996); Virginia Ethics Op. No. 1814 (2011) (lawyer representing a party may ethically surreptitiously record conversations with an unrepresented witness, provided that the witness is informed of the lawyer's role); Virginia Ethics Op. No. 1738 (2000) (approving use of undisclosed taping for purpose of a criminal or housing discrimination investigation and noting that there may be other factual situations in which the same result would be reached).

48 *See, e.g.*, Midwest Motor Sports v. Elliot Powers Sports, Inc., 347 F.3d 693, 699 (8th Cir. 2003).

49 No. 10-13544, 2013 WL 6145294, at *4 (W.D. La. Nov. 20, 2013).

50 *Id.*

51 *Reporter's Recording Guide, A State-by-State Guide to Taping Phone Calls and In-Person Conversations*, at 3 (Reporters Committee for Freedom of the Press 2012), *available at* http://www.rcfp.org/rcfp/orders/docs/RECORDING.pdf.

52 *See, e.g.*, Jamison v. Morris, 684 S.E.2d 168, 222 (S.C. 2009).

53 *Id.* at 224 n.9 ("Among the items checked by the Mystery Shopper were whether the employees complied with the Brand Standards appearance requirements and courtesy standards, whether merchandise was properly priced and in-date, and whether the premises and exterior were clean and well-kept.").

54 *Id.*

55 *Midwest Motor Sports*, 347 F.3d at 694.

56 *Id.* at 699-700.

57 *Id.*

58 *Id.*

59 15 F. Supp. 2d 456 (D.N.J. 1998).

60 *Id.* at 462.

61 *Id.*

62 *Id.*

63 *Id.* at 462-64.

64 *Id.* at 475.

65 *Id.* at 474.

66 *Id.* at 474-75.

67 *Id.* at 475 ("The 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." Rule 8.4 is limited to "grave misconduct that would not only be generally reproved 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.").

68 *Id.*

69 *See, e.g.*, *Gidatex*, 82 F. Supp. 2d at 122 ("The presence of investigators posing as interior decorators did not cause the sales clerks to make any statements they otherwise would not have made. There is no evidence to indicate that the sales clerks were tricked or duped by the investigators' simple questions such as 'is the quality the same?' or 'so there is no place to get their furniture?'").

70 *See, e.g.*, Cottman Transmission Sys., Inc. v. Melody, 851 F. Supp. 660, 668 (E.D. Pa. 1994); JTH Tax, Inc. v. Donofrio, CIV A 2:06CV47, 2006 WL 2796841, at *3 (E.D. Va. Sept. 26, 2006); Gallagher's NYC Steakhouse Franchising, Inc. v. 1020 15th St., Inc., Bus. Franchise Guide (CCH) ¶ 14,035 (D. Colo. Dec. 2, 2008)Gallagher's NYC Steakhouse Franchising, Inc. v. 1020 15th St., Inc., Bus. Franchise Guide (CCH) ¶ 14,035 (D. Colo. Dec. 2, 2008); Shell Trademark Mgmt. BV & Motiva Enters., LLC v. Ray Thomas Petro. Co., Inc.,

Bus. Franchise Guide (CCH) ¶ 14163 (W.D. N.C. June 15, 2009)Shell Trademark Mgmt. BV & Motiva Enters., LLC v. Ray Thomas Petro. Co., Inc., Bus. Franchise Guide (CCH) ¶ 14163 (W.D. N.C. June 15, 2009); Amerispec, Inc. v. Psaris, Bus. Franchise Guide (CCH) ¶ 14234 (W.D. Tenn. Sept. 10, 2009)Amerispec, Inc. v. Psaris, Bus. Franchise Guide (CCH) ¶ 14234 (W.D. Tenn. Sept. 10, 2009); Novus Franchising, Inc. v. Livengood, Bus. Franchise Guide (CCH) ¶ 14754 (D. Minn. Jan. 9, 2012)Novus Franchising, Inc. v. Livengood, Bus. Franchise Guide (CCH) ¶ 14754 (D. Minn. Jan. 9, 2012).

71 Winmark Corp. v. Schneeberger, Bus. Franchise Guide (CCH) ¶ 15,033 (D. Colo. Mar. 19, 2013)Winmark Corp. v. Schneeberger, Bus. Franchise Guide (CCH) ¶ 15,033 (D. Colo. Mar. 19, 2013).

72 *Id.*

73 Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475 (D.N.J. 1998) ("[L]imited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil-rights law enforcement.").

74 486 U.S. 35, 39-40 (1988).

75 *Id.*

76 Stephen Slesinger, Inc. v. Walt Disney Co., 66 Cal. Rptr. 3d 268, 279-80 (Cal. Ct. App. 2007).

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *See* N.Y. State Bar Ass'n Comm'n on Prof'l Ethics, Formal Op. No. 843 (2010).

82 Allison Clemency, "Friending," "Following," and "Digging" Up Evidentiary Dirt: The Ethical Implications of Investigating Information on Social MediaWebsites, 43 ARIZ. ST. L.J. 1021, 1026 (2011).

83 San Diego Cnty. Bar Ass'n Legal Ethics Comm., Op. 2011-2 (2011) (This "strikes the right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented.").

84 N.Y. City Bar Ass'n Comm'n on Prof'l Ethics, Formal Op. 2010-2 (2010) (concealment of purpose as related to unrepresented persons is considered neither deceitful nor a false statement by omission of fact).

85 *Compare* Midwest Motor Sports, 347 F.3d at 694, *with Turfgrass Grp.*, 2013 WL 6145294, at *4.

86 675 N.Y.S.2d 29 (N.Y. App. Div. 1998).

87 *Id.*

88 *Id.*

89 *Id.*

90 *See, e.g.*, FED. R. CIV. P. 11.

91 *The Mechanic* (2011).

92 Salvato v. Miley, No. 5:12-CV-635-Oc-10PRL, 2013 WL 2712206, at *2 (M.D. Fla. June 11, 2013).

93 *Id.*

94 *See* Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 SEATTLE U.L. REV. 123 (2008).

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