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LEGAL ETHICS AND INTERNAL INVESTIGATIONS: TWO TOPICAL ISSUES

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NOTE: Like most materials on legal ethics, this outline relies heavily on the American Bar Association's *Model Rules of Professional Conduct*. The full text of the Model Rules is reproduced on the ABA website at—

www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

Forty-nine states (plus the District of Columbia and all the territories) have adopted some version of the Model Rules, in many instances with few substantive changes. (California is the only state with ethics rules not based on the Model Rules.) Because the Model Rules have been so widely adopted by state jurisdictions, commentators on legal ethics indulge in the simplifying assumption that, if one of the Model Rules contains something pertinent, then the applicable rule in the jurisdiction in which you practice is likely to say the same thing or something similar. This makes the Model Rules a useful starting point.

Do not assume, however, that, just because the Model Rules adopt a certain standard, the same standard is necessarily contained in the ethics rules in your state. You are ethically required to follow *your state's rules*, which you are ethically obligated to have read. To find the text of the ethical code in the state or states in which you are admitted, start with the American Bar Association's listing of state rules of professional conduct—

www.americanbar.org/groups/professional_responsibility/resources/links_of_interest

Remember also that many cities, counties and municipalities issue their own ethics opinions (*e.g.*, the opinions issued by the Professional Guidance Committee of the Philadelphia Bar Association, which are collected at http://www.philadelphiabar.org/page/Opinions2010Present?appNum=1), as do some specialized bars (*e.g.*, the patent bar – see the *U.S. Patent and Trademark Office Rules of Professional Conduct*, https://www.uspto.gov/sites/default/files/documents/Final_Rule.pdf) and many specific courts and administrative agencies (*e.g.*, Camden County's *Code of Professionalism*, https://www.camdencountybar.org/code-of-professionalism; U.S. Securities and Exchange Comm'n, *Standards Of Professional Conduct For Attorneys Appearing And Practicing Before The Commission In The Representation Of An Issuer*, 17 C.F.R. Part 205, https://www.ecfr.gov/cgi-bin/text-idx?node=17:3.0.1.1.6&rgn=div5).

I. PRELIMINARY OBSERVATION ON LEGAL ETHICS GENERALLY

A. *Ethics in a broader, more holistic sense*. A point often overlooked in the study of legal ethics is that the applicable code of professional conduct in your state is only one of the sources of ethical behavior to which you may be bound. This point is made explicit in the Preamble to the Model Rules (in language that is likely to appear in the same or related form in your own jurisdiction's rules):

> Many of a lawyer's professional responsibilities are prescribed in the [Model Rules] …. *However, a lawyer is also guided by personal conscience and the approbation of professional peers*. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service. [Model Rules, Preamble, Clause 7 (emphasis added).]

B. It is far from clear what this language means or what kind of behavior it impels from lawyers. Commentators generally agree that it is designed to combat so-called "minimal-ethicality," a term used in an old but often-cited law review article on legal ethics: "Not only do many professional codes frame ethicality narrowly, leaving out what might be thought to be most important, they often function affirmatively to encourage a sort of minimal-ethicality, according to which actors are rewarded for being as 'minimally ethical' as possible. … Whenever ethics is reduced to a system of rules, one need not make choices, but may merely mechanically follow the rules. Rules also benefit the savvy and opportunistic. They will operate as close as possible to the rules' border, while the inexperienced or morally motivated will remain well inside." [Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought,* 139 U. PA. L. REV. 933, 953 (1991).]

C. All of which is to say: as we examine ethical conundrums in this session and elsewhere, keep in mind that what the rules of ethics *permit* is not necessarily what a highly developed sense of ethical propriety commands. As the Preamble to the Model Rules suggests (even if the Preamble is less than helpful in operationalizing the thought), our first obligations as lawyer and practitioners are to our personal consciences and our professional reputations.

II. TWO TOPICAL ETHICS ISSUES THAT ARISE IN THE CONTEXT OF CONDUCTING INTERNAL INVESTIGATIONS

A. *Introduction*.

1. Institutions conduct investigations for a myriad of reasons and under a wide range of circumstances. For purposes of this outline, Professor Sarah Duggin's inclusive definition of the term "internal investigation" is a good starting point:

> An internal investigation is an inquiry conducted by, or on behalf of, an organization in an effort to discover salient facts pertaining to acts or omissions that may generate civil or criminal liability. Internal investigations are invaluable tools for addressing a wide variety of potential sources of corporate civil and criminal liability. The employee interview is the heart of the internal investigation. Documents, accounting ledgers, and other corporate records are important, but words and numbers come to life through the stories related by real people. Talking with those who have knowledge of key developments facilitates understanding of what happened and why better than any other investigative tool. [Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 864 (2003) (footnotes omitted.)

An internal investigation is a fact-oriented inquiry designed to assist an institution in assessing potential liability. Because *liability* and *lawfulness* are at the core of an internal investigation, lawyers play an important role in determining whether an investigation should be conducted, how to do it, and what use to make of the investigational work product.

2. Investigations serve several standard purposes (the following list is adapted from Diara M. Holmes and Andras Kosaras, *Ethical Landmines in Internal Investigations* [American Law Institute, Advanced Course in Tax Exempt Organizations, 2015], available from ALI at https://www.ali-cle.org/search/courses-webcasts-telephone-ondemand-publications-coursematerials/kosaras):

   - Fact finding—determining what happened, who (if anybody) is responsible, how much and what kind of damage ensued, and what records exist documenting the facts.
   - Identifying and dealing with wrongdoers.
   - Determining whether damages can be recovered, either through litigation or by asserting a claim under an insurance policy.
   - Identifying and addressing internal control lapses to prevent recurrence of similar problems in the future.
   - Preparing for and eventually defending against possible government investigations or enforcement proceedings.
   - Anticipating institutional responses.

3. There is a rich and abundant literature on the kinds of recurring ethical problems the institution's lawyer faces when organizing or conducting an internal

investigation. Among these problems: can and will the investigative work be conducted under the protective insulation of the attorney-client and work-product privileges? How can the lawyer (and the institution) ensure that pertinent records are preserved? How should the lawyer balance the need to develop the factual record confidentially with the legal imperative to disclose potentially damaging facts to regulatory agencies, other members of the institutional community (including governing board members), the media, elected officials, and the public? Rather than cover this well-plowed ground in this outline, I will content myself with citing in a footnote a few of the resources available through NACUA or from an adequate law library to aid campus counsel in anticipating and dealing with these recurring ethical issues.[1] In this session, we will focus on two contemporary ethical issues confronting lawyers when they conduct or manage internal investigations on campus.

B. *Dealing with a Traumatized Witness*. Over the last half-dozen years, we have seen the beginning of a national conversation about the rights of witnesses in investigatory interviews. In particular, we are starting to see the emergence of a school of thought contending that *the investigatory process owes a special duty of care to particularly sensitive witnesses—what commentators refer to as "traumatized survivors" for whom the act of being interviewed can itself trigger painful and even dangerous psychological reactions*. For such witnesses, many adjudicatory processes alter the traditional process for conducting interviews by mandating so-called "trauma-informed investigation" ("TII") methodology. TII uses specially designed ground rules to protect the witness from the potentially damaging impacts of re-telling—hence, re-experiencing—the traumatic details of someone else's conduct. TII is used in many contexts, but for our purposes its most prevalent use is in the investigation of

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[1] All the following materials are available without charge to members of the National Association of College and University Attorneys through NACUA's online Resource Library:

- Karen Baillie *et al.*, *Ethics and Internal Investigations* (March 2018);
- Donald M. Lewis, *Ethics and Internal Investigations* (March 2018);
- Carl Crosby Lehmann and Brent P. Benrud, *Ethical Issues for Employment Investigations on Campus* (March 2013);
- Scott A. Coffina, Robert F. Roach and Daniel Small, *Outside Investigations: When to Recommend Them and How to Survive Them* (June 2013).

Other useful materials include:

- *Ethics of Internal Investigation*s Carl H. Loewenson, Jr., https://media2.mofo.com/documents/loewenson_ethics_of_internal_investigation.pdf.
- Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859 (2003), https://scholarship.law.edu/cgi/viewcontent.cgi?article=1367&context=scholar.
- Siri Thanasombat et al., *Ethical Challenges Related to Attorney Involvement in Employers' Internal Investigations* (American Bar Ass'n Section of Labor and Employment Law, 2012), www.americanbar.org/content/dam/aba/events/labor_law/2012/03/ethics_professional_responsibility_committee_midwinter_meeting/mw2012_thanasombat-mathay.pdf.

sexual harassment, sexual violence, and discrimination complaints. TII procedures typically incorporate the following features:

- The investigator gives the witness the time and opportunity to relate the facts without interruption or with minimal interruption, recognizing that factual testimony may not be linear and witnesses may need additional time to deal with their emotions.
- Once the initial recounting of the event has occurred, the investigator asks open-ended follow-up questions. The investigator is encouraged to choose words sensitively and thoughtfully, to avoid an interrogating or skeptical tone, and to address any questions the witness may have about the purpose of particular questions.
- The investigator is trained to appreciate that discussion of traumatic events must be approached slowly and carefully in accordance with time parameters established and controlled by the witness—even if that means suspension of interviews, taking lengthy breaks, and allowing ample time for follow-up and rephrasing.

(This description of TII methodology is adapted from United Educators, *Trauma-Informed Investigations* (March 2016), www.edurisksolutions.org/blogs/?Id=2772.)

Until very recently, the U.S. Department of Education's Office for Civil Rights essentially required colleges and universities to conduct investigations of sexual assault complaints using procedures borrowed from TII methodology. From OCR's 2014 *Questions and Answers on Title IX and Sexual Violence*, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf:

> OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating and may perpetuate a hostile environment. A school may choose, instead, to allow the parties to submit questions to a trained third party (*e.g.*, the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.
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> Questioning about the complainant's sexual history with anyone other than the alleged perpetrator should not be permitted. Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence. The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant.

> All persons involved in implementing a school's grievance procedures (*e.g.*, … investigators …) must have training or experience in handling sexual violence complaints, and in the operation of the school's grievance procedures. The training should include information on working with and interviewing persons subjected to sexual violence; … the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds. [Pp. 31, 40.][2]

Are there conceivable ethical constraints that might come into play if an investigator adopts (or refuses to adopt) one set of rules for some witnesses and a different and more solicitous set of rules for others? Under the "lawyer competence" rule in Model Rule 1.3, the investigator owes to that organization the duty to act "with zeal in advocacy upon the client's behalf." (Model Rule 1.3, Comment 1.) But Comment 1 also states explicitly that the duty to represent clients zealously "does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." As one commentator has pointedly noted, the dividing line between being zealous and treating interviewees with respect "can be difficult to discern …. [L]awyers who conduct internal investigative interviews constantly confront the inherent tension between zealous representation of their corporate clients and fairness to corporate constituents. This tension gives rise to significant ethical issues for lawyers handling internal investigations for corporate clients …. [Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859 865, 918 (2003).]

The incorporation of TII techniques into the investigation of sexual assault allegations is a fairly new phenomenon. With one exception discussed in the footnote at the end of this sentence, no bar association, court, or other ethics arbiter has been asked to hold, or has yet held, that an investigator acts unethically by conducting (or not conducting) the interview of a sexual assault complainant using rules designed to protect against the possibility of retraumatization.[3] That fact notwithstanding, we live

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[2] On September 22, 2017, the Trump administration "withdrew"—i.e., rescinded—the 2014 *Questions and Answers*, along with other guidance materials promulgated by the Obama administration. U.S. Dep't of Education, *Dear Colleague Letter*, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=. They have not yet been replaced by new guidance material, although media accounts suggest that the promulgation of new Title IX guidance material is imminent. See more on this subject in note 3 on the next page of his outline.

[3] The exception is an interesting letter written by the South Carolina Attorney General's Office to Veronica Swain Kunz, the state's Crime Victims Ombusdman, on June 2, 2015, and reported at 2015 WL 3636394. In South Carolina, defendants in domestic violence proceedings are routinely ordered by courts as a condition of release on bond not to contact their spouses. The question posed by Ombudsman Kunz was whether, consistent with the rules of ethical conduct, criminal defense attorneys could contact victims of crime directly if the court issued an order prohibiting their clients from having contact of any kind with the defendant. The Attorney General's Office answered that question affirmatively: "Domestic violence survivors are particularly vulnerable, physically, emotionally and financially, in the aftermath of the crime. They are

at a moment in the evolution of Title IX procedures on campus when the U.S. Department of Education is actively championing the principle that respondents accused on sexual violence cannot be "singl[ed] out … for uniquely unfavorable treatment" during the fact-finding process.[4] It is not far-fetched to imagine that self-styled advocates of the rights of the accused might make the argument that an investigator who uses such processes has violated ethical precepts by using one set of rules for (female) accusers and a different set for (male) respondents in violation of the proscription in Model Rule 8.4(g) that lawyers refrain from "engag[ing] in conduct that the lawyer knows or reasonably should know is … discrimination on the basis of … sex … in conduct related to the practice of law." At the same time and on the other hand, it is also possible to imagine that in this day and age a lawyer conducting a traditional, cross-examination-style interrogation of a witness might be accused of an ethical lapse for failing to treat the witness with requisite "courtesy and respect" (Model Rule 1.3, Comment 1) were the lawyer to fail to take into account the well documented residual effects of trauma on the psychological health and well-being of a victim of sexual assault.

C. *"Lawyer Pretexting"—Under What Circumstances Can a Lawyer Engage in Investigatory Subterfuge?* As we know from televised dramas, effective investigatory work often involves an element of deception—wearing wires, going undercover, using agents, making misrepresentations. The subject of so-called "lawyer pretexting"[5] has received extended consideration by legal ethicists in a variety of

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usually unaware that they are not required to communicate with a defense attorney, and are often unable to afford to hire their own private attorneys to advise them throughout the criminal matter. … [B]ased on the current law and rules at this time, this Office believes a court would likely find that South Carolina['s] Rule[s] of Professional Conduct … would authorize the defense attorney (not in the presence of the defendant) to contact any potential witnesses as a part of 'reasonable diligence' in defending a client. We would note that a court would limit such contact to 'diligence' … to the incident involving the charges, not to transfer messages by the defendant to the Victim or otherwise attempt to circumvent a court's order prohibiting contact. However, after a Victim declines to speak with a defense attorney, any contact by the defense attorney, or any third party at his or her direction, would be analyzed based on the South Carolina Rules of Professional Conduct, … balancing the rights of the defendant with the rights of the Victim with the responsibilities of the defense attorney." 2015 WL 3636394, at *8.

[4] Over the course of the last six months the Department of Education has been unusually secretive about both the substance of new Title IX regulations and the process it plans to use in adopting new regulations. On September 14, 2018, a link to a document purporting to be DOE's working draft appeared in a blog entry posted on the Reason.com web site. That document can be viewed at https://atixa.org/wordpress/wp-content/uploads/2018/09/Draft-OCR-regulations-September-2018.pdf. The language in quotation marks appears on page 48. The document repeatedly expresses the view that complainant and respondent must be accorded identical procedural rights and that any differentiation between procedural rights would violate due process. The document expressly prohibits the use of procedures that "rely on sex stereotypes." (Page 33.) It also mandates that sexual assault victims be subject to cross examination without constraints or limitations (page 45).

[5] See generally Kathryn M. Fenton, *Ethical Implications of Lawyer Pretexting* (American Bar Ass'n), https://www.americanbar.org/content/dam/aba/publications/antitrust_law/at311550_fenton_ethical_implications.authcheckdam.pdf.

investigatory contexts. The point of departure is typically one or more in a series of Model Rules concerning the integrity of lawyers and the legal process:

- Model Rule 4.1(a): In the course of representing a client, "a lawyer shall not knowingly. . . make a false statement of material fact or law to a third party." (Note the wording: while it is an ethical breach to "make a false statement," the rule is silent on the question whether the *omission* of a pertinent fact can give rise to ethical impropriety.)
- Model Rule 4.2: A lawyer cannot communicate "about the subject matter of a representation with a person who 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." (There is a huge body of codified ethics law dealing with an investigator's entitlement to interview witnesses known to be represented by counsel. "In the context of an internal investigation[,] Model Rule 4.2 generally requires a lawyer to refrain from interviewing a corporate employee or agent who has retained his own counsel without first obtaining counsel's consent." Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 928 (2003).)
- Model Rule 4.4(a): A lawyer may not "use methods of obtaining evidence that violate the legal rights" of third parties. This vague proscription is given some content by Comment 1, which provides: "[A] lawyer may [not] disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons …."
- Model Rule 8.4(c): It is "professional misconduct" for a lawyer "to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

There many different situations in which an investigator may be ethically constrained when considering whether to use surreptitious methodology. We consider three in the following paragraphs.

1. *Recording conversations without consent*. In general terms, federal law makes it lawful to record a telephone conversation if one party to the conversation knows he or she is being recorded and explicitly or implicitly consents to recording. About three-quarters of the states follow federal law and permit surreptitious recording of telephone conversations. *See generally* Digital Media Law Project, *Recording Phone Calls and Conversations*, http://www.dmlp.org/legal-guide/recording-phone-calls-and-conversations.[6]

[6] For a list of the 36 state jurisdictions in which it is lawful to record conversations without disclosure to the other party, see https://www.justia.com/50-state-surveys/recording-phone-calls-and-conversations/. In about a quarter of the states (*including* Pennsylvania and Delaware), recording without the knowledge of both parties is prohibited. Pennsylvania and Delaware are so-called "two-party consent," states, meaning that non-consensual recording is absolutely illegal. 18 Pa. Cons. Stat. §§ 5703, 5704, 5725; 11 Del. Code §§ 1335, 2402, 2409.

The fact that phone recording is *legal* in a particular state, however, does not necessarily mean it's *ethical* in that state, and for the better part of three decades both the ABA and the bars in most states declared the practice ethically unacceptable. In the mid-1970s the ABA's Standing Committee on Ethics and Professional Responsibility issued two formal opinions declaring that surreptitious telephone recording violated the rules of legal ethics. In Formal Op. 337 (1974), the ABA first addressed secret telephone recording by *lawyers*. Notwithstanding the fact that federal law did not prohibit undisclosed recording, the ABA nevertheless concluded that the ethical canon prohibiting lawyers from engaging in "even the appearance of impropriety … clearly encompasses the making of recordings without the consent of all parties." A year later, in Formal Op. 1320, the ABA affirmed and expanded its initial opinion, concluding that a lawyer is also ethically prohibited from directing an *investigator* to record a conversation without the other party's knowledge. *See* Peter A. Joy *et al*., *To Tape or Not to Tape: Secret Recordings*, CRIMINAL JUSTICE (2006), https://scholarlycommons.law.case.edu/faculty_publications/832/. Since 1983, when the Model Rules were adopted, those rules have clearly established that lawyers engage in ethical misconduct by directing a nonlawyer assistant to violate the rules (Model Rule 5.3(c)) and, to reinforce the point, have also declared that it is unethical for a lawyer to violate the rules "through the acts of another" (Rule 8.4(a))—rules that were cited by many bar associations and state supreme courts in promulgating their own prohibitions on undisclosed recording.

But:

The ABA position proved unpopular in the legal community and created agitation within the ABA. In 2001, in Formal Opinion 01-422, the ABA abandoned its longstanding opposition to undisclosed recording; withdrew Opinion 337; and held that undisclosed recording is unethical only if it is "deceitful"—in other words, only if a lawyer is *asked* whether he or she is recording a conversation and deceitfully answers that it is not being recorded when in fact it is.[7] The ABA's about-face predictably led in short order to a spate of state ethics decisions adopting the ABA's reasoning. From Charles Doyle, *Wiretapping, Tape Recorders, and Legal Ethics: An Abridged Overview of Questions Posed by Attorney Involvement in Secretly Recording*

[7] The text of Op. 01-422 is available online at www.abajournal.com/images/main_images/01-422.pdf. I have oversimplified its conclusion slightly (not much). The opinion is worth reading for two reasons. First, it makes an attempt—tortured, in my view—to explain why a flat-out prohibition against undisclosed recording is not ethically undesirable. Second, the opinion has been widely discussed recently in the wake of the revelation that Michael Cohen, while serving as Donald Trump's personal attorney, secretly recorded meetings and telephone conversations with his client. *See* Debra Cassens Weiss, *Legal Ethics: Was Cohen's secret Trump tape an ethics violation? ABA opinion authors split on client taping*, ABA JOURNAL, Aug. 1, 2018, www.abajournal.com/news/article/was_michael_cohens_secret_tape_of_trump_an_ethics_violation_aba_opinion_aut.

Conversation (Library of Congress, Cong. Research Service, August 2012), https://fas.org/sgp/crs/misc/R42649.pdf:

> A substantial number of states … agree with the ABA's Formal Opinion 01-422 that a recording with the consent of one, but not all, of the parties to a conversation is not unethical per se unless it is illegal or contrary to some other ethical standard. This is the position of the bar in Alabama, Alaska, Hawaii, Minnesota, Missouri, Nebraska, New York, Ohio, Oregon, Tennessee, Texas, Utah, and Vermont. In four other states—Maine, Mississippi, North Carolina, and Oklahoma—comparable opinions appeared before the ABA's Formal Opinion 01-422 was released and have never withdrawn or modified.
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> Yet even among those that now believe that secret recording is not per se unethical, some ambivalence seems to remain. Nebraska, for example, refers to full disclosure as the "better practice." New Mexico notes that the "prudent New Mexico lawyer" hesitates to record without the knowledge of all parties. And Minnesota cautions that surreptitiously recording client conversations "is certainly inadvisable" except under limited circumstances.
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> Although the largest block of states endorse this view, whether it is a majority view is uncertain because a number of jurisdictions have apparently yet to announce a position, for example, Arkansas, Connecticut, Delaware, Georgia, Louisiana, Nevada, New Jersey, North Dakota, Rhode Island, West Virginia, and Wyoming.

2. *Social media trolling*. People lead distinctive and at times uninhibited lives online, and with increasing frequency what they write and post on their social media sites can come to have indisputable pertinence to the subject of an investigation.[8] In recent years several state and local ethics decisions have explored the issue whether investigators can take on assumed identities or engage in other subterfuge in order to obtain access to password-protected social media posts by investigative targets.

   It seems clear that a lawyer—or an investigator acting at a lawyer's behest—may ethically access and use information posted on the public pages of a social

[8] An example: "At the University of Wisconsin La Crosse, the police fined a number of students for underage drinking based upon photos the police had seen posted on Facebook. The students had restricted access to the photographs to their Facebook friends, believing this protected them from the police. However, one of the young men who had posted photos of the party on Facebook later recalled accepting a friend request from an attractive young woman he did not know. After the arrests, he began suspecting that the woman was actually an undercover police officer." Shane Witnov, *Investigating Facebook: The Ethics of Using Social Networking Websites in Legal Investigations*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 31, 34 (2011).

media site.[9] More difficult, however, is the question of accessing restricted content. "The simplest way of obtaining access to a person's restricted information is to become 'friends' on the social network. As with the use of deception during traditional proactive investigations, there is also disagreement among the authorities as to when it would be ethical to send a friend request to a witness or an opposing party." Scott A. Coffina, Robert F. Roach and Daniel Small, *Outside Investigations: When to Recommend Them and How to Survive Them* (June 2013), page 5.

The Philadelphia Bar Association tackled precisely that question in its Professional Guidance Committee's Opinion 2009-02 (March 2009), http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf. While taking the deposition of a third-party witness in a civil case, a lawyer asked questions about the witness's Facebook posts and concluded that those posts were both pertinent to the subject matter of the litigation and potentially useful as impeachment material were the witness to testify against the lawyer's client at trial. The lawyer also determined that the witness had a practice of willingly "friending" anyone who asked to be a friend. The lawyer sought ethical guidance on whether he could ask a specially retained investigator, someone whose name the witness would not recognize, to go to the witness's Facebook site, ask to "friend" her, harvest information from the site, and turn it over to the lawyer for use against the witness at trial. The investigator "would state only truthful information [in the 'friend' request], for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness." The Professional Guidance Committee cited Model Rule 8.4(c), which makes it unethical for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The Committee reasoned:

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

[9] "Receiving information from a [public website] is generally ethical. An investigator need not make any misrepresentations in observing a [witness] browsing a social networking website or by receiving copies of the information that is available to the [investigator] as a user of one of the websites." Shane Witnov, *supra n. 7* at 63. *See generally* Or. State Bar Comm. on Legal Ethics, Formal Op. 2005-164 (2005); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010).

purpose of the access was to obtain information for the purpose of impeaching her testimony.

But:

Pretty much the exact opposite conclusion was reached by the Committee on Professional Ethics of the Association of the Bar of the City of New York in Formal Opinion 2010-2, https://www.nycbar.org/pdf/report/uploads/20071997-Formal_Opinion_2010-2.pdf. "In this opinion, we address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively 'deceptive' behavior to 'friend' potential witnesses. … [W]e conclude that an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request.4 While there are ethical boundaries to such 'friending,' in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements." (Page 2.)

3. *Misrepresenting one's identity*. The interplay between ethical rules and the courts that formulate and apply them is illustrated *in In re Conduct of Gatti*, 8 P. 3d 966 (Ore. 2000) (en banc). Gatti represented several chiropractors in licensure revocation proceedings. He became suspicious that the chiropractors' professional liability insurer planned to deny insurance coverage using bogus methodology and biased claims reviewers. As part of what he later described as a self-generated racketeering investigation into the coverage practices of the insurer, Gatti made telephone calls to chiropractors hired by the insurer as file reviewers. In one call, Gatti identified himself (inaccurately) as a chiropractor. In another call, he identified himself (again inaccurately) as "a doctor with experience performing independent medical examinations and reviewing insurance claims" who was "interested in participating in [the insurer's] educational programs for insurance claims adjusters." The insurer then filed an ethics complaint against Gatti claiming that Gatti had misrepresented himself and his credentials when he called company representatives to gather information in support of his racketeering claim. Gatti answered that, under the state's ethics rules, public policy permitted investigators to misrepresent their identity and purpose while "investigating persons who are suspected of engaging in unlawful conduct." 8 P. 3d at 975. The Oregon Supreme Court rejected Gatti's claim, concluding that his misrepresentations violated the state's ethical rules against "[e]ngaging in conduct involving dishonesty, fraud, deceit or misrepresentation" (Model Rule 8.4(c)) and "[k]nowingly making a false statement of law or fact" (Model Rule 4.1(a)). The court continued:

> The accused contends that this court should adopt an investigatory exception to the disciplinary rules and the statute. … According to the accused, such an exception is necessary if lawyers in private practice, like their counterparts in the government, are to be successful in their efforts to "root out evil." …
>
> The accused points to legal commentary and authority from other jurisdictions for the argument that this court should recognize an exception to the disciplinary rules that prohibit conduct involving dishonesty, fraud, deceit, misrepresentation, or false statements of law or fact. Those authorities assert that public policy favors an exception that, at the least, allows investigators to misrepresent their identity and purpose when they are investigating persons who are suspected of engaging in unlawful conduct. The rationale for such an exception is that there may be no other way for investigators or discrimination testers to determine if a person who is suspected of unlawful conduct actually is engaged in unlawful conduct. Therefore, the argument goes, the public benefits more from allowing lawyers to use deception than allowing unlawful conduct to go unchecked. …
>
> [T]his court is aware that there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of the law, are useful means for uncovering unlawful and unfair practices, and that lawyers in both the public and private sectors have relied on such tactics. However, the rules of professional conduct are binding upon "*all* members of the bar." (Emphasis added.) Faithful adherence to the wording of [the rules] does not permit recognition of an exception for *any* lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements. In our view, this court should not create an exception to the rules by judicial decree. Instead, any exception must await the full debate that is contemplated by the process for adopting and amending the Code of Professional Responsibility. [*Id.* at 530, 531, 532.]

So:

After the *Gatti* decision, what did the Oregon Supreme Court do? It revised the pertinent state ethics rules to include the very exception Gatti had urged for "deceptive investigatory practices." Here's the new language:

> Notwithstanding [the rest of these rules], it shall not be professional misconduct for a lawyer to advise clients or others about or *to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights*, provided the lawyer's conduct is

> otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future. [Rule 8.4(b), Oregon Rules of Professional Conduct, www.osbar.org/_docs/rulesregs/orpc.pdf (emphasis added).]

III. A VERY QUICK, VERY INCOMPLETE CHECKLIST FOR ASSESSING AND REACTING TO PROBLEMS IN LEGAL ETHICS.

Nothing—*nothing*—poses more of a challenge for a lawyer representing an institutional client than careful scrutiny of the ethical obligations to which the lawyer is bound. Recognizing that ethical conundrums take an infinite variety of forms, that generalizations can be dangerous, and that nothing substitutes for experience, instinct and smarts, here are a few suggestions on what to do when confronted with an ethical question:

1. *Seek advice from an ethics rabbi or other qualified advisor*. If you are represented by, or work for, a law firm of any size, the firm probably has what one state bar journal referred to as an "'ethics rabbi' to give ethical and behavior advice to lawyers and conduct in-house MCLE programs in ethics, professionalism, [and] civility …." Peter M. Appleton, *Is Winning Everything?: 'Professionalism' Doesn't Have To Mean 'Doormat'*, 62 Ore. St. Bar. Bull. 21 (2002). In addition to that (or instead of that), take advantage of the fact that the National Association of College and University Attorneys has extensive material on its website analyzing ethical rules in the context of higher education legal practice. NACUA also has a stable of experts—we all know who they are—who have written and lectured extensively on ethical issues and who can be counted on to be generous with their time if you consult them on an ethical dilemma.

   Some interesting sub-questions: If you go to your outside law firm's ethics guru (or some other source of expertise on ethics issues) and seek advice about an ethical dilemma confronting you in dealing with a troublesome client, *who does that lawyer represent* when answering your question? Is that lawyer *your lawyer*—or the institution's lawyer? What if there is a conflict between the two? Is it your obligation—or the institution's—to pay whatever legal bill is generated by your ethics consultation? (Note: Model Rule 1.6(b)(4) explicitly allows you to share information that would otherwise be confidential client information if necessary "to secure *legal advice about [your] compliance with these Rules*….")

2. *Make a record of what you've done to ascertain your ethical obligations*. The obvious reason for making a record is to manifest your sensitivity to the ethical dimension of what you're doing—or, to put the same thought in double-negative form, to dispel any suggestion that you were insensitive to ethical constraints. Among the steps you might document, in increasing degree of ethical severity, might be checking the ethics rules that apply in your jurisdiction, researching pertinent ethics opinions, going to the NACUA website or the ABA website to review ethics materials there, and checking with one or more ethics gurus for advice and counsel.

3. *Check to see whether you are covered by an institutional indemnification provision or liability insurance policy*. Senior administrative officers are usually indemnified against claims asserted against them in *any kind of action* (civil, criminal, administrative, actual, threatened, pending, or completed); and for *money payments in virtually any form* (judgments, fines, settlement awards, and attorneys' fees). It is typical for institutions to purchase a commercial "errors and omissions" or "professional legal liability" policy that provides insulation from potential liability. You may have additional insurance protection through commercial or state-sponsored legal malpractice policies.

4. Once you get even a whiff of a potential legal or ethical problem, *make absolutely sure your client understands your obligations*—including your reporting and withdrawal obligations—as a lawyer subject to the state code of professional conduct. That, of course, can be easier said than done; but for whatever cold comfort it gives, remember that under Model Rule 1.13(e)—a provision added to the Model Rules in 2004—you are entitled to go over the head of the person to whom you report if you suspect that you are the subject of adverse action on account of your adherence to governing ethical rules.