

FIGHTING FIRE WITH FIRE: PRIVATE ATTORNEYS USING THE SAME INVESTIGATIVE TECHNIQUES AS GOVERNMENT ATTORNEYS: THE ETHICAL AND LEGAL CONSIDERATIONS FOR ATTORNEYS CONDUCTING INVESTIGATIONS

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I. INTRODUCTION

As any litigator knows, cases are won or lost on the facts. Effective factual development and investigation are crucial to the success of any case. But lawyers are often faced with legal and ethical dilemmas concerning the investigative techniques they and their investigators want to use. This is particularly true in criminal cases, where discovery is extremely limited.

One of the thorniest issues is the use of deception and other surreptitious techniques to gather information. While such tactics have long been the bread and butter of investigations led by government attorneys, ethics opinions and statutes often draw a distinction between what is proper conduct for a government attorney and what a private attorney can do. This Article examines the legal and ethical considerations New York lawyers face when using the exact same techniques relied on by government lawyers, including deception, secret audio recordings, video surveillance, computer data analysis, document gathering, and witness interviews. Also considered are the significant advantages the government enjoys from numerous statutory exceptions

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that allow the government to use techniques to gather information that private attorneys are prohibited from using.

It is important to note that, while the investigative techniques discussed in this Article are often implemented by an investigator working under the supervision of an attorney, rather than by the attorney herself, attorney ethics rules apply with equal force when the conduct is merely supervised by an attorney. That is so because the ethics rules make it clear that attorneys are responsible for the conduct of those over whom they have supervisory authority.¹

Given these rules, attorney conduct and attorney-supervised conduct by an investigator or member of law enforcement are considered interchangeably in this Article. I express no view as to the degree of independence from an attorney that an investigator needs to be free of attorney ethics rules. I do caution, however, that even if attorney ethics rules do not apply, unlawful investigative techniques (anything from wiretapping to so-called consensual recordings in states that require two-party consent, for example) can never be used.

II. DECEPTION

To what extent can lawyers or their investigators misrepresent their identities, allegiances, or purposes to gather information? The government, of course, does this all the time. Undercover law enforcement officers infiltrate various groups to gather information, such as drug importation and distribution networks, organized crime families, prostitution rings, stock scamming operations, political groups, Internet chat rooms. In all of these instances, law enforcement officers misrepresent their identities. That is so, obviously, because if law enforcement officers were to identify themselves as such, it is unlikely persons involved in unlawful activity would speak openly in front of them. Under the supervision of government attorneys, law enforcement officers create fake identities, set up fake businesses, concoct phony résumés and references, and even plant nonexistent cases into court

1. See MODEL RULES OF PROF'L CONDUCT R. 5.3(b)-(c)(1) (2007) ("[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of 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 . . ."); MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2007) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct . . . or do so through the acts of another . . ."); N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(2) (2007) ("A lawyer . . . shall not . . . [c]ircumvent a Disciplinary Rule through actions of another.").

dockets—all in the effort to investigate possible criminal conduct.

But as defense attorneys, we too want people to speak honestly and openly to us or to our investigators. Fortunately, in New York, the law imposes few restraints on simply misrepresenting one's identity or purpose merely to obtain information. Instead, New York's penal statutes targeting misrepresentations of one's identity are narrowly tailored to very specific types of misrepresentations—generally, misrepresentations intended to further a crime or to impede law enforcement.

For example, New York Penal Law section 190.23, False Personation, makes it a class B misdemeanor to misrepresent one's "name, date of birth or address to a police officer."² Penal Law section 190.25, Criminal Impersonation in the second degree, makes it a class A misdemeanor when one (1) "impersonates *another* and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another;"³ or (2) pretends to be a member of an organization with intent to benefit or defraud; or (3) pretends to be a public servant (or wears a badge or uniform) or pretends to be acting with the approval of a public agency to induce another to: (i) submit to pretended authority, (ii) solicit funds, (iii) act in reliance on that pretense.⁴ Thus, under section 190.25, it would seem that misrepresenting one's identity merely to obtain information is not a crime, provided one does not pretend to work for the government or a particular organization.

Finally, Penal Law section 190.26, Criminal Impersonation in the first degree, makes it a class E felony to (1) pretend to be a police officer or acting under the authority of the police; and (2) cause another to rely on that pretense and in the course of which the impersonator commits or attempts to commit a felony; or, (3) pretend to be a physician or other person authorized to issue prescriptions and orally communicates a prescription to a pharmacist.⁵ Obviously, a lawyer may not instruct or condone an investigator posing as a member of law enforcement to gain information.⁶

But what about the situation that mirrors a typical undercover

2. N.Y. PENAL LAW § 190.23 (McKinney 1999).

3. *Id.* § 190.25 (emphasis added). Impersonation of "another" is understood to mean impersonating a "real person." *See, e.g.,* *People v. Sadiq*, 654 N.Y.S.2d 35, 36 (App. Div. 1997). No case has held that merely using a phony identity is illegal where one does not pretend to be another real person.

4. N.Y. PENAL LAW § 190.25 (McKinney 1999).

5. N.Y. PENAL LAW § 190.26 (McKinney Supp. 2007).

6. Lawyers are always ethically prohibited from committing crimes. *See* N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(3) (2007); MODEL RULES OF PROF'L CONDUCT R. 8.4 (2007).

police operation, where an investigator uses a fake identity for the purpose of obtaining information? While such conduct would not necessarily violate any of New York's false impersonation laws, some bar associations have proclaimed that such conduct is unethical if sanctioned by the supervising attorney.

Both the ABA *Model Rules of Professional Conduct* ("ABA Model Rules") and the *New York Code of Professional Responsibility* ("New York Code") generally prohibit false statements by attorneys. For example, DR 1-102(A)(4) of the New York Code states: "A lawyer or law firm shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."⁷ Similarly, ABA Model Rule 8.4(c) provides: "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ."⁸ In addition, New York Code DR 7-102(A)(5) states that "a lawyer shall not . . . [k]nowingly make a false statement of law or fact."⁹ ABA Model Rule 4.1(a) states that "[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person."¹⁰ Therefore, both the ABA Model Rules and the New York Code can be read to prohibit any deception in an attorney-supervised investigation.¹¹

All is not lost, however. A recent opinion from the New York County Lawyer's Association ("NYCLA") distinguishes an investigator's deception or "dissemblance," which is permissible, from "dishonesty, fraud, misrepresentation, and deceit," which is not. While there is no bright line between dissemblance and dishonesty, it would appear to be one of the "degree and purpose of dissemblance."¹² According to the opinion, "[d]issemblance 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."¹³ The opinion also carves out an exception for government attorneys supervising law enforcement personnel¹⁴ and focuses on misstatements made by

7. N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (2007).

8. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007).

9. N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(5) (2007).

10. MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2007).

11. Interestingly, and addressed further below, there is no law enforcement exception in either the ABA Model Rules or the New York Code. *See infra* note 20 and accompanying text.

12. NYCLA Comm. on Prof'l Ethics, Formal Op. 737, at 2 (2007).

13. Formal Op. 737, at 2-3 (footnote omitted); *see also* N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-104 (2007).

14. Formal Op. 737, at 3. Some state rules specifically permit subterfuge in investigations

investigators, not by attorneys directly.¹⁵ The NYCLA opinion concludes that non-government attorneys do not violate ethics rules while supervising non-attorney investigators employing a limited amount of dissemblance as long as:

- (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and
- (ii) the evidence sought is not reasonably available through other lawful means; and
- (iii) the lawyer's conduct and the investigators' conduct that the lawyer is supervising do not otherwise violate the Code (including, but not limited to, DR 7-104, the "no-contact" rule) or applicable law; and
- (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties.¹⁶

The NYCLA opinion further adds, "the investigator must be instructed not to elicit information protected by the attorney-client privilege."¹⁷

By limiting the use of deception to the investigation of "a violation of civil rights or intellectual property rights," the NYCLA opinion attempts to reconcile the ethics rules with the majority of judicial opinions that have held (albeit in the context of whether or not to suppress evidence) that dissemblance by an investigator is not ethically proscribed to investigate discrimination and trademark infringement cases.¹⁸

supervised by government lawyers in criminal or regulatory investigations. See ALA. RULES OF PROF'L CONDUCT R. 3.8(2) (2007); FLA. RULES OF PROF'L CONDUCT R. 4-8.4(c) (2007).

15. Formal Op. 737, at 3.

16. *Id.* at 5-6 (footnote omitted).

17. *Id.* at 6.

18. *Id.* at 5; see, e.g., *Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 880 (N.D. Ill. 2002) (explaining that in a discrimination lawsuit, "secret videotapes of [service] station employees reacting (or not reacting) to plaintiffs and other persons posing as consumers. . . do not rise to the level of communication protected by [Model] Rule 4.2"); *United States v. Parker*, 165 F. Supp. 2d 431, 476 (W.D.N.Y. 2001) ("[P]rohibition against attorney misrepresentations in DR 1-102(A)(4) [is] not applicable to use of undercover investigations initiated by private counsel in trademark infringement case[s].") (citing *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119, 123-24 (S.D.N.Y. 1999)); *Gidatex*, 82 F. Supp. 2d at 122 (holding that investigators posing as consumers to interview store clerk not a misrepresentation, but rather "an accepted investigative technique"); *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456, 475 (D.N.J. 1998) ("The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed. . ."). Another approach is taken by David B. Isbell and Lucantonio N. Salvi. They suggest that misrepresentations made by an investigator under the supervision of an attorney do not violate ABA Model Rule 4.1 because the rule only applies to misrepresentations made by an attorney "in the course of representing a client . . . i.e. acting in the capacity of a lawyer." David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and*

While NYCLA Opinion 737 permits dissemblance by a non-government investigator in some circumstances, those circumstances are extremely narrow.¹⁹ The acceptable use of dissemblance by an investigator should be broader. For example, it should certainly apply to the defense of criminal cases. As long as the misrepresentations made by an investigator are aimed at gathering information and developing the underlying facts of a case, there is no reason why it should be limited to civil rights and intellectual property cases. Certainly, the defense of a person accused of a crime is of at least equal importance.

There should also be no exception permitting only government attorneys to use deception. To say that the pursuit of law enforcement is of greater importance than the pursuit of justice by assuring a fair trial in a criminal case is unjustifiable. Indeed, neither the ABA Model Rules nor the New York Code make any “deception exception” for government attorneys.²⁰ Nevertheless, NYCLA Opinion 737 distinguishes between the ethical restrictions on government versus non-government attorneys.²¹

The NYCLA never states why government attorneys can be held to a lower ethical standard than private attorneys,²² and none can be imagined. Given law enforcement’s long history of using deception in investigations, it is inconceivable that any ethics opinion could ever reach the conclusion that traditional undercover investigator deception under the supervision of a government attorney would violate the ethics rules. That being the case, fairness dictates that private attorneys should be permitted to fight fire with fire and employ similar undercover investigative techniques frequently used by government attorneys in their investigations when aimed at getting at the truth. If we recognize that deception is needed to get certain persons to speak the truth, then we must accept deception by all who seek the truth—prosecutors and defense attorneys alike.

Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct, 8 GEO. J. LEGAL ETHICS 791, 811-12 (1995). They also conclude that investigator misrepresentations do not violate ABA Model Rule 8.4 because that rule does not apply to “misrepresentations of the mild sort necessarily made by . . . undercover investigators.” *Id.* at 812.

19. As the NYCLA opinion points out, the ABA has left “for another day the separate question of when investigative practices involving misrepresentations of identity and purpose nonetheless may be ethical.” Formal Op. 737, at 3 (citation omitted).

20. *See id.*

21. *Id.* at 5.

22. “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.” *Id.* at 3.

III. GAINING ENTRY TO A PREMISES THROUGH DECEIT

It is at times necessary to gain entry to premises, both to inspect and photograph a physical location itself or to gain access to witnesses who work or reside at the premises. The government is able to obtain search warrants to enter private premises and gather evidence. Indeed, in certain exceptional circumstances, members of law enforcement can even enter premises without a search warrant. The government also has the ability to issue grand jury subpoenas to obtain statements from witnesses during the investigation of its case.

In contrast, non-government attorneys have no ability to gain entry to private locations and no investigative subpoena power. Of course, any type of forced entry is illegal and therefore violates the ethical rules as well. However, may an attorney supervise an investigator who will use subterfuge to gain entry as an invitee? Under New York law, doing so would probably constitute the crime of Criminal Trespass in the third degree,²³ a class B misdemeanor, and therefore would violate the disciplinary rules.²⁴

The elements of Criminal Trespass in the third degree are: (1) knowingly; (2) entering or remaining unlawfully; (3) in a building or upon real property.²⁵ According to the definition section of Penal Law section 140.00(5), a person “enters or remains unlawfully” in a premises “when he is not licensed or privileged to do so.”²⁶ As the Practice Commentaries that accompany Penal Law section 140.00 note:

Key to whether one’s presence on the premises of another is lawful is whether one was “licensed or privileged” to enter or remain in or upon the premises “In general, a person is ‘licensed or privileged’ to enter private premises when he has obtained the consent of the owner or another whose relationship to the premises gives him authority to issue such consent.” *People v. Graves*, 555 N.E.2d 268, 269 (N.Y. 1990). In the absence of such license or privilege, a person will generally be deemed to have entered or remained unlawfully on the premises.²⁷

Gaining the consent of the owner by deception does not create a valid “license or privilege” and therefore the person has entered the premises unlawfully. As the Practice Commentaries accompanying

23. N.Y. PENAL LAW § 140.10 (McKinney Supp. 2007).

24. See N.Y. CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(3) (2007); MODEL RULES OF PROF’L CONDUCT R. 8.4 (2007).

25. N.Y. PENAL LAW § 140.10 (McKinney Supp. 2007).

26. N.Y. PENAL LAW § 140.00(5) (McKinney 1999).

27. William C. Donnino, Practice Commentary to N.Y. Penal Law § 140.00 (1998).

Penal Law section 140.00 further state:

A person “who gains admittance to premises through intimidation or by deception, trick or artifice, does not enter with ‘license or privilege.’”²⁸

Various misrepresentations used to gain entry to a premises have been held to satisfy the “enters or remains unlawfully” element of criminal trespass (and burglary, which shares the same element).²⁹

While it should be noted that in all of these cases (except *Segal*) the purpose of the illegal entry was to commit some additional crime, not merely to gather information. An investigator who uses a ruse to gain entry to a premises nevertheless does so at the risk of committing Criminal Trespass. An attorney who puts him up to it is subject to prosecution for conspiracy and is also subject to discipline.

Yet, law enforcement officers appear to commit this crime frequently. When working undercover—that is, using a false identity for the purpose of deceiving others—it seems clear that a law enforcement officer who gains entry to a private location as part of his undercover persona has done so in violation of New York’s trespassing statutes. If courts and bar associations overlook such practices by the government because they are necessary in the search for the truth, then they should equally be permitted by private counsel building a defense.

IV. AUDIO RECORDINGS: THE DEFENSE ATTORNEY’S GRAND JURY

When a material issue of fact comes down to “he says/she says,” a single audio recording can avoid months of litigation and tremendous expense to both parties. While lawyers in civil cases have the ability to compel depositions in order to nail down potential trial testimony, in neither state nor federal criminal prosecutions in New York are there depositions of witnesses.³⁰ Unless there are tape recordings taken during

28. *Id.* (quoting Denzer & McQuillan, Practice Commentary to N.Y. Penal Law § 140.00 (1967)).

29. *See, e.g.*, *People v. Mitchell*, 647 N.Y.S.2d 637, 638 (App. Div. 1996) (posing as a utility repairman); *People v. Rosa*, 589 N.Y.S.2d 881, 881 (App. Div. 1992) (posing as police officers); *People v. Piro*, 504 N.Y.S.2d 163, 164 (App. Div. 1986) (telling a contractor doing work in a home that defendant was “a relative of the family”); *People v. Thompson*, 501 N.Y.S.2d 381, 382 (App. Div. 1986) (man claiming he was “representing the Senior Citizens”); *People v. Hutchinson*, 477 N.Y.S.2d 965, 966 (Sup. Ct. 1984) (defendant pretended he was at apartment to leave a note for “Leroy,” a person who did not exist), *aff’d*, 503 N.Y.S.2d 702 (App. Div. 1986); *People v. Segal*, 78 Misc.2d 944, 358 N.Y.S.2d 866, 868 (Crim. Ct. 1974) (posing as a journalism student under a fake name to gain entry to CBS television studios).

30. Some states, such as Florida, do allow witnesses to be deposed in criminal cases. *See* FLA. R. CRIM. P. § 3.220(h).

the course of the alleged crime itself, or summaries of prior statements of witnesses as either *Rosario*³¹ material or Jencks Act³² material, criminal defense attorneys in these jurisdictions learn what a witness is going to say for the first time when the witness testifies at trial. Prosecutors, unlike defense attorneys, have the ability to “lock in” a witness’s testimony by subpoenaing the witness to a grand jury. Unfortunately, grand jury testimony need only be made available to defense counsel until shortly before (or at) trial and only if the witness is actually called to testify. In practice, the inherently coercive influence of a request by law enforcement officers to chat often convinces witnesses to talk to the government even when under no compulsion to do so, as in non-grand jury cases. By contrast, witnesses are frequently unwilling to speak with defense counsel or to a private investigator.

For this reason, defense attorneys want to “lock in” witness testimony by recording witness interviews. A recorded conversation, though it differs from grand jury testimony in that it cannot be compelled and is not under oath, is perhaps the closest thing a defense attorney has to the prosecutor’s ability to subpoena witnesses to a grand jury and cement a witness’s story. To combat the government’s ability to compel witnesses to commit to testimony pre-trial, private attorneys must seriously consider recording witness interviews.³³

In the digital age, creating and working with high-quality audio recordings of conversations has become easier than ever. For recording phone conversations, many modern office phone systems and cell phones come with a “record” feature already built in, that allows a party to record a phone conversation, which is then saved as a voicemail message or an MP3. In addition, there are several inexpensive commercially available digital recorders that connect phone to computer and can record a telephone conversation, which is then saved as a .wav file directly onto the computer. If a computer is unavailable, several handheld digital voice recorders have accessories that connect to both landlines and cell phones to record conversations. Readily available computer software can also transform laptops into recording devices.

31. See N.Y. CRIM. PROC. LAW § 240.45 (McKinney 2002); see also *People v. Rosario*, 173 N.E.2d 881 (N.Y. 1961) (the *Rosario* rule).

32. See Jencks Act, 18 U.S.C. § 3500 (2000).

33. New York, like many jurisdictions, allows conversations to be recorded with the consent of one party. The other party or parties to the conversation need not consent or even be told of the recording. See N.Y. PENAL LAW § 250.00 (McKinney Supp. 2007); N.Y. PENAL LAW § 250.05 (McKinney 2000). Other jurisdictions require the consent of all parties to a recording. See, e.g., CAL. PENAL CODE § 632(a) (West 1999); WASH. REV. CODE ANN. § 9.73.030(1)(a) (West 2003). One must know the law not only of the jurisdiction in which the person recording is located, but also the law of the jurisdiction where the other participant is located.

Digital recorders are easily disguised as watches, ballpoint pens, or cell phones, making it possible to create very high-quality digital recordings in virtually any environment. Digital recordings can be quickly copied, enhanced, e-mailed, and shared with others who have access to the computer network.

Any recording will have to be authenticated if it is to be received into evidence. The easiest method for authenticating a recording is to have one of the participants to the conversation testify that the recording accurately reflects the conversation. That may be awkward where the only participants are an adverse witness and either the trial attorney or the client. Therefore, if counsel anticipates entering the recording into evidence, using an investigator to conduct the interview is essential.

More often than not, audio recordings of a witness will never actually be entered into evidence. Instead, if the witness's testimony is inconsistent with the recorded interview, counsel may impeach the witness by asking him about the recorded conversation or playing the recording for him (through earphones or otherwise out of the presence of the jury) and ask the witness whether the witness previously made *xyz* statement, which contradicts his *abc* trial testimony. Most witnesses, when confronted with an audio recording of themselves, will admit that they said something different on a prior occasion. If they do not, then in the same way that prior sworn testimony, such as grand jury testimony, can be admitted into evidence should the witness deny making the prior inconsistent statement, courts may admit that portion of the authenticated recording which directly contradicts the witness's testimony to show the inconsistency.

Unfortunately, most witnesses, especially adverse witnesses, are reluctant to speak openly, if at all, about a case if they know their answers are being recorded. Accordingly, it is usually necessary to record the conversation without the knowledge or consent of the witness.

There are several legal and ethical issues to consider when secretly recording conversations. In all jurisdictions, secret recording requires the consent of at least one party. Secretly recording a conversation without the consent of at least one party is wiretapping and violates federal and state law;³⁴ it also obviously violates ethical rules.³⁵ One-party consent recording, however, is legal in most jurisdictions, including New York and under federal law.³⁶

34. See, e.g., 18 U.S.C. § 2511 (2000); N.Y. PENAL LAW § 250.05 (McKinney 2000). There are exceptions for the government, though they usually require judicial authorization.

35. See MODEL RULES OF PROF'L CONDUCT R. 8.4 (2007).

36. See *supra* note 34 and accompanying text. As of this writing, the following states require two-party consent: California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts,

Provided the recording is not illegal in the jurisdiction in which the unknowing party is to be recorded, the next issue is whether it is unethical for an attorney to do it or to advise others to do it. There is a difference of opinion among the bar associations as to whether secret recordings by attorneys are unethical.

At one time, the ABA determined that secret recording of conversations was unethical unless conducted by law enforcement officials.³⁷ Recently, however, evidently catching up to actual practice, the ABA has concluded that secret recording (provided it is not illegal in the relevant jurisdiction) is not unethical. However, if asked, the attorney cannot falsely represent that the conversation is not being recorded if in fact the recorder is on.³⁸

There is considerable tension between that opinion and the longstanding opinion of the New York State Bar Association (“NYSBA”), which concluded that nonconsensual recordings are always unethical, except in “extraordinary circumstances.”³⁹ However, even that opinion has a large exception: an attorney may counsel a client to record a conversation secretly.⁴⁰

The situation is further muddled by the opinion of the Association of the Bar of the City of New York (“ABCNY”). At one time, the ABCNY was of the view that secret recording was permissible in criminal cases—by both prosecutors and defense counsel.⁴¹ Subsequently, ABCNY determined that “undisclosed taping as a routine practice is ethically impermissible” except where it “advances a generally accepted societal good.”⁴² Examples of permissible recording have been found to include “the investigation of ongoing criminal conduct or other significant misconduct” or “with respect to individuals who have made threats against the attorney or a client or with respect to witnesses whom the attorney has reason to believe may be willing to commit perjury (in either a civil or a criminal matter).”⁴³

The most liberal view on secret recording is that of the NYCLA,

Michigan, Montana, New Hampshire, Pennsylvania, and Washington. But note that one two-party consent state, California, has interpreted its restrictions to reach recordings made out-of-state where the unknowing party is in-state. *See Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 930-31 (Cal. 2006). The other two-party consent states may follow California’s lead on imposing its laws on out-of-state callers.

37. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 337 (1974).

38. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 01-422, at 1-2, 6 (2001).

39. NYSBA Comm. on Prof’l Ethics, Formal Op. 328 (1974).

40. NYSBA Comm. on Prof’l Ethics, Formal Op. 515 (1979).

41. ABCNY Comm. on Prof’l Responsibility, Formal Op. 80-95 (1985).

42. ABCNY, Formal Op. 2003-02 (2003).

43. *Id.* ABCNY has also issued an opinion that it is unethical for attorneys to secretly record other attorneys. *See* ABCNY Comm. on Prof’l and Judicial Ethics, Formal Op. 1995-10 (1995).

which concluded that lawyers may secretly tape conversations in all circumstances, *including with other lawyers*, provided that the lawyer does not misrepresent whether the conversation is being recorded.⁴⁴ With stricter ethics opinions governing attorneys in the same jurisdiction, however, it is difficult to chart the proper course.

In a decision on a motion to suppress tape recordings secretly made at the behest of an attorney, one New York court concluded that the secret taping was permissible.⁴⁵ When one of the plaintiffs asked her attorney how to record the obscenities and racial slurs that were commonplace at her job, the attorney advised her how to create a secret recording. The resulting tape caught a voice alleged to be a Key Food supervisor asking whether a job applicant was a “f*****g n*****r.”⁴⁶ At trial, the defendants moved to suppress the tapes as a violation of the disciplinary rules’ prohibition of “fraudulent or dishonest conduct.”⁴⁷ The court responded clearly: “Contemporary ethical opinions hold that a lawyer may secretly record telephone conversations with third parties without violating ethical strictures so long as the law of the jurisdiction permits such conduct.”⁴⁸

The *Mena* case illustrates how taping can be beneficial, and even necessary, in a civil case. The decision could be read narrowly, since the lawyer in that case only advised his clients that their secret taping would be legal; the lawyer did not initiate the recording or do the taping on his own. But *Mena* should be read more broadly than that. The legal profession must have a clear signal that secret taping, when legal and done for a purpose other than to harass, is not unethical. While some bar associations make distinctions depending on whether “public” or “private” interests are served by secret taping, these distinctions are not justifiable. Inevitably, the same considerations that led to the change in view regarding secret taping were permissible when advancing the “public interest”—that is, the outcome of criminal cases—must lead to expanding the rule to cover all civil litigation as well. There is simply no basis to shield witnesses who will tell one story in court and another out of court.

Secretly recording a witness should be an available option for non-government attorneys, especially since government attorneys use this technique all the time. A witness will tend to be more forthright when he

44. NYCLA Comm. on Prof’l Ethics, Question No. 696, at 3-6 (1993).

45. In *Mena v. Key Food Stores Cooperative, Inc.*, 758 N.Y.S.2d 246, 247, 250 (Sup. Ct. 2003), supermarket workers alleged racial bias in the workplace.

46. *Id.* at 247.

47. *Id.*

48. *Id.* at 248.

does not know the conversation is being recorded. Of course, witness candor advances, not impedes, the search for the truth. This is no principled reason why secretly recording witnesses should be an accepted investigative technique for members of law enforcement, but not for private attorneys. Drawing some artificial distinction keeps the playing field uneven and hinders the advancement of justice.

While secretly recording conversations with witnesses, as well as with other attorneys, may be neither unlawful nor unethical,⁴⁹ there are practical reasons why lawyers may not wish to routinely record conversations. For example, if lawyer recordings become commonplace, it may impede the public's willingness to ever speak openly with an attorney. By recording a conversation with a witness, including the client, the lawyer may be creating discoverable evidence and would have the concomitant obligation of properly preserving that evidence.⁵⁰ Ultimately, practical considerations such as these may outweigh the usefulness of routinely recording conversations with anyone, and recording should be reserved for those situations where one believes one is going to need the recording in court.

V. VIDEO SURVEILLANCE

Surveillance video cameras are now a part of everyday life. In the recent words of New York City Mayor Michael Bloomberg, “[i]n this day and age, if you think that cameras aren’t watching you all the time, you are very naive We are under surveillance all the time It’s ridiculous, people who object to using technology”⁵¹ Mayor Bloomberg’s comments were made in support of his plan to install more cameras in New York City streets, subways, and buses.⁵²

There is no blanket legal prohibition on secretly video recording the activities of individuals. And, indeed, it has become commonplace, from the so-called “nanny-cam,” to parents being able to check on their children’s activities at day care and camp, to live Internet “webcams,” to the omnipresent security cameras in drug stores, apartment buildings, and subways. Instead, video surveillance is prohibited in New York as a class E felony only under certain limited circumstances, such as where it is done to record for mere amusement and to capture a person undressed.⁵³ Under Penal Law section 250.65, statutory exceptions exist

49. See NYCLA Comm. on Prof'l Ethics, Question No. 696, at 5-6 (1993).

50. See *id.* at 5.

51. Frankie Edozien, *Spyderman Mike; Wants Cams on Streets, Trains & Buses*, N.Y. POST, Oct. 2, 2007, at 3.

52. See *id.*

53. N.Y. PENAL LAW § 250.45 (McKinney Supp. 2007).

for: (a) law enforcement engaged in their authorized duties; (b) a security system where notice is conspicuously displayed; and (c) a security system where the presence of the camera is obvious.⁵⁴

Given the prevalence of security cameras already, and Mayor Bloomberg's plans to install cameras all over New York City, and the belief that citizens are naïve to think cameras are not "watching you all the time," a lawyer is probably safe having an investigator secretly videotape or photograph a witness, provided no trespass is involved.⁵⁵ Neither the law nor the ethical rules appear to prohibit this investigative technique and is certainly one that is available to both government and non-government attorneys.

VI. RECORDS

Obtaining non-public records of a witness or party, financial or otherwise, will almost always require some legal process, such as a subpoena or discovery demand. Using some pretense or deceit to obtain non-public records is generally a crime, except for the government.

For example, the Gramm-Leach-Bliley Act of 1999,⁵⁶ prohibits making false, fictitious or fraudulent statements or representations, or using documents that are forged, counterfeit, lost or stolen or contain false or fraudulent statements, to obtain non-public financial information from financial institutions or their customers. There is an exception for law enforcement officers in the performance of an official duty.⁵⁷

The Telephone Records and Privacy Protection Act of 2006,⁵⁸ enacted following the recent Hewlett-Packard pretexting case,⁵⁹ which is similar to the Gramm-Leach-Bliley Act, prohibits using false and fraudulent statements or representations, or providing false or fraudulent documents, to obtain confidential telephone records from an employee or customer of a telecommunications carrier or IP-enabled voice service

54. *Id.* § 250.65.

55. It cannot be gainsaid that recording cannot include audio recording, to which very different rules apply. In this instance it would be unlawful electronic surveillance.

56. Gramm-Leach-Bliley Act, 15 U.S.C. § 6821(a) (2000).

57. *Id.* § 6821(c).

58. Telephone Records and Privacy Protection Act of 2006, 18 U.S.C.A. § 1039(a) (Supp. 2007).

59. To investigate leaks of confidential information from Hewlett-Packard board meetings, HP hired investigators who used deception or "pretexts" to obtain the phone records of board members and journalists who were reporting the information—essentially, calling the phone companies and pretending to be the person whose phone records they were trying to obtain and presenting that person's personal information. *See Demand for Jury Trial at 1-5, 1199 SEIU Greater N.Y. Pension Fund v. Dunn, ex rel. Hewlett-Packard Co.*, No. 1:06-cv-071186 (Cal. Super. Ct. filed Nov. 29, 2006).

provider. Like the Gramm-Leach-Bliley Act, this Act exempts law enforcement.⁶⁰

In addition to these specific federal statutes, deceitful activity to obtain records may violate one or more of the more general criminal statutes, such as the federal identity theft, mail fraud, and wire fraud statutes.⁶¹

New York State also has several statutes that criminalize unauthorized accessing of non-public information. The New York Consumer Communication Records Privacy Act prohibits the unauthorized acquisition of consumer telephone record information.⁶²

A person is guilty of tampering with private communications in violation of New York Penal Law section 250.25, a class B misdemeanor, when, without the consent of the sender or receiver, (1) “he opens or reads a sealed letter;” (2) “[k]nowing that a sealed letter . . . has been opened or read in violation of subdivision one . . . he divulges . . . the contents;” (3) he tries to obtain the contents of a telephonic communication from a telephone company by deception or intimidation; or (4) being an employee of a telephone company, he divulges the contents of a telephone conversation.⁶³

Penal Law section 250.30 makes it a crime to use deception, stealth, or any other manner to obtain from a telephone company any information concerning a record of any telephone communication.⁶⁴ It may also be a crime to have an investigator pay money for non-public records.⁶⁵

In light of the many prohibitions on obtaining or accessing non-public information, such conduct will always subject an attorney to discipline. Attorneys should be very careful about accepting records from an investigator that the attorney has reason to know are not publicly available. Of greater concern, however, are the many law enforcement exceptions that exist which apparently permit members of law enforcement to engage in all kinds of fraud and deceit to obtain private records. Most functions of the government that invade the privacy of citizens require some judicial oversight. Permitting the government to intrude upon citizens’ privacy rights without an appropriate level of judicial oversight places too much power in the

60. 18 U.S.C.A. § 1039(g).

61. 18 U.S.C. §§ 1028A (aggravated identity theft), 1028(a)(7) (identity theft), 1341 (mail fraud), 1343 (wire fraud) (2000 & Supp. V 2005).

62. N.Y. GEN. BUS. LAW § 399-dd (McKinney Supp. 2007).

63. N.Y. PENAL LAW § 250.25 (McKinney 2000).

64. *Id.* § 250.30.

65. N.Y. PENAL LAW §§ 180.00 to .08 (McKinney 1999) (commercial bribery).

hands of the government and will inevitably lead to government abuses.

VII. COMPUTER ACCESS

The contents of a home or business computer are tantalizing stores of potentially useful information in any case. And the law is far from settled on how freely either the government or a party with a subpoena can rummage around looking for evidence. Here, we are concerned with seeking to search a computer without a court order.

There are several statutes aimed at preventing unauthorized access to computer records. While “hacking” into a computer is clearly illegal, attorneys must also be careful about obtaining information—such as emails—through a spouse, significant other, or employee who may have the ability, but not the authority, to access computer records.

The Computer Fraud and Abuse Act prohibits accessing or attempting to access a computer without authorization or *exceeding authorized access*.⁶⁶ Again, law enforcement is excepted.⁶⁷

Unauthorized access of a computer is a crime in New York. It is illegal to use a computer or computer service without authorization⁶⁸ if the computer has a “coding system, a function of which is to prevent the unauthorized use of said computer.”⁶⁹

“Computer trespass” is a felony⁷⁰ and occurs when there is unauthorized use⁷¹ of a computer or computer service (1) in furtherance of intent to commit a felony or (2) thereby knowingly gains access to “computer material.”⁷²

“Unlawful duplication of computer related material”⁷³ is the unauthorized copying of computer data⁷⁴ (1) to deprive owner of

66. Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a) (2000 & Supp. V 2005).

67. 18 U.S.C. § 1030(f) (2000).

68. “Without authorization” requires “actual notice in writing or orally to the user.” N.Y. PENAL LAW § 156.00(6) (McKinney 1999).

69. *Id.* § 156.05.

70. *Id.* § 156.10.

71. Unauthorized use includes use that is “in excess of the permission” of the owner or the computer or computer service. *Id.* § 156.00(6).

72. *Id.* § 156.10. “Computer material” has a limited definition. It only includes: (1) medical records; (2) government records; and (3) information which “may accord such rightful possessors an advantage over competitors or other persons who do not have knowledge or the benefit thereof.” *Id.* § 156.00(5).

73. *Id.* § 156.30.

74. In contrast to the narrow definition of “computer material” in Penal Law section 156.00(5), the definition of “computer data” is quite broad. “‘Computer data’ is property and means a representation of information, knowledge, facts, concepts or instructions which are being processed, or have been processed in a computer and may be in any form, including magnetic storage media, punched cards, or stored internally in the memory of the computer.” *Id.* § 156.00(3).

economic value or benefit in excess of \$2500 or (2) in furtherance of a felony.

Notably, “reasonable grounds to believe” one has permission to use, copy, or destroy computer data is a defense.⁷⁵ Therefore, when a spouse or employee accesses computer data using the password of another, there will often be an issue of fact as to whether or not that person had reasonable grounds to believe that the access was authorized.

Stealing “computer data” may not only violate the computer trespass statutes, but may also constitute larceny. Under Penal Law section 155.25: “A person is guilty of petit larceny when he steals property.”⁷⁶ Penal Law section 155.00 defines “[p]roperty” as “any money, personal property, real property, *computer data*.”⁷⁷

Finally, the NYSBA has issued an opinion condemning the practice of lawyers using computer software applications to surreptitiously examine and trace email and other electronic documents,⁷⁸ on the ground that such conduct violates DR 1-102(A)(4) of the New York Code, which proscribes conduct “involving dishonesty, fraud, deceit, or misrepresentation.”⁷⁹

While obtaining computer records will usually involve acquiring those records through a client who has access to them, attorneys must be careful that the records are not just available, but that the person obtaining them actually has authority to do so.

VIII. WHO CAN YOU INTERVIEW?

When it comes to interviewing witnesses, the biggest issue will usually be whether or not that person has a lawyer. The ethics rules are divided on whether attorneys are prohibited from contacting a *person* they know is represented by counsel or a *party* they know is represented by counsel. New York Code DR 7-104(A)(1) states that a lawyer shall not “[c]ommunicate or cause another to communicate on the subject of the representation with a *party* the lawyer knows to be represented by a lawyer in that matter.”⁸⁰ In contrast, ABA Model Rule 4.2 states that “[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a *person* the lawyer knows to be represented by another lawyer in the matter.”⁸¹ Moreover, a lawyer

75. *Id.* § 156.50.

76. *Id.* § 155.25.

77. *Id.* § 155.00 (emphasis added).

78. See NYSBA Comm. on Prof'l Ethics, Formal Op. 749, at 2 (2001).

79. See *id.* at 3; N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (2007).

80. N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (2007) (emphasis added).

81. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2007) (emphasis added).

cannot direct an investigator to contact a represented person who the lawyer could not contact personally.⁸²

In *Grievance Committee for the Southern District of New York v. Simels*,⁸³ the Second Circuit interpreted DR 7-104(A)(1) narrowly and determined that an attorney did not violate that rule by interviewing a non-party (non-codefendant) witness in a criminal case even though the witness was represented by counsel.⁸⁴ Under *Simels*, it is clear that attorneys practicing in the Second Circuit and New York State may contact and interview a witness even where the witness is represented by counsel. The victim in a criminal case is not a party to the action and occupies the same position as any other witness.⁸⁵ Similarly, a cooperating government witness in a criminal case is not a party, either.

Although the New York Code permits client-to-client contact and permits an attorney to advise his client on the interaction,⁸⁶ in the criminal context, lawyers must be especially wary of this tactic, since it could lead to an obstruction of justice charge. Another potential danger is if threats are used to convince a witness to submit to an interview. In New York, it is illegal to compel a witness to speak by threatening to file a complaint accusing the person of a crime, to expose an embarrassing secret or fact, or to testify or refuse to testify with respect to another's legal right.⁸⁷ Often, the only way to protect oneself against potential allegations of obstruction of justice or coercion is to record the conversation or at least have a witness present.

This is also an area where judicial decisions have imposed harsh sanctions on the government for violating an ethics rule. In *United States v. Hammad*,⁸⁸ the Second Circuit concluded that where government attorneys obtained evidence by contacting a represented party in violation of DR 7-104(A)(1), suppression may be an appropriate

82. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995). Both the ABA and the NYSBA have concluded that an attorney may communicate with non-party adverse witnesses, including expert witnesses, without the consent of opposing counsel, even where the information is obtained from a witness whose interests are adverse to the lawyer's client. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1410, at 300 (1978); NYSBA Comm. on Prof'l Ethics, Formal Op. 402 (1975).

83. 48 F.3d 640 (2d Cir. 1995).

84. See *id.* at 650-51. After *Simels*, the ABA changed the language of Model Rule 4.2 from *party to person*. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (2007).

85. See, e.g., NYSBA Comm. on Prof'l Ethics, Formal Op. 463 (1977) (Commissioner of Social Services could not be deemed counsel to mother in state-initiated paternity proceeding, nor could mother be deemed a "party," such that mother could be contacted by counsel for respondent-father).

86. See N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-104(B) (2007).

87. See N.Y. PENAL LAW § 135.60 (McKinney 2004) (coercion in the second degree).

88. 858 F.2d 834 (2d Cir. 1988).

remedy.⁸⁹ Although *Hammad* limited the availability of the suppression remedy to violations of the no contact rule,⁹⁰ it represents perhaps the most significant enforcement of the ethics rules against government attorneys.

IX. CONCLUSION

While some investigative techniques are prohibited by both the law and the ethics rules, lawyers must also keep in mind their duty of zealous representation under both the Sixth Amendment and the disciplinary rules, which require that a lawyer not intentionally “[f]ail to seek the lawful objectives of the client through reasonably available means permitted by law.”⁹¹ With technological advances, the investigative tools available to a lawyer have increased, but so have the potential ethical pitfalls. Attorneys must be careful not only to be on the cutting edge of investigative technologies in zealously representing their clients, but also on the cutting edge of ethical approaches to using that technology.

Finally, many of the traditional investigative techniques used by government attorneys—undercover investigations, secret tape recordings, trespass, document gathering, and contacting represented individuals—involve conduct that appears to violate the ethics rules. Advancements in technology now enable private attorneys to conduct the same kinds of investigations once feasible only by the government. While the history and tradition that accompanies these law enforcement techniques make it difficult, if not impossible, for bar associations to issue opinions condemning these practices, the ethics rules should apply evenly to both government and non-government attorneys.

89. *Id.* at 840.

90. *See id.* at 842.

91. N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (2007).