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ETHICS

James M. McCauley is the Ethics Counsel for the Virginia State Bar where he has been employed since 1989. He supervises the Bar's legal ethics section serving the Standing Committee on Legal Ethics. His staff write the draft advisory legal ethics opinions, propose amendments to the Virginia Rules of Professional Conduct and provide informal advice via the "ethics hotline" to members of the bar and bench on matters involving legal ethics, lawyer advertising and the unauthorized practice of law. Mr. McCauley frequently lectures and publishes on matters relating to legal ethics and the unauthorized practice of law. He teaches Professional Responsibility at the T.C. Williams School of Law in Richmond, Virginia, and served on the American Bar Association's Standing Committee on Legal Ethics and Professionalism from 2008-2011. Prior to assuming his duties as Ethics Counsel, Mr. McCauley was an Assistant Bar Counsel for the Virginia State Bar for six years, prosecuting cases of attorney misconduct before the District Committees, Disciplinary Board, and Three-Judge Courts. Before his employment with the Virginia State Bar, Mr. McCauley was in private litigation-focused practice for seven years. Mr. McCauley graduated *cum laude* from James Madison University in 1978, received his law degree from the T.C. Williams School of Law, University of Richmond, in 1982 and was on the *University of Richmond Law Review*. By appointment by the Chief Justice of the Supreme Court of Virginia, Mr. McCauley served on the faculty of the Virginia State Bar's Mandatory Professionalism Course from 2004-2010. He is also a Fellow of the Virginia Law and the American Bar Foundations. Mr. McCauley also served on the Board of Governors of the Real Property Section of the Virginia State Bar from 2004-2010. In 2013, he was appointed by the Chief Justice of the Supreme Court of Virginia to serve on its Special Committee on Criminal Discovery Rules. In 2014, Mr. McCauley was elected to the Board of Directors for Lawyers Helping Lawyers. Mr. McCauley is a member of the John Marshall Inn of Court in Richmond, Virginia.

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VIRGINIA WORKERS' COMPENSATION AMERICAN INN OF COURT & ADVISORY CONFERENCE MARCH 13 & 14, 2018

Ethics Problems for WC Practitioners

James M. McCauley, Ethics Counsel

Virginia State Bar, Richmond Virginia

March 14, 2018

Hypothetical No. 1

- Parties reach a TTD agreement and settlement app'd by the Commission. TTD award is issued. Employer could not accommodate Employee and Employee could not work within the restriction. Post-settlement, but before compensation is paid, Claimant returns to work with a new employer. 30-day appeal period is still running.
- Does Counsel for Claimant have a duty to tell Defendants that Claimant has accepted new employment?
- A. Yes
- B. No

Hypothetical No. 2

- Same scenario as Hypo #1, but before the 30-day appeal period has run, Claimant's Counsel gets a medical report showing that Claimant asked her treating physician to lift the original Employer's work restrictions so she could accept a new job.
- Must Claimant's Counsel advise Defendants of the medical report?
- A. Yes
- B. No
- C. It depends

Hypothetical No. 3

- Is it ethical for Defendant's Counsel to use a surreptitious surveillance video depicting Claimant performing activity that contradicts her claims of disability and pain?
- A. Yes
- B. No

Hypothetical No. 3—Surveillance Video

- May Defense Counsel selectively edit the video keeping only the parts the Defendants intend to use at trial?
- A. Yes
- B. No

Hypothetical No. 4—Surveillance Video

- Same scenario as in Hypo #3, except Claimant's Counsel has now propounded discovery requesting a copy of the video recording.
- Does Defense Counsel have to produce the entire 4-hour video?
- A. Yes
- B. No

Hypothetical No. 5—Private Investigators "friend" the Claimant on Face Book

- Claimant frequently posts to Facebook, and does have privacy settings on her Facebook account. Private investigators hired by the carrier "friend" the claimant under false pretenses, and obtain some posts that could potentially be used to impeach the claimant's credibility.
- Does Defense Counsel have an ethical duty to question the private investigators about how they obtained the Claimant's SM material?
- A. Yes
- B. No

Hypothetical No. 6—Advising Client to take down SM

- **At what point may an employee take down, remove or delete posts or deactivate her account on Facebook?**
- A. After the accident but before reporting it to the employer?
- B. After report to the employer but before speaking with counsel?
- C. After speaking with counsel on own initiative or upon implied or direct advice with counsel?
- D. All of the above
- E. None of the above

Hypothetical No. 7—Using SM for informal discovery/investigation

- **Can defendants or defense counsel search and review an employee's public profiles on SM to discover information related to her WC claim?**
- A. Yes
- B. No
- C. Maybe

Hypothetical No. 8—Advising Clients About Social Media

- **Is it ethical for counsel to advise their client to change their privacy settings or use apps like Snap Chat or other SM apps which by their nature are not discoverable?**
- **A. Yes**
- **B. No**

Hypothetical No. 9—Lawyer's Use of SM obtained by 3d Party

- **If an employer, insurer or claims adjuster presents social media relevant to claim defense, does defense counsel have an ethical obligation to inquire as to how it was obtained?**
- **A. Yes**
- **B. No**

Hypothetical No. 10—Posting Specific Case Results on SM

- **Can you ethically post your high-profile victories and case outcomes on social media? If not, why is it permissible to do so with Virginia Lawyers Weekly and interviews with newspaper reporters?**
- **A. Yes**
- **B. Yes, provided you use disclaimers**
- **C. No**

Duty of Competence and Using SM Ethically

Rule 1.1—Duty to competently represent a client

- Comment [6]: Must pay attention to benefits and risks associated with relevant technology.
- Ethics opinions in NY, PA, NC, FLA, WV and DC have stated that competence requires a lawyer to understand SM so that she may properly advise clients. Pa. Bar Ass'n Formal Op. 2014-300 (2014); Fla. Bar Ethics Op. 14-1 (2015); W. Va. Office of Disc. Counsel LEO No. 2015-02 (2015); DC Bar Ethics Op. 371 (2016).
- 2010 Survey of American Academy of Matrimonial Lawyers—81% reported using evidence obtained from social networking sites in their cases.
- In a habeas proceeding the Ninth Circuit held that a lawyer's failure to locate and use a purported sexual abuse victim's recantation on her social media profile was IAC. *Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013)

Being Competent and Using SM

- ABA Formal Op. 466 upholds the practice of researching SM profiles of every prospective juror, but c/n send a "friend request" or "invitation to connect" because of MR 3.5(b) banning ex parte communication with jurors during a proceeding. See also Va. Rule 3.5(a).
- *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010) stating lawyers have an affirmative duty to conduct online research of jurors to prepare for voir dire.
- Should I advise my client about posting on SM during the professional relationship? Yes.
- How much do I need to know about my client's social media activity? The short answer is that you need to know what the client has posted.
- Can I advise my client to adjust his/her privacy settings on SM? Yes. But adjusting privacy settings does not create any expectation of confidentiality to support a claim of privilege or work-product protection against subpoenas. D.C. Bar Ethics Op. 371 (2016).
- Can I advise my client not to post on SM during the legal representation? Yes
- Can I advise my client to deactivate her SM account during the representation? Maybe, but only if relevant information or information reasonably expected to be sought by the adversary is preserved. See Rule 3.4(a).

Counseling Clients About SM

- Best practice mandates an early discussion with client regarding what to post or not post on SM. Advising a client both before and after the filing of a lawsuit is tantamount to providing competent and diligent representation to a client. NC State Bar Formal Ethics Op. 2014-5 (2015).
- Some lawyers download their client's SM content on a flash drive to preserve relevant information that may be sought in discovery by an opponent to avoid later spoliation claims.
- It is permissible for an attorney to review and counsel what a client intends to publish on her social media page in advance of her posting. NYC Bar Ass'n Ethics Op. 745 (2013).
- An attorney may advise a client to remove social media posts so long as relevant information is preserved so that it may be produced in discovery, if requested. D.C. Bar Ethics Op. 371. If litigation is not pending nor reasonably contemplated, it is not improper to delete photos or posts.

Counseling Clients About SM

- Should I monitor my client's activity on SM during the representation? Tracking a client's activity on SM may prove useful in keeping informed of relevant developments as they unfold. While this may be a judgement call, in one case, *Gulliver Sch., Inc. v. Snay*, 137 So.3d 1045 (Fla. 3d DCA 2014) a lawyer's monitoring of the client's activity might have avoided a mishap. A former headmaster of a private school sued for employment discrimination. The parties entered into a confidential settlement for $150K but there was a forfeiture clause if confidentiality was breached. The defendants found that the plaintiff's daughter had posted on her FB page: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT!"
- Court ordered disgorgement in the amount of $80K because disclosure of the settlement by Snay to his daughter was a breach of the agreement.

Counseling Clients About SM

- In West Virginia, a public defender found herself before a judge for a contempt hearing because she had delivered to her client, in breach of a confidentiality agreement with the prosecutor, a packet of information about a confidential informant. The CI's name and address was posted on FB by the client's former roommate with captions like "exposed" and "cheap whore." Although the public defender received only a fine, this example shows how SM can be used to intimidate witnesses as well as reveal ethical breaches by the lawyer.
- Another practical issue that is likely to cause some ethical heartburn in the not too distant future is the explosive growth in self-deleting SM applications like SnapChat, Telegram, Confide and Wickr, that delete data shortly after it is shared or actively erase pictures once the recipient has viewed them.
- Bottom line: An attorney must be aware or what his or her client has done, is doing and plans to do in terms of their online presence.

Social Sleuthing and Discovery

- Informal v. Formal Discovery—thanks to SM and the Internet, a great amount of discovery is obtained informally through online research, well before formal discovery begins, but which is often the foundation for formal discovery requests.
- Assume that if your client has damaging data, photos, posts, or other information on SM, so does your adversary!
- *Pahoua Xiong v. Knight Transp. Co., Inc.,* No. 14-1390, 2016 WL 4056115 (10th Cir. 2016). Plaintiff sued for personal injuries arising out of a collision with one of defendant's trucks. Plaintiff was involved in a second accident in which she sustained injuries. After a jury verdict for plaintiff, defendants moved for a new trial, claiming that they should have been allowed to present more evidence of the second collision and claiming that plaintiff had committed a fraud on the court.

Social Sleuthing and Discovery

- A paralegal for defense counsel discovered a photo of plaintiff on FB on the paralegal's cousin's FB page. This photo led to the discovery of more photos that contradicted the plaintiff's trial testimony of a life plagued by painkillers and void of the activities she had enjoyed before her accident. The "Facebook version" of a day in her life displayed her as clubbing, taking vacations and enjoying outings to restaurants, weddings and friends' homes. Based on these FB photos, the defendant's employed a private investigator who uncovered more evidence damaging to plaintiff's case.
- Despite the FB evidence, the trial court denied the defendant's motion for a new trial because the new material did not qualify as "newly discovered evidence," and finding that the defendant was not diligent in their pre-trial investigation.

Social Sleuthing and Discovery

- May I review an opposing party's SM accounts? Yes, if the opposing party maintains SM accounts or profiles that are available for public viewing in whole or in part. D.C. Bar Ethics Op. 371 (2016); Colo. St. Bar Ethics Op. 127 (2015). Does it matter if the opposing party is represented? No, viewing an opponent's public information is not "communicating" with a represented party so there is no violation of Rule 4.2.
- May I contact an opposing party by connecting with him or "friending" him on FB? It depends. On what?
  - Is the opposing party represented by counsel? See Rule 4.2.

Social Sleuthing & Discovery

- Note: If it is unethical for you to "friend" or invite a represented person to connect under Rule 4.2 it is also unethical to use an employee or agent to do so.
- Rule 8.4(a): It is professional misconduct for a lawyer to 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. See also Rule 5.3 (duty to supervise non-lawyers and ensure that their conduct comports with the supervising lawyer's ethical obligations).
- *Robertelli v. New Jersey Office of Atty. Ethics*, 134 A.3d 963 (2016). Two NJ attorneys defending a personal injury case had a paralegal "friend" the plaintiff during the trial. The attorneys claimed that they did not understand Facebook and the meaning of sending a "friend" request. The case actually settled but afterward plaintiff's counsel assisted his client in filing a bar complaint against the two defense attorneys!

Social Sleuthing & Discovery

- Contacts with *unrepresented* persons, i.e., witnesses
  - Rule 4.3: ln communicating with an unrepresented person, lawyer may not state or imply that he is disinterested, must clarify the lawyer's role when necessary and not give legal advice.
  - Rule 8.4(c): a lawyer may not engage in conduct involving fraud, dishonesty, deceit or misrepresentation.
  - NYC Bar Ass'n Ethics Op. 2010-2 (2010)—a friend request to an unrepresented person need only identify the lawyer's name. *Accord*, Or. St. Bar Formal Op. 2013-189 (2013), except that if unrepresented person asks for additional information, then requesting lawyer must be forthcoming.
  - NH, Colo. and DC take a stricter approach: A lawyer who merely provides his name is implicitly acting disinterested in violation of Rule 4.3.

Social Sleuthing & Discovery

- Colo. St. Bar Formal Op. 127 (2015): Lawyers and their agents must provide sufficient disclosure to allow the unrepresented person to make an informed decision concerning whether to grant access to restricted portions of their SM profile. This means:
  - Providing the name of the lawyer requesting access or for whom the requesting person is acting as agent,
  - Disclosing that the lawyer is acting on behalf of a client.
  - Disclosing the general nature of the matter in connection with which the lawyer is seeking information, and
  - Disclosing the identity of the client if disclosure is necessary to avoid a misunderstanding regarding the lawyer's role.

Social Sleuthing & Discovery

- If your adversary is a represented corporation, some special applications of Rule 4.2, are important. Suppose your client has a WC claim against her Employer. May you/your client/your investigator send a "friend request" to:
  - The client's former supervisor?
  - Fellow coworkers?
  - Former disgruntled employees you think have some dirt on their former employer's workplace?

Rule 4.2 prohibits contacts with employees of a represented organization if they occupy a position in the organization that places them in the "control group" or the "alter ego" of the organization (i.e., owner of a closely held company). Rule 4.2 does not prohibit contacts with *former* employees, but you cannot ask them about communications they may have had with counsel for their employer or if they are separately represented.

Social Sleuthing & Discovery

- Other jurisdictions and the federal courts in VA have a different interpretation of Rule 4.2 and forbid contacts with employees whose statements, acts or omissions in a particular matter could be imputed to the represented organization.
- Contacts with persons protected under Rule 4.2 can only be had with the consent of the organization's counsel or through formal discovery.
- Viewing information that a witness or represented person has posted for which there is public access is not a "communication." Rules 4.2 and 4.3 do not prohibit you from viewing SM that is accessible to the public.

Social Sleuthing & Discovery

- Is it OK to review an opposing party's or witness's SM postings that are behind a privacy wall if my client, a witness, or an employee at my law firm has been connected on SM to that person before the incidents or events that are the subject of the lawsuit?
- Although there may be some disagreement, most authorities say "yes." The analysis involves a parsing of what is "public information" and "deceptive conduct." Where a person, not acting as an agent at the behest of a lawyer, has obtained information from a witness's SM page, the lawyer may receive and use the information. Information that is not available to the general public may be restricted to a person's group of Facebook friends. At the same time, that person may also post on various FB groups in which the group's members' posts are public. Thus it is possible for a lawyer to view photos or postings of a witness on FB, though an account of another who is a "friend" or connected with that witness, without engaging in any deception or initiating a request to connect. This is sometimes called the "friend of a friend" connection.

Social Sleuthing & Discovery

- The lawyer's viewing of information that would otherwise be restricted should be permissible because the original friend request between the paralegal and the opposing party occurred before the litigation, and was not made for any purpose related to the subject matter of the representation. Also there was no deceit involved with the original friend request. A person who posts on FB assumes the risk that a third party might share or repost the information to others that are not "connected" with that person.
- If a lawyer permissibly views and locates a relevant posting by an adverse party, what steps should be taken?
  - Notify the opposing party, or their counsel, if they are represented to hold and preserve the information—a litigation hold letter.
  - Take steps to download and preserve the discovered information

Virginia's Lawyer Advertising Rules

- Substantial overhaul of Rules effective July 1, 2017
- Used to be five rules: Rules 7.1-7.5
- Eliminated Rule 7.2 in 2013, with amendments that including removing the ban on in-person solicitation in personal injury and wrongful death cases.
- Current rule on solicitation of potential clients is Rule 7.3
- 2017 amendment defines "solicitation:" –a targeted communication initiated by the lawyer that is directed to a specific potential client, known to be in need of legal services, that offers to provide legal services.
- Compare with general lawyer advertising such as a billboard, banner ad, website or TV commercial that is directed to the general public.
- 2017 Amendments eliminated Rules 7.4 (specialization claims) and 7.5 (law firm names)

Virginia's New Lawyer Advertising Rules

- Streamlines regulation of lawyer advertising down to a single standard—Is the advertising "false or misleading?
- Eliminated the boilerplate disclaimer for advertising specific case results.
- Eliminated the disclaimer required by former Rule 7.4 when a lawyer advertises that the lawyer has be "certified" as a "specialist" in an area of practice by a third party organization.
- Specific case results may be misleading if they omit material facts or need to be put in context that is not misleading.
- Claims of specialization must be capable of factual verification.
- Some statements in former Rules 7.4 and 7.4 may be found in the comments to Rule 7.1.

VIRGINIA WORKERS' COMPENSATION AMERICAN INN OF COURT & ADVISORY CONFERENCE MARCH 13 & 14, 2018

Ethical Problems for Workers Compensation Practitioners

James M. McCauley, Ethics Counsel, Virginia State Bar

Hypothetical No. 1

Case settled on a full and final basis; at the time of settlement claimant was under a temporary total disability (TTD) award. The TTD award resulted because of severe light duty work restrictions that her pre-injury employer could not accommodate, and vocational rehabilitation had not been able to find her work within the restrictions. The parties anticipated that she would continue to be unable to work for at least six more months, with the settlement amount reflecting this. However, claimant had returned to work, for a different employer, in violation of her light duty work restrictions. She returned after entry of the settlement order by the Commission but prior to the settlement monies being paid, and prior to the expiration of the thirty-day appeal period.

What obligation does claimant's counsel have to advise defendants of her return to work?

ANSWER: Claimant's counsel has a duty to advise defendants and the Commission that her client has returned to work.

Generally, absent a legal or ethical requirement to report the claimant's return to work, the claimant's lawyer would be ethically bound not to reveal information or circumstances that develop after the award has been made. Rule 1.6 (cannot disclose information detrimental to client). Since the claimant, employer and insurer reached settlement under a mutual understanding of the claimant's condition and work status, and there was no deceit or misrepresentation made, there is no ethical duty for claimant's counsel to reveal that her client has returned to work with a new employer, a fact not discovered until after the Commission approved the settlement and made the award. That, however, does not finish the analysis in this situation.

Comment [1] to Rule 4.1 states:

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, **but generally has no affirmative duty to inform an opposing party of relevant facts**. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person

that the lawyer knows is false. Misrepresentations can also occur by failure to act or by knowingly failing to correct false statements made by the lawyer's client or someone acting on behalf of the client.

So . . . one might argue that there was no fraud or misrepresentation during the negotiation of the settlement that was approved so there is no *ethical* duty to affirmatively disclose post-settlement change in circumstances. But this position only goes so far and overlooks other ethical rules and considerations.

First, there may be a *legal* duty to report:

§ 65.2-712. Reporting incarcerations, change in earnings, remarriage, change in student status; recovery of payments procured by fraud, misrepresentation, or unreported change in condition. — So long as an employee or statutory dependent pursuant to § 65.2-515 receives payment of compensation under this title, any such person shall have a duty immediately to disclose to the employer, when the employer is self-insured, or insurer in all other cases, any incarceration, return to employment, increase in his earnings, remarriage or change in his status as a full-time student. Any payment to a claimant by an employer or insurer which is later determined by the Commission to have been procured by the employee or statutory dependent under § 65.2-515 by fraud, misrepresentation, or failure to report any incarceration, return to employment, increase in earnings, remarriage or change in his status as a full-time student may be recovered from the claimant or statutory dependent by the employer or insurer either by way of credit against future compensation payments due the claimant or statutory dependent, or by action at law against the claimant or statutory dependent. The Commission shall provide for notification to the statutory dependent of his obligation under this section.

However, it is no so clear that there is a duty to report claimant's return to work if she has not yet "received payment of compensation." Claimant's counsel may not have a duty to report if her client has not yet "received payment of compensation." Does an order approving an award qualify as "receiving compensation?" Or is the reporting duty triggered only after the claimant receives the settlement?

Another question: Does the duty to report a change in employment under Va. Code §65.2-712 apply to claimant's *counsel* or is the duty limited to the claimant? The statute states that the claimant or statutory dependent has a duty to notify, but is silent as to counsel. The statute goes on to allow recovery from the claimant of any compensation improperly paid because of the claimant's failure to report her return to work.

Regardless of whether claimant's counsel has a *legal* duty to report, is there an *ethical* duty to report?

YES. Simply because the law requires reporting a change in circumstances does not necessarily mean that a RPC is violated for failure to report, unless the failure to report is a criminal as opposed to a civil law violation, or because non-disclosure of a material fact one must disclose as required by law is a species of fraud.

Rule 4.1 concerns candor in dealing with others and states:

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

(a) make a false statement of fact or law; or

(*b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.*

Rule 4.1(a) does not apply because there has not been any knowing misrepresentation of fact or law. However, it is possible that Rule 4.1(b) does apply if claimant's counsel is assisting her client in receiving funds to which claimant is not entitled. The question is whether claimant's conduct—receiving funds to which she is not entitled—is criminal or fraudulent. This part of the analysis is a legal question. Assuming that the claimant's conduct *is* criminal or fraudulent—and it may very well be—claimant's counsel has to take some action in order to avoid possible disciplinary exposure. It is true that Rule 1.6 prohibits disclosure of information that the claimant would not want revealed or if the disclosure would be detrimental to claimant. However, Rule 1.6 is not an absolute and there are exceptions to the rule that either require or permit the lawyer to disclose information that the rule otherwise protects. Rule 1.6 (b)(3) states that a lawyer may reveal "information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation**." Here, the fraud would be allowing the claimant to receive compensation to which she is not entitled and not disclosing her change in employment. Thus, while that exception does not *require* disclosure, it permits the lawyer to disclose if reasonably necessary to prevent the client from perpetrating a fraud on a third party.**

Another rule that seems to be in play is Rule 3.3(a)(2) which applies when a lawyer represents a client in a proceeding before a tribunal:

"A lawyer shall not knowingly . . . fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."

Unlike Rule 1.6(b)(3), Rule 3.3(a)(2) *requires* disclosure when necessary to avoid assisting a criminal or fraudulent act by the client. Because the settlement agreement resulted in an award issued by the Commission, the Commission is a "tribunal" and has acted on information that may have been true at the time the Commission approved the settlement and made the award. The material fact relied on is that the claimant is unable to return to work.

Rule 3.3(a)(4) states that a lawyer shall not knowingly:

"offer evidence that the lawyer knows to be false. *If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.*"

If claimant's counsel knows that her client has returned to work, and the facts presented in the settlement were that the claimant was not able to return to work, claimant's counsel has duty to take remedial measures to rectify an apparent fraud on the Commission.

Finally, there is Rule 1.2(c) that states:

"A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law."

CONCLUSION:

Rule 3.3 requires claimant's counsel to remediate a false statement of fact made to the Commission if she learns later that statements made to the Commission are no longer true. Pursuant to Rule 1.6(b)(3) and Rule 1.2(c), to avoid assisting the client in conduct that is illegal or fraudulent, **she should advise defendants that her client has found employment with a new employer.**

Hypothetical No. 2

Same basis scenario as above, but within the thirty day appeal period of the full/final settlement order, claimant counsel obtains a medical report reflecting that the claimant asked her physician to immediately completely drop her work restrictions so that she could accept a new job.

What obligation does claimant's counsel have to advise defendants of this medical report after the settlement order was entered?

ANSWER: Counsel for claimant must advise her of the consequences of returning to work and that the defendants and Commission will be notified if she returns to work, that the award may be vacated and the defendants will be entitled to recover any compensation paid by then under the TTD award. If claimant's counsel can persuade her to abandon her intent to work for another employer, claimant's counsel may not disclose the existence of the medical report and claimants intentions—now abandoned—to accept new employment. **If the claimant insists on taking the new job, then counsel for claimant must disclose that fact to the defendants and the Commission as explained in Hypothetical No. 1.**

Hypothetical No. 3

Surveillance of claimant was done over the course of three days, with 4 hours of video taken. Defense counsel brought the video to claimant's treating physician, who upon watching the video became disillusioned with claimant's allegations of disability. However, the physician was shown only seven minutes of the video, and was not shown other portions of the video portraying pain/guarding behaviors.

Does defense counsel have an ethical obligation to present a fair portrayal to the treating physician?

Can defense counsel edit the videos to portray only selected activities or movements?

ANSWER: Yes, defense counsel have an ethical obligation of candor when dealing with third parties under Rule 4.1. *See* Rule 4.1(a) set out on page 2 of this material. They may not edit the videos to portray only selected activities or movements if doing so is misleading and deceptive. Thus, if defense counsel remove or delete portions of the video that would show claimant suffered pain, became tired over time or collapsed as a result of the portrayed activity, this conduct would violate Rules 4.1 and 8.4(c).

Hypothetical No. 4

Same basic scenario as above, but claimant counsel propounds discovery to obtain a copy of the surveillance video.

Does defense counsel need to disclose all 4 hours of video? Or just the portions shown to the treating physician that defendants will be relying upon at hearing? Would the results change if defense counsel had not edited the video, but rather requested the private investigators to send defense counsel only the "relevant" portions of the video? Does defense counsel have an obligation to request the video in its entirety from the investigators?

ANSWER: Yes, defense counsel has to produce all 4 hours of video. No, defense counsel may not leave it to the investigators to decide what is "relevant" and what is to be produced to respond to claimant's discovery requests. Defense counsel has an obligation to comply with lawful requests for discovery.

See Rule 3.4(e). Claimant is entitled to discover and has likely framed her discovery request to seek production of and all video the defense has in its custody or control portraying the claimant. Defense counsel may try to limit the discovery only to video (edited or unedited) that they intend to rely on at trial or hearing and possibly assert work product protection for material they do not intend to use or rely on at trial. There problems with this. First, any selective editing of the video raises questions of spoliation and incomplete response to discovery. Rule 3.4(a) states that a lawyer may not

> obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

Defense counsel may not have the investigators determine and select which portions of the video are relevant. Lawyers may employ non-lawyers to perform investigative tasks but determining which portions of the video are relevant is the practice of law. Defense counsel would be assisting the investigators in the unauthorized practice of law. See Rule 5.5(c). Comment [2] to Rule 5.5 explains:

> The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unauthorized persons. Paragraph (c) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, *so long as the lawyer supervises the delegated work and retains responsibility for their work.* See Rule 5.3. (emphasis added).

Thus, as part of their duty to supervise the work of their investigators, and to avoid intentional or inadvertent spoliation of evidence, defense counsel have a duty to obtain the video recording in its entirety and to instruct the investigators to not edit or delete any portions.

Surveillance videotapes of this sort are a traditionally accepted way for defendants and their lawyers to challenge plaintiffs' claims of permanent injuries.

There are many cases involving this practice, none of which even mention the practice's ethical propriety -- thus implicitly acknowledging the legitimacy of such investigative or discovery tactics.

Courts dealing with surveillance videotapes most frequently wrestle with one of four issues.

First, **courts debate whether such surveillance videotapes constitute protected work product.** Most courts hold that they do. *Bradley v. Wal-Mart Stores, Inc.*, 196 F.R.D. 557, 557 (E.D. Mo. 2000). This seems like the proper conclusion under the work product doctrine. The surveillance videotapes are "tangible things" prepared at a time when the defendant is in or reasonably anticipates litigation, and motivated by that litigation.

The fact that the surveillance videotapes show non-confidential events does not change that analysis. The work product doctrine is not based on confidentiality, and can protect such "tangible things" as a court reporter's transcript (*McGarrah v. Bayfront Med. Ctr., Inc.*, 889 So. 2d 923, 926 & n.2 (Fla. Dist. Ct. App. 2004)), a videotape of an accident scene (*Falco v. N. Shore Labs. Corp.*, 866 So. 2d 1255 (Fla. Dist. Ct. App. 2004)) or the translation of a document from one language to another (*In re Papst Licensing GmbH Patent Litig.*, Civ. A. No. 99-MD-1298 Section "G" (2), 2001 U.S. Dist. LEXIS 10012, at *69-70 (E.D. La. July 12, 2001)).

Interestingly, no court seems to have dealt with the possibility that a surveillance videotape might deserve *opinion* work product protection. This seems like a long shot, but the higher protection of opinion work product might apply to the surveillance videotape that somehow reflects the lawyer's specific instructions about how to tape the plaintiff. Because the opinion work product doctrine protection applies to opinions of any client representative (not just

lawyers), the doctrine might even protect a surveillance videotape that reflects the videographer's opinion about what is important.

Second, **courts must determine if the plaintiff can overcome the work product protection.** The work product doctrine provides only a conditional or qualified immunity from discovery, and the adversary can obtain a litigant's work product by showing "substantial need" for the work product, and the inability to obtain the "substantial equivalent" without "undue hardship."

In some ways, it is almost humorous to consider how a plaintiff could ever meet this standard. After all, the plaintiff presumably *knows* whether she can mow the lawn, climb a ladder, play touch football, etc. Some courts recognize this common sense principle. *Ex parte Doster Constr. Co.*, 772 So. 2d 447 (Ala. 2000). Other courts use shaky logic to come to a different conclusion -- holding that surveillance videotape might somehow be misleading. These courts conclude that a plaintiff can overcome defendant's work product doctrine protection covering the surveillance videotapes. *Southern Scrap Material Co. v. Fleming*, No. 01-2554 SECTION "M" (3), 2003 U.S. Dist. LEXIS 10815, at *56 n.45 (E.D. La. June 18, 2003) (holding that surveillance videotapes and photographs were protected by the work product doctrine, but must be produced because they are "available only from the ones who obtained it, fixes information available at a particular time and place under particular circumstances, and therefore, cannot be duplicated").

Third, **courts debate whether a defendant has to produce such surveillance videotapes that it has taken of plaintiff.** This analysis also involves the "substantial need" test for overcoming an adversary's work product doctrine protection. Unlike other forms of work product, almost by definition a plaintiff does not have "substantial need" for a surveillance videotape **unless the defendant intends to use the videotape at trial. Thus, most courts take the logical approach that defendant must produce such surveillance videotapes only if it intends to use the videotapes at trial**. *Fletcher v. Union Pac. R.R.*, 194 F.R.D. 666 (S.D. Cal. 2000) (finding that the defendant's secret surveillance videotape of plaintiff in daily activities amounted to factual work product, but refusing to order its production because defendant indicated that it would not use the surveillance tape at trial). *Samples v. Mitchell*, 495 S.E.2d 213 (S.C. Ct. App. 1997) (finding that a defendant had improperly failed to disclose the existence of a surveillance videotape showing a plaintiff engaged in activity casting doubt on her injury; noting that defendant is obligated to at least disclose the existence of the videotape, even if it claimed work product protection; granting plaintiff a new trial after the trial judge allowed the defendant to use the videotape despite not having disclosed it). Of course, <u>any</u> litigant must produce documents or other exhibits that they intend to introduce at trial.

Fourth, **courts must decide <u>when</u> the defendant should produce a surveillance videotape that it intends to use at trial.** This analysis highlights the interesting intersection of privilege/work product doctrine and discovery/trial logistics. A majority of courts take a very clever approach -- requiring the defendant to produce surveillance videotapes but only <u>after</u> it deposes the plaintiff. *Runions v. Norfolk & W. Ry.*, 51 Va. Cir. 341, 344 (Roanoke 2000) ("The court will therefore order that (1) the contents of surveillance movies, tape, and photographs

must be disclosed if the materials will be used as evidence either substantively or for impeachment; and (2) the plaintiff and his attorneys must be afforded a reasonable opportunity, consistent with the needs expressed by the court in Dodson, to observe these movies or photographs before their presentation as evidence. Within its discretion, however, the court will further order that the defendant has the right to depose the plaintiff before producing the contents of the surveillance information for inspection. Counsel will forthwith arrange for the plaintiff's deposition to be taken. As soon as Mr. Runions has signed the deposition transcript, or, if he waives signature, as soon as his deposition is concluded, NW's lawyers will produce the surveillance materials."). The *in terrorem* effect of a secret surveillance videotape presumably drives the plaintiffs to truthfully answer deposition questions about the extent of their injuries.

Hypothetical No. 5

Claimant frequently posts to Facebook, and does have privacy settings on her Facebook account. Private investigators hired by the carrier "friend" the claimant under false pretenses, and obtain some posts that could potentially be used to impeach the claimant's credibility.

(a) Does defense counsel have an obligation to question the private investigators as to their investigative techniques, or can defense counsel use whatever he was sent?

(b) The Facebook posts also mention other individuals that defendants could potentially use as witnesses adverse to the claimant. Can defense counsel then contact these additional witnesses?

ANSWER: (a) Probably not. A distinction is drawn between investigators that are under the supervision of the lawyer and others who are employed as independent contractors or are employed by a third party. Here the investigators are employed by the insurance carrier and therefore the responsibilities of a lawyer to supervise non-lawyer employees under Rule 5.3 do not apply. The result would likely be different if the investigator is under the lawyer's "direct supervisory authority." Then, Rule 5.3(a) would require the lawyer to properly train and direct non-lawyers to conduct their work in a manner compliant with the RPC.

(b) Yes, probably. A lawyer may use the fruits of an investigation obtained under questionable provenance if the lawyer was not complicit and played no role in advising, encouraging, recommending or ratifying the means by which the investigation was performed. The lawyer's use of the investigator's work product, without knowledge of the means by which it was obtained, does not "ratify" the investigator's conduct. Nevertheless, a lawyer may wish to consider a more cautious approach before using evidence that was obtained illegally or in violation of the legal rights of another

Lawyers may not use deception to “friend” a person on Facebook, nor can they use or employ an agent to do so. See Va. Rule 8.4(a)(a lawyer may not 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). (New York City LEO 2010-2 (9/2010) ("A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent."; "[W]e 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. 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." (footnote omitted) (emphasis added); "Despite the common sense admonition not to 'open the door' to strangers, social networking users often do just that with a click of the mouse."; "[A]bsent some exception to the Rules, a lawyer's investigator or other agent also may not use deception to obtain information from the user of a social networking website."; "We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. *See* N.Y. County 737 (2007) (requiring, for use of dissemblance, that 'the evidence sought is not reasonably and readily obtainable through other lawful means'); *see also* ABCNY Formal Op. 2003-2 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions -- a question we do not address here -- they are, at least in most situations, inapplicable to social networking websites. Because non-deceptive means of communication ordinarily are available to obtain information on a social networking page -- through ordinary discovery of the targeted individual or of the social networking sites themselves -- trickery cannot be justified as a necessary last resort. For this reason we conclude that lawyers may not use or cause others to use deception in this context." (footnote omitted); "While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an ethical line when she falsely identifies herself in a 'friend request.'"; "Rather than engage in 'trickery,' lawyers can -- and should -- seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful 'friending' of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line."; "**Accordingly, a lawyer may not use deception to access information from a social networking webpage.** Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.").

In what might become a groundbreaking analysis, the New York County Lawyers' Association endorsed lawyers' supervision of others who engage in mildly deceptive conduct in "a small number of exceptional circumstances." Interestingly, the New York County Lawyers' Association apparently could not bring itself to use the word "deception" -- or any of the other terms used in ABA Model Rule 8.4 or the analogous New York ethics rule DR-102(A)(1) ("a lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"). Instead, the New York County Lawyers' Association used the word "dissemblance."[1] It will be interesting to see if other bars follow New York's lead.

This hypothetical raises the difficult issue of lawyers deciding whether they can use the fruits of an investigation that might have involved violation of the ethics rules had the lawyer engaged in the same conduct to obtain the evidence.[2]

Under Virginia Rule 5.3,

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[1] New York County Law. Ass'n LEO 737 (5/23/07) (addressing a non-government lawyer's use of an investigator who employs "dissemblance"; explaining that the word "dissemble" means: "'To give a false impression about (something); to cover up (something) by deception (to dissemble the facts).'" (citation omitted); explaining that "dissemblance is distinguished here from dishonesty, fraud, misrepresentation, and deceit by the degree and purpose of dissemblance. For purposes of this opinion, dissemblance refers to misstatements as to identity and purpose made solely for gathering evidence. It is commonly associated with discrimination and trademark/copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or job seekers while negotiating or engaging in a transaction that is not by itself unlawful. Dissemblance ends where misrepresentations or uncorrected false impressions rise to the level of fraud or perjury, communications with represented and unrepresented persons in violation of the Code . . . or in evidence-gathering conduct that unlawfully violates the rights of third parties." (footnote omitted); not addressing lawyers' <u>own</u> dissemblance, but permitting a lawyer-directed investigator's dissemblance under "certain exceptional conditions," which lawyers "should interpret . . . narrowly"; "In New York, while it is generally unethical for a non-government lawyer to knowingly utilize and/or supervise an investigator who will employ dissemblance in an investigation, we conclude that it is ethically permissible in a small number of exceptional circumstances where the dissemblance by investigators is limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence. Even in these cases, a lawyer supervising investigators who dissemble would be acting unethically unless (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably and readily available through other lawful means; and (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the New York Lawyer's Code of Professional Responsibility (the 'Code') or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. These conditions are narrow. Attorneys must be cautious in applying them to different situations. In most cases, the ethical bounds of permissible conduct will be limited to situations involving the virtual necessity of non-attorney investigator(s) posing as an ordinary consumer(s) engaged in an otherwise lawful transaction in order to obtain basic information not otherwise available. This opinion does not address the separate question of direction of investigations by government lawyers supervising law enforcement personnel where additional considerations, statutory duties and precedents may be relevant. This opinion also does not address whether a lawyer is ever permitted to make dissembling statements directly himself or herself.").

[2] Va. Rule 1.2(c) "prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud."

[w]ith respect to a nonlawyer employed or retained by or associated with a lawyer: . . . a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to insure that the person's conduct is compatible with the professional obligations of the lawyer. Va. Rule 5.3(b). In addition, a law firm's management must make "reasonable efforts to insure that the firm has in effect measures giving reasonable assurance that the [nonlawyer's] conduct is compatible with the professional obligations of the lawyer." Va. Rule 5.3(a).

Va. Rule 5.3(c) governs a lawyer's ethical liability for a nonlawyer's unethical conduct.

With respect to a nonlawyer employed or retained by or associated with the lawyer . . . a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer **if:**

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

(2) the lawyer is a partner or has comparable managerial authority *in the law firm in which the person is employed, or has direct supervisory authority over the person*, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Va. Rule 5.3(c).

Comment [1] provides more detailed guidance.

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Va. Rule 5.3 cmt. [1].

The ABA dealt with this issue in ABA LEO 396.

Under these provisions, if the lawyer has direct supervisory authority over the investigator, then in the context of contacts with represented persons, the lawyer would be ethically responsible for such contacts made by the investigator if she had not made reasonable efforts to prevent them (Rule 5.3(b)); if she instructed the investigator to make them (Rule 5.3(c)(1)); or if, specifically knowing that the investigator planned to make such contacts she failed to instruct the investigator not to do so (Rule 5.3(c)(2)). **The Committee believes, however, that if, despite instruction to the contrary, an investigator under her direct supervisory authority (or one not under such authority) made such contacts, she would not be prohibited by Rule 5.3 from making use of the result of the contact. . . .** Rule 8.4(a) imposes similar, albeit narrower, ethical limits on

what a lawyer can direct an investigator to do. . . . **Although the question is a close one, the Committee does not believe that a lawyer's making use of evidence offered by an investigative agent by means that would have been forbidden to the lawyer herself but in which she was not complicitous would constitute "ratification" under Rule 5.3(c)(1).** "Ratify" is defined by *Black's Law Dictionary* (6th ed. 1990) as: "To approve and sanction; to make valid; to confirm; to give sanction to. To authorize or otherwise approve, retroactively, an agreement or conduct either expressly or by implication."

ABA LEO 396 (7/28/95). **Thus, the ABA did <u>not</u> require the hypothetical lawyer to forego using the evidence -- unless the lawyer has <u>actual</u> knowledge of the investigator's misconduct.**

The *Restatement* provides some guidance on a lawyer use of information unlawfully obtained through the actions of an agent or third party.

If the disclosure operates to end legal protection for the information, the lawyer may use it for the benefit of the lawyer's own client and may be required to do so if that would advance the client's lawful objectives . . . . That would follow, for example, when an opposing lawyer failed to object to privileged or immune testimony . . . . The same legal result may follow when divulgence occurs inadvertently outside of court . . . . The receiving lawyer may be required to consult with that lawyer's client . . . about whether to take advantage of the lapse. If the person whose information was disclosed is entitled to have it suppressed or excluded . . . , the receiving lawyer must either return the information or hold it for disposition after appropriate notification to the opposing person or that person's counsel. A court may suppress material after an inadvertent disclosure that did not amount to a waiver of the attorney-client privilege . . . . **Where deceitful or illegal means were used to obtain the information, the receiving lawyer and that lawyer's client may be liable, among other remedies, for damages for harm caused or for injunctive relief against use or disclosure.** The receiving lawyer must take steps to return such confidential client information and to keep it confidential from the lawyer's own client in the interim. Similarly, if the receiving lawyer is aware that disclosure is being made in breach of trust by a lawyer or other agent of the opposing person, the receiving lawyer must not accept the information. An offending lawyer may be disqualified from further representation in a matter to which the information is relevant if the lawyer's own client would otherwise gain a substantial advantage . . . . **A tribunal may also order suppression or exclusion of such information.**

Restatement (Third) of Law Governing Lawyers § 60 cmt. m (2000).

Several ethics opinions highlight the difficulty of knowing where to draw the line.

Some bars and courts take the fairly aggressive ABA approach, generally allowing lawyers to use the fruits of investigators' or clients' misconduct, which would have been unethical had the lawyer engaged in the misconduct herself.

Philadelphia LEO 2001-10 (11/2001) (addressing evidence uncovered during a surveillance of a worker's compensation claimant by a hired investigator; noting that the investigator spoke directly with the claimant, which would have violated Rule 4.2 had the conduct been engaged in by the lawyer; "*The investigator in this case was not employed by counsel, but was instead employed by the TPA [third-party administrator]*, and his existence was unknown to counsel at the time of the disputed conduct. Thus, there is no basis to impute to the lawyer a violation of the Rules by the conduct of someone wholly unrelated to him. A different conclusion may result, however, if the TPA had advised counsel of its retention of the investigator, and the assignment given to him, or if counsel either had actual knowledge, or had reason to believe from prior dealings with the TPA that the conduct was occurring."; noting that "the attempted proffer of the surveillance evidence does not constitute a ratification of the conduct by counsel," because the lawyer fully described to the court how the surveillance evidence was obtained).

Kearney v. Kearney, 974 P.2d 872 (Wash. Ct. App. 1999) (allowing use of an illegally obtained tape in a child custody dispute; noting that the children's mother had taped conversations between her former husband and the children to show the former husband's emotional abuse).

Maryland LEO 97-5 (10/11/96) (addressing a tape illegally made by a child's father of the mother threatening to kill herself and the child; ordering the lawyer to maintain the tape but not transfer it to a third party).

Maryland LEO 96-38 (6/19/96) ("You ask whether a lawyer who represents a client suing a corporate defendant may review documents of the corporation which were obtained from the dumpsters on the corporation's premises by a third party. The third party gave the documents to the client, who then delivered them to the lawyer. You state that: (a) the lawyer did not solicit the retrieval of the documents; (b) the client believes that the documents are relevant to the pending suit; and (c) as a result of the pending suit and a related suit you believe the corporation may be disposing of sensitive information adverse to it. We are of the opinion that you are under no obligation to reveal the matter to the court in which the litigation is pending documents, and regardless whether they are privileged or confidential. . . . However, if the documents are originals, you may be obliged to return them to the owner.").

Some slightly older bar analyses went even farther. Virginia LEO 1141 (10/17/88) (a lawyer representing a widow in a medical malpractice/wrongful death action may use files taken by the widow from the treating physician's office; the files are not "fruits of a crime" but the lawyer should advise the widow to return the original of the file; the lawyer could keep and use a copy of it); Virginia LEO 278 (1/29/76) (a client's wife stole a document from the client's employer to use in a lawsuit; as long as the client's lawyer was not involved in the theft, the lawyer may continue to represent the client and use the document; overruled in LEO 1702, which would require lawyer to return stolen document).

Other bar and court analyses seem to require much more from the lawyers.

Bratcher v. Ky. Bar Ass'n, 290 S.W.3d 648, 648-49, 649 (Ky. 2009) (imposing a public reprimand based on the following situation: "Movant [lawyer] represented Dennis D. Babbs in a

wrongful termination action against his former employer, R.C. Components, Inc. After suit was filed, Movant learned of a company called Documented Reference Check ('DRC'), which could be hired to determine the type of reference being given by a former employer. Movant obtained an application form from DRC and provided it to her client. Movant also paid DRC's fee on behalf of her client. An employee of DRC subsequently called the owner of R.C. Components, identified herself as a prospective employer of Mr. Babbs, and requested information about him. The telephone conversation was transcribed and provided to Movant."; "Movant sent a copy of the transcript to defense counsel as a part of discovery in the case. After receiving the transcript, R.C. Components sought to have Movant disqualified as Mr. Babb's counsel and to have the DRC transcript suppressed."; "Then Circuit Judge John Minton presided over the case. He entered an order disqualifying Movant and suppressing the transcript. He also found that Movant's conduct violated SCR 3.130-4.2, which prohibits a lawyer from communicating about the subject of the representation with a party the lawyer knows to be represented by counsel, and SCR 3.130-8.3(a), which prohibits a lawyer from violating the Rules of Professional Conduct through the conduct of another.").

Florida LEO 07-1 (9/7/07) (addressing the ethics issues involved in a client's removal of documents from her husband's car, including privileged documents; noting that the wife gave the documents to her lawyer, who immediately put them in a sealed envelope; explaining that Rule 4.4(b) did not apply because the wife had "deliberately obtained" the documents from her adversary husband; holding that the lawyer "would have to produce the documents in response to a valid discovery request for the documents," and "may also have an obligation under substantive law to turn over the documents" if they were stolen -- because they would amount to "'evidence of a crime'" (citations omitted); also explaining that the lawyer could not disclose the client's past removal of the documents, but cannot assist the client in any future wrongdoing; "If the client possibly committed a criminal act, it may be prudent to have the client obtain advice from a criminal defense attorney if the inquiring attorney does not practice criminal law. The inquiring attorney should advise the client that the inquiring attorney is subject to disqualification by the court as courts, exercising their supervisory power, may disqualify lawyers who receive or review materials from the other side that are improperly obtained. . . . The inquiring attorney should also advise the client that the client is also subject to sanction by the court for her conduct. . . . Finally, the inquiring attorney must inform the client that the materials cannot be retained, reviewed or used without informing the opposing party that the inquiring attorney and client have the documents at issue. . . . If the client refuses to consent to disclosure, the inquiring attorney must withdraw from the representation.").

Allen v. International Truck & Engine, No. 1:02-cv-0902-RLY-TAB, 2006 U.S. Dist. LEXIS 63720, at *1-2, *25 (S.D. Ind. Sept. 6, 2006) (as a result of defendant's inadvertent filing one of its law firm's billing records in court, the plaintiffs discovered that the defendant had hired a "private investigation company to conduct an undercover investigation into allegations of racial hostility at its Indianapolis facility"; the court criticized defendant's lawyer Littler Mendelson, who knew or should have known that the investigator was engaging in improper ex parte contacts with represented adversaries; describing "Defendant's ostrich-styled defense";

explaining this "Defendant's counsel's culpability is compounded by their failure to affirmatively advise, instruct or otherwise act to prevent contact with represented employees or to prevent contact with unrepresented employees under false pretenses").

North Carolina LEO 2003-4 (7/25/03) (explaining that a lawyer may not use a private investigator's testimony about conversations the investigator had with the plaintiff in a workers' compensation case, which tended to show that the plaintiff was not as severely injured as he claimed; explaining that the lawyer "instructed the private investigator not to engage Plaintiff in conversation," but that "[d]uring the surveillance, the investigator ignored Attorney's instructions and engaged Plaintiff in a conversation"; concluding that "to discourage unauthorized communications by an agent of a lawyer and to protect the client-lawyer relationship, the lawyer may not proffer the evidence of the communication with the represented person, even if the lawyer made a reasonable effort to prevent the contact, unless the lawyer makes full disclosure of the source of the information to opposing counsel and to the court prior to the proffer of the evidence"; also concluding that the lawyer may still use evidence "gained through the investigator's visual observations of Plaintiff" -- because "[v]isual observation is not a direct contact or communication with a represented person and does not violate Rule 4.2(a)").

District of Columbia Bar LEO 321 (6/2003) ("Counsel for a respondent may send an investigator to interview an unrepresented petitioner in preparation for a contempt proceeding in which the petitioner has alleged that the respondent has violated the terms of a domestic violence civil protection order, provided that respondent's counsel makes reasonable efforts to ensure that the investigator complies with the requirements of the D.C. Rules of Professional Conduct. These obligations include ensuring that the investigator does not mislead the petitioner about the investigator's or the lawyer's role in the matter and that investigators do not state or imply that unrepresented petitioners must or should sign forms such as personal statements or releases of medical information. Counsel should also take reasonable steps to ensure that, where an investigator reasonably should know that the unrepresented person misunderstands the investigator's role, the investigator makes reasonable affirmative efforts to correct the misunderstanding.").

North Carolina LEO 192 (1/13/95) (addressing the lawyer's obligation upon receiving from a client an illegal tape recording of the client's spouse and paramour; holding that the lawyer may not even listen to the tape; "The tape recording is the fruit of Client W's illegal conduct. If Attorney listens to the tape recording in order to use it in Client W's representation, he would be enabling Client W to benefit from her illegal conduct. This would be prejudicial to the administration of justice in violation of Rule 1.2(D). See also Rule 7.2(a)(8). Attention is directed to the Federal Wiretap Act, 18 U.S.C. Section 2510, et seq., particularly Sections 2511 and 2520, regarding criminal penalties for endeavoring to use or using the contents of an illegal wire communication.").

Finally, several bars try to "thread the needle" in providing guidance to lawyers receiving the fruits of investigative techniques that might not be proper.

See, e.g., Virginia LEO 1786 (12/10/04) (analyzing a series of hypotheticals in which a lawyer receives documents about an adversary that might be useful; explaining that: lawyers may not direct clients to obtain evidence via a method that the lawyers themselves may not engage in; determining whether lawyers must return documents that their clients have removed from the client's employer's office depends on a number of factors, including the client's authorization to handle the documents and the absence or presence of privileged communications in the documents; although the ABA has changed the Model Rules to replace a "return unread" policy with a notice requirement in the case of inadvertent transmission of privileged communications, Virginia has not changed its rules -- so under LEO 1702 lawyers should return unread an adversary's privileged documents given to the lawyer by clients, even if the client "had the documents as part of his employment"; lawyers are not required to notify the opposing party of such receipt of privileged documents if a whistleblower statute permits the lawyer to refrain from providing notice; an additional exception to the "return unread" rule applies if the client/employee made a copy of the employer's documents rather than took originals; LEO 1702 applies only to documents containing privileged communications of an adversary -- thus, lawyers may review and use non-privileged documents as long as the lawyer has not obtained the documents through the use of methods "that violate the legal rights of a third person" under Rule 4.4; determining whether Rule 4.4 would prohibit the lawyer's use of the documents "depends on whether the documents are originals or copies, whether any litigation is foreseen, how the employee acquired the materials, and their relevancy to the potential litigation"; lawyers should remember that stolen documents might amount to "fruits or instrumentalities of a crime" and thus have to be turned over to law enforcement authorities; all of these rules would not prohibit government lawyers from engaging in the collection of documents that is "part of the lawful operation" of a U.S. Attorney's investigation).

Interestingly, the Philadelphia Bar indicated in a 2008 legal ethics opinion that a lawyer may not summarily refuse to take advantage of evidence that his or her client might have wrongfully obtained. In Philadelphia LEO 2008-2 (3/08), the Philadelphia Bar dealt with a lawyer whose client obtained access to the client's ex-wife's e-mails through a computer that the couple once jointly owned. The husband had told his lawyer that the e-mails included communications between his ex-wife and her lawyer, and that the e-mails "would devastate her case against" the husband.

The lawyer asking for the opinion clearly did not want to use the e-mails, but the Philadelphia Bar explained that the lawyer had to at least examine the issue in detail. As the Philadelphia Bar explained,

> [I]f, after vetting these questions with the client, the inquirer is satisfied that there is no risk of civil and/or criminal liability to the client, it is the Committee's opinion that the inquirer cannot rest on the conclusion expressed in the inquiry that the e-mails are 'privileged communications' and merely ignore them.

Philadelphia LEO 2008-2 (3/2008). The Philadelphia Bar pointed to Pennsylvania Rule 4.4(b), which indicates only that the receiving lawyer's duties upon obtaining inadvertently transmitted

privileged communications "are limited to notifying the sender" -- so that "the question of whether and to what extent use can thereafter be made of those e-mails will be a matter of substantive and procedural law."

The Philadelphia Bar also pointed to Pennsylvania Rule 1.4's duty to communicate with clients, and ultimately found

> that the inquirer cannot rule out -- at least without being aware of their content -- the possibility that the content of the e-mails may be such as to impose an affirmative duty on the inquirer's part to employ them in pursuing the client' s claims and defenses if they will significantly advance the client's interests.

Philadelphia LEO 2008-2 (3/2008).[3]

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[3] Philadelphia LEO 2008-2 (3/2008) (assessing a situation involving an ex-husband's desire to use e-mail between his ex-wife and her lawyer; "The inquirer has a client whose ex-wife has sued the client regarding an estate matter. The client has revealed to the inquirer that he, the client, has access to the ex-wife's e-mail through the computer in his home which she used while they were married. She never changed her password until recently. The client has told the inquirer that he has e-mails between his ex-wife and her attorney that would devastate her case against the client. The inquirer does not know anything further because he advised his client that the e-mails were privileged communications and that he, the inquirer did not want to know anything further. The client wants to reveal the e-mails to the Orphans Court. The inquirer asks if he is correct that these communications should not be revealed and cannot be subpoenaed. The issues of whether the communications are, in fact, privileged and are or are not accessible via subpoena are mixed questions of fact and law which are beyond the purview of the Committee (however see discussion of the privilege below). However, the Committee understands this inquiry to be whether the inquirer is constrained by the Pennsylvania Rules of Professional Conduct (the "Rules") from (a) reviewing these e-mails and/or (b) making use of them in the litigation between the inquirer's client and the client's ex-wife."; noting that a Pennsylvania law renders illegal use of e-mail communications in certain circumstances, but explaining that there were insufficient facts to determine that law's applicability; "[I]f, after vetting these questions with the client, the inquirer is satisfied that there is no risk of civil and/or criminal liability to the client, it is the Committee's opinion that the inquirer cannot rest on the conclusion expressed in the inquiry that the e-mails are 'privileged communications' and merely ignore them. There are several reasons for this. First, the mere fact that the e-mail communications in question are between the client's ex-wife and her attorney does not render them privileged, per se. The scope of the privilege is statutory in nature; see, 42 Pa.C.S. § 5928, as well as case law interpreting the statute, and extends, inter alia, only to those communications that are 'for the purpose of securing primarily either an opinion of law or legal services. . . .' Accordingly, the Committee feels that the inquirer may not be able to make any judgments on the privilege issue without subjecting the e-mails to some kind of review. The Committee appreciates the inquirer's concern about coming into possession of e-mails between the client's ex-wife and her lawyer that may turn out to have been inadvertently sent. In the event that the inquirer should determine that the e-mails came into the client's possession inadvertently the inquirer's ethical duties are limited to notifying the sender as provided by Rule 4.4(b). As previously stated, the question of whether and to what extent use can thereafter be made of those e-mails will be a matter of substantive and procedural law. However, should use of the e-mail be a possibility several other ethical issues must be examined."; holding that the lawyer must deal with the e-mails rather than just indicate to the client that the lawyer will not analyze or possibly use them; "In the present case, the client clearly wishes the inquirer to use the subject e-mails. Because the inquiry does not make the nature of the litigation between the client and his ex-wife entirely clear, the Committee cannot guess at the objectives of the representation. The Committee notes that the inquirer and the client, if they have not done so already, should clarify those objectives and at least discuss how and whether the e-mails can or should be used. This is entirely consistent with the inquirer's duty under Rule 1.4 Communication specifically, Rule 1.4(a)(2) which obligates a lawyer to 'reasonably

Hypothetical No. 6

At what point may an employee take down, remove or delete posts or deactivate her account on Facebook?

(a) After the accident but before reporting it to the employer?

(b) After report to the employer but before speaking with counsel?

(c) After speaking with counsel on own initiative or upon implied or direct advice with counsel?

ANSWER: With or without the advice of counsel an employee may take a number of actions with respect to her FB account without knowing or realizing the consequences such actions may have on her WC case. Since the employee is not a lawyer and not familiar with the doctrine of spoliation, it is important for claimant's counsel to become familiar with social media and advise the claimant properly regarding deactivation and removal of posts or photos. Indeed, counsel may have a duty to become familiar with social media and its uses as an investigative and research tool, and the potential risks to clients if their messages, posts, videos, photos posted on social media are discovered by an adversary or are the subject of formal pre-trial discovery requests. In March 2016, the Supreme Court of Virginia amended comment 6 to Rule 1.1:

> [6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. **Attention should be paid to the benefits and risks associated with relevant technology.**

As the New York State Bar Association observed:

> Lawyers appreciate that one of the best ways to investigate and obtain information about a party, witness, or juror, without having to engage in formal discovery, is to review that person's social media account, profile, or posts. Lawyers must remember, however, that ethics rules and opinions govern whether and how a lawyer may view such social media communications. Unintended social media communications have ethical consequences when conducting research. For example, by viewing someone's social media profile on a network, such as LinkedIn, a lawyer may cause the holder of the account to be automatically notified by such network of the attempted or actual viewing of the profile. Further, because social media communications are often not just directed at a single person but at a group of people, attorney advertising rules and other related

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consult with the client about the means by which the client's objectives are to be accomplished.' The Committee finds that the inquirer cannot rule out -- at least without being aware of their content -- the possibility that the content of the e-mails may be such as to impose an affirmative duty on the inquirer's part to employ them in pursuing the client' s claims and defenses if they will significantly advance the client's interests.").

> issues raise ethical concerns. It is not always readily apparent that a lawyer's social media communications may constitute prohibited "attorney advertising." Similarly, privileged information may be unintentionally divulged beyond the intended recipient when a lawyer communicates to a group using social media.
>
> Lawyers must be cognizant when a social media communication might create an unintended attorney-client relationship. There are also ethical obligations with regard to a lawyer counseling clients about their social media posts and the removal or deletion of them, which may be subject to litigation or regulatory preservation obligations.

New York State Bar Ass'n Guidelines on Social Media.

Lawyers must be cognizant of Rules 3.4(a), (d) and (e) when advising clients about social media and responding to an adversary's discovery requests.

Rule 3.4. A lawyer shall not

> (a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.
>
> (d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.
>
> (e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

Allied Concrete Co. v. Lester, 285 Va. 295, 736 S.E.2d 699 (2013) is a civil case in which Lester deleted Facebook postings upon advice of his lawyer, Murray. Murray's firm concealed the deletions when preparing discovery answers for Lester. The case resulted in more than a half million dollars in sanctions against Murray and the matter was referred for a bar investigation. http://caselaw.findlaw.com/va-supreme-court/1620235.html

In the Matter of Matthew B. Murray, Virginia State Bar Disc. Bd. (2013), Murray received a five year suspension for violation of Va. Rules 3.4 and 8.4 in connection with *Allied Concrete v. Lester*. http://www.vsb.org/docs/Murray-092513.pdf

New York County Lawyers' Ass'n Opinion 745 (2013) opines that lawyers may (subject to any contrary law specific to the content at issue) advise clients on social media deletions; and, notwithstanding deletion from public view, when copies may need to be preserved for evidentiary purposes. http://www.jdsupra.com/legalnews/nycla-ethics-opinion-745-2013-advisi-92713/

New York State Bar Association, Commercial & Federal Litigation Section, *Social Media Ethics Guidelines* (2017), at Guideline 4.A., offers guidance on *Take Down* issues that are effectively the same as New York County Lawyers' Ass'n Opinion 745. http://www.nysba.org/workarea/DownloadAsset.aspx?id=61111

Florida Bar, Professional Ethics Committee, Proposed Advisory Opinion 14-1 (2014), offers guidance on ethical obligations regarding advising clients to "clean up" social media. http://www.floridabar.org/DIVEXE/RRTFBResources.nsf/Attachments/8E73C71636D8C237852 57DD9006E5816/$FILE/14-01%20PAO.pdf?OpenElement

Hypothetical No. 7

Can defendants or defense counsel search and review an employee's public profiles on SM to discover information related to her WC claim?

ANSWER: Yes. Visiting the employee's SM public profile, blog or web page is permissible and not an attempt to communicate with a represented person.

A lawyer may view the public portion of a person's social media profile or public posts even if such person is represented by another lawyer. However, the lawyer must be aware that certain social media networks may send an automatic message to the person whose account is being viewed which identifies the person viewing the account as well as other information about such person. Making a "friend" request or invitation to connect is a communication and a violation of Rule 4.2 if the person is represented by counsel. Even if the person is not represented, defense counsel may not employ means that are deceptive to connect with a witness or unrepresented employee and may not use non-lawyer agents to do so. For example, it would be unethical for a defense counsel or an agent under their supervision to use a false identity. Some bar opinions require that the investigator or attorney state the reason why they are seeking to connect with the person on FB or LinkedIn. *See, e.g. New York State Bar Ass'n Social Media Guideline No. 3B*:

> A lawyer may request permission to view the restricted portion of an unrepresented person's social media website or profile. However, the lawyer must use her full name and an accurate profile, and she may not create a different or false profile in order to mask her identity. If the person asks for additional information from the lawyer in response to the request that seeks permission to view her social media profile, the lawyer must accurately provide the information requested by the person or withdraw her request.

In New York, there is no "deception" when a lawyer utilizes her "real name and profile" to send a "friend" request to obtain information from an unrepresented person's social media account. NYCBA Formal Op. 2010-2 (2010). In New York, the lawyer is not required to disclose the reasons for making the "friend" request. *Id.* New Hampshire, however, requires that a request to a "friend" must "inform the witness of the lawyer's involvement in the disputed or litigated

matter," the disclosure of the "lawyer by name as a lawyer" and the identification of "the client and the matter in litigation." N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012). San Diego requires its lawyers to disclose the lawyer's "affiliation and the purpose for the request." San Diego County Bar Ass'n Legal Ethics Comm., Op. 2011-2 (2011). Philadelphia notes that the failure to disclose that the "intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness" constitutes an impermissible omission of a "highly material fact." Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2009-2 (2009). In Oregon, there is an opinion that, if the person being sought out on social media "asks for additional information to identify the lawyer, or if the lawyer has some other reason to believe that the person misunderstands her role, the lawyer must provide the additional information or withdraw the request. Oregon State Bar Comm. on Legal Ethics, Formal Op. 2013-189 (2013).

Hypothetical No. 8

Is it ethical for counsel to advise their client to change their privacy settings or use apps like Snap Chat or other SM apps which by their nature are not discoverable?

ANSWER: It is proper, if not an ethical duty, for counsel to advise claimants about the risks of posting and uploading photos and videos to their SM profiles. It is also proper to advise a litigation client to take down or remove posts, photos or videos that may be embarrassing or detrimental to their case if observed by others if that such data is preserved and not permanently deleted or destroyed. A litigation client may be instructed to deactivate a SM account if that data is preserved and kept that may be the subject of discovery.

New York State Bar Association Social Media Guideline 4A (Removing Social Media):

A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information. New York County Lawyers'Ass'n Comm. on Prof'l Ethics ("NYCLA"), Formal Op. 745 (2013). Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject to a duty to preserve.

A lawyer must ensure that potentially relevant information is not destroyed "once a party reasonably anticipates litigation" or in accordance with common law, statute, rule, or regulation. Failure to do so may result in sanctions. "[W]here litigation is anticipated, a duty to preserve

evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence, there is no ethical bar to 'taking down' such material from social media publications, or prohibiting a client's lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer." NYCLA Formal Op. 745 (July 2, 2013).When litigation is not pending or "reasonably anticipated," a lawyer may more freely advise a client on what to maintain or remove from her social media profile. A lawyer needs to be aware that the act of deleting electronically stored information does not mean that such information cannot be recovered through the use of forensic technology. This similarly is the case if a "live" posting is simply made "unlive."

New York State Bar Ass'n Guideline 4B (Adding New Social Media Content)

A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim." *Id.*

Hypothetical No. 9

If an employer, insurer or claims adjuster presents social media relevant to claim defense, does defense counsel have an ethical obligation to inquire as to how it was obtained?

ANSWER: No, there is no duty to question persons who are outside the supervisory authority of defense counsel about the means or investigative techniques used to obtain evidence.

However, even if the lawyer was not complicit and therefore not subject to discipline under Rule 5.3, there may be legal consequences and embarrassment if the lawyer uses evidence obtained unlawfully or in violation of the legal rights of third parties. *See discussion under Hypothetical 5 at p. 12 and further below*. A lawyer that engages in "willful blindness" could be blindsided, for example, if his or her adversary knows how the evidence was obtained but the lawyer dos not. A lawyer may have a duty to make inquiry if he or she knows that the adjuster or investigator routinely uses deception or other means of questionable provenance in their investigations.

Lawyers need to use caution when communicating with a client or client's agent about her connecting to or "friending" a represented person and obtaining private information from that represented person's social media site. It is one thing if the client or client's agent obtains the information independently without the lawyer's knowledge or involvement. It's a totally different matter—and an ethics issue—if the client is seeking advice from the lawyer about making an *ex parte* contact with a represented adversary; or, the lawyer is encouraging or

recommending that the client initiate a friend request or an invitation to connect with a represented adversary.

New York State Bar Ass'n Guideline No. 4.D (A Lawyer's Use of Client-Provided Social Media Information)

A lawyer may review the contents of the restricted portion of the social media profile of a represented person that was provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain confidential information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person.

New Hampshire opines that a lawyer's client may, for instance, send a "friend" request or request to follow a restricted Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety "depends on the extent to which the lawyer directs the client who is sending the [social media] request," and whether the lawyer has complied with all other ethical obligations. N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

Represented adversaries may communicate directly with each other without their lawyers' knowledge or consent. *See* Comment [4] to Va. Rule 4.2. But state bar opinions differ about whether a lawyer may direct or encourage the client to communicate directly with a represented adversary. Many jurisdictions take the view that the lawyer may not use the client as an intermediary to circumvent Rule 4.2. See Va. Rule 8.4(a)(lawyer may not violate the RPC through the agency of another). Other jurisdictions take the view that the lawyer may advise the client regarding communications the client may lawfully make. Still other jurisdictions allow the lawyer to advise the client regarding the *content* of such communications.

Below is a discussion of cases applying these positions—albeit not in a social media context—however, they are instructive on the extent to which a lawyer can ethically be involved in a client's direct contact with a represented adversary.

"Parties"—presumably meaning clients generally—are free to bypass their lawyers and communicate directly with each other. A 2002 amendment to comment [4] to ABA Model Rule 4.2 specifies that "[p]arties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." See *Miano v. AC&R Adver. Inc.*, 148 F.R.D. 68, 83 (S.D.N.Y. 1993) (when client asks lawyer if he should approach represented opponent, lawyer may tell client it is "not prohibited should he independently decide to do so"; lawyer free to use tape recordings legally made by plaintiff); see also ABA Formal Ethics Op. 92-362 (1992) (lawyer who has made settlement offer to opposing counsel but suspects offer has not been conveyed has "duty to discuss [with his own client] not only the limits on the lawyer's ability to communicate with the offeree-party, but also the freedom of the offeror-party to communicate with the opposing offeree-party"). In a more recent opinion, The American Bar Association opines that a "lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be

addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who – the lawyer or the client – conceives of the idea of having the communication . . . . [T]he lawyer may 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. American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (2011).

Although Model Rule 4.2 does not use the language of the predecessor DR 7-104(A)(1) of the Model Code, which specifically prohibited a lawyer from "causing another" to engage in prohibited ex parte communications, Model Rule 8.4(a) clearly states the blanket prohibition on assisting or inducing another to violate an ethics rule, or doing so "through the acts of another." See *Holdren v. Gen. Motors Corp.*, 13 F. Supp.2d 1192, 1195, 14 Law. Man. Prof. Conduct 432 (D. Kan. 1998) (no basis to conclude "that a substantive change was intended when the concepts were separated into two different rules"). Moreover, in 2002 the ABA added language to comment [4] to Model Rule 4.2 clarifying that "[a] lawyer may not make a communication prohibited by this Rule through the acts of another."

The line between permissible discussion and impermissible assistance is unclear. *In re Pyle*, 91 P.3d 1222, (Kan. 2004), was a personal injury case in which a woman was suing her boyfriend. At the woman's request, her lawyer prepared an affidavit for her to deliver to her boyfriend. The court found that the lawyer had "circumvented the constraints of KRPC 4.2 by encouraging his client to do that which he could not." See also *Holdren v Gen. Motors Corp.*, 13 F. Supp.2d 1192, 1195, (D. Kan. 1998) ("While it is true that plaintiff's counsel encouraged his client's actions only after plaintiff specifically asked about obtaining written statements, the court finds that such conduct crosses the line and violates Rule 4.2 'through the acts of another'"; protective order issued); *Trumbull County Bar Ass'n v. Makridis*, 671 N.E.2d 31 (Ohio 1996) (publicly reprimanding plaintiff's lawyer in personal injury suit who, three days before trial, suggested that plaintiff call defendant and tell her what he planned to testify to at trial; during call, plaintiff handed telephone to lawyer, who continued conversation); California Formal Ethics Op. 1993-131 (1993) (lawyer may confer with client about strategy to be pursued in client's communication with opposing party, but content of communication must originate with client); New York City Ethics Op. 2002-3, 18 Law. Man. Prof. Conduct 553 (2002) (if client "conceives of the idea" of communicating with represented party, lawyer may advise client about it but must avoid helping client to either elicit confidential information or encourage other party to proceed without his or her counsel").

A lawyer is not responsible for ex parte communications made by agents and investigators working for and at the direction of the client. See *Jones v. Scientific Colors Inc.*, 201 F. Supp.2d 820 (N.D. Ill. 2001) (defendant employer's counsel did not communicate or cause defendant's undercover investigators to communicate with plaintiff employees); *Babbs v. Minton*, 2004 WL 1367621 (Ky. Ct. App. 2004) (lawyer for plaintiff suing former employer for wrongful termination hired reference-check agency to pose as prospective employer and solicit information as "a 'trick' to find out if the former employer would give a bad reference"; court endorsed trial court's orders disqualifying lawyer and suppressing results of conversation); Michigan Informal Ethics Op. RI-315 (1999) (whether investigators' acts may be imputed to

lawyer turns on whether investigators can be said to have been "employed by, retained by, or associated with" lawyer; lawyer does not violate ethics rules by "acquiescing in the investigative techniques" used by agents employed by insurance company and not working at lawyer's direction).

In *Midwest Motor Sports v. Arctic Cat Sales Inc.*, 347 F.3d 693, (8th Cir. 2003), a snowmobile dealership franchisee was suing the franchisor for wrongful termination. Counsel for the franchisor hired a private investigator to pose as a customer visiting the plaintiff's showroom. The investigator secretly tape-record conversations with the plaintiff's low-level employees. The court found that counsel intended to elicit specific admissions "that the attorneys [knew] would be advised against by the [corporation's] counsel" and, as a sanction for violating Rule 4.2, excluded the evidence. The court added that counsel had violated not only Rule 4.2 but also Rule 8.4(a) (violating rule through acts of another) and Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

The distinction between observing and communicating is particularly important in the litigation context if the court is being asked to exclude evidence as a sanction for a lawyer's violation of the anti-contact rule. See *Gidatex SrL v. Campaniello Imp. Inc.*, 82 F. Supp.2d 119, (S.D.N.Y. 1999) (investigators posing as furniture customers "did nothing more than observe and record the manner in which Campaniello employees conducted routine business"); *Hill v. Shell Oil Co.*, 209 F. Supp.2d 876, 880 (N.D. Ill. 2001) (using similar rationale to conclude that Rule 4.2 is inapplicable when plaintiff in discrimination case uses "testers" to engage in normal business transactions with defendant's employees); see also Oregon Ethics Op. 2001-164, 17 Law. Man. Prof. Conduct 124 (2001) (lawyer may visit Web site of opposing party but may not elicit responses concerning subject of representation). Cf. *In re Howes*, 940 P.2d 159 (N.M. 1997) (prosecutor violated anti-contact rule by listening to criminal defendant discuss case without his counsel on several occasions, even though defendant initiated discussions and prosecutor asked no questions; "[o]ne can communicate interest and concern simply by indicating a willingness to listen"). See generally Julian J. Moore, *Home Sweet Home: Examining the (Mis)-Application of the Anti-Contact Rule to Housing Discrimination Testers*, 25 J. Legal Prof. 75 (2001).

Hypothetical No.10

Can you ethically post your high-profile victories and case outcomes on social media? If not, why is it permissible to do so with Virginia Lawyers Weekly and interviews with newspaper reporters?

ANSWER: Yes, provided that the case outcomes are not false or misleading.

Effective July 1, 2017, lawyers are not required to use the mandatory disclaimer to publicize specific case results ; however some specific outcomes may need explanation and placed in context to avoid making a misleading statement or claim or unjustified expectations about the results the lawyer can achieve. For example, a lawyer may claim that he won a $1 Million

verdict in court, which on its face may be true. However, the statement is misleading if the lawyer fails to disclose that the opposing party offered $2 Million to settle before trial.