***In re Social Networking Inquiry* (July 2011, MPT-2)** Examinees' supervising partner is the chairman of the Franklin State Bar Association Professional Guidance Committee. The committee issues advisory opinions in response to inquiries from Franklin attorneys concerning the ethical propriety of contemplated actions under the Franklin Rules of Professional Conduct. The committee has received an inquiry from a Franklin attorney asking whether an investigation using the social networking pages (such as Facebook or MySpace) of a nonparty, unrepresented witness in a personal injury lawsuit would violate the Rules. The supervising partner has reviewed the matter and believes that the attorney's proposed course of conduct would be contrary to the Rules. Examinees' task is to prepare a memorandum analyzing the issue with the object of persuading the other committee members that the proposed course of conduct would violate the Rules. This is an issue of first impression in Franklin. Examinees must therefore discern the relevance of, and guidance to be derived from, the three differing applications of those Rules in other states and then apply those differing approaches to the proposed course of conduct. The File contains the instructional memorandum, the letter from the Franklin attorney making the inquiry to the committee, and notes of the committee meeting. The Library contains the applicable Rules of Professional Conduct (including commentary on the Rules) and two cases—one from Olympia and one from Columbia—bearing on the legal issues.

THREE JULY 2011 SELECTED MPT ANSWERS TO FOLLOW

MEMORANDUM

To: Franklin State Bar Association - Professional Guidance Committee
From: Bert H. Ballentine
Re: Social Networking Inquiry

This memorandum addresses attorney Melinda Nelson's inquiry for an advisory opinion regarding whether obtaining access to a potentially adverse witness's social networking sites by having her legal assistant "friend" the witness would be a violation of the Franklin Rules of Professional Conduct ("FRPC"). This memorandum will argue that the proposed conduct is a violation of the FRPC. Although the inquiry presents a case of first impression in our jurisdiction, the conduct would violate the Rules of Professional Conduct under any of the three approaches to interpreting the Rules identified by the case law of the jurisdictions of Olympia and Columbia, which have identical Rules of Professional Conduct.

I. Approach 1: Any misrepresentation by an attorney is a violation of the Rules, regardless of its motivation

One approach, adopted by the Olympia Supreme Court in its *Rose* opinion, is that any misrepresentation by an attorney is a violation of the Rules of Professional Conduct. Under this approach, which adopts a strict interpretation of the language of the Rules, the inquiry by attorney Nelson would violate FRPC.

FRPC 4.1(a) states that an attorney "shall not knowingly make a false statemet of material fact" to another person in the course of representing a client. Here, a misrepresentation has been proposed. Attorney Nelson would like to have her legal assistant "friend" a nonparty and potentially adverse witness on a variety of social networking sites. The purpose of doing so is to obtain information that the witness might not otherwise reveal, such as whether or she and the plaintiff were drinking on the night of the alleged incident, and to use it to impeach the witness because her statements could otherwise be crucial to other side and damaging to Attorney Nelson's client.

In order to befriend the witness on these social networking sites, Attorney Nelson does not

propose to engage in direct deceit. Her legal assistant would use her real name in making the request, and simply not reveal that is she is making the request on behalf of the attorney. Under FRPC 4.1, this is still a misrepresentation. As the comments indicate, an omission or only a partial statement of facts may constitute a misrepresentation. Furthermore, the misrepresentation would be material. The witness was hostile to the attorney during her deposition, and therefore not revealing the attorney's involvement is necessary in order for the witness to accept the assistant's friend request.

It may be countered that even if a misprepresentation is occurring, it is not being perpetrated by the attorney herself. However, as the Columbia Supreme Court recognized in *Branton*, under the Rules of Professional Conduct it is not necessary for the attorney herself to make the misrepresentation. Instead, Rule 8.4 provides that knowingly assisting or inducing another to make a misrepresentation makes the attorney liable for that breach of the Rules of Professional Conduct. In *Branton*, two non-attorney employees misrepresented their identities to an adverse party in order to obtain information that would be difficult to obtain through discovery. While the court ultimately concluded that, under a different approach to the Rules, this was not actionable conduct by the attorney, it did conclude that the conduct was attributable to the attorney because his employees were acting under his direction. In this case, the legal assistant would only make the friend request to a stranger because she has been asked to do so by her boss. Consequently, it may be a violation of the Rules by her attorney.

Under the strict approach, therefore, the fact that a misprepresentation is being ordered by an attorney to be performed by her legal assistant is a breach of conduct. That it is being done by partial omission does not excuse it, as directly noted by the Comments to Rule 4.1.

However, one might counter that in this case, the conduct proposed by Attorney Nelson is not a violation of her ethical duties because Comment 2 to FRPC 8.4 specifically provides that an attorney "should be professionally answerable only for offenses that indicate lack of those characterstics relevant to law practice," that involve "violence, dishonesty, breach of trust, or serious interference with the administration of justice." Here, the argument would go, there was not a serious breach and does not go to the core of the profession. It is a rather harmless failure to disclose that will only lead the witness to share information that she already shares with the public. However, this kind of misrepresentation is prohibited under the approach. As the Olympia Supreme Court explained in *Rose*, acting deceptively cannot be justified, especially when the attorney has other options. Honesty is a core part of the profession. In *Rose*, an attorney was faced with particularly difficult circumstances: she believed that she had to make a misrepresentation to an adverse party (a criminal

when she was a district attorney) in order to prevent harm for hostages. In that case, she made the decision to misrepresent her identity and portray herself as his public defender to diffuse the situation. Even in such circumstances, the Supreme Court concluded, because the attorney had alternative means of completing her goal, such as actually contacting a public defender, her actions in deceiving the hostage taker could not be excused under the Rules. In this case, Attorney Nelson clearly has other alternatives open, such as requesting this information through the normal channels of discovery during litigation.

It might also be countered that the motive of the attorney is "good" for wanting this misrepresentation. As Mr. Hamm has noted, this will allow the attorney to achieve the worthwhile goal of exposing a lying witness. Furthermore, as Ms. Piel has noted, this would be a misrepresentation in the pursuit of justice. However, the strict first approach to the Rules does not account for motive in engaging in misrepresentation. As the Olympia Supreme Court noted in *Rose*, an attorney "cannot compromise her integrity, and that of our profession, regardless of the cause." While the court left open the possibility that in certain extreme circumstances an exception might be permissible, it also repeatedly emphasized that no such exceptions are found in the Rules, and suggested that the only such exception would be to prevent "imminent public harm." Clearly, no such situation faces Attorney Nelson, particularly since there are other means at her disposal to help her client reach a just outcome in this litigation.

II. Approach 2: Conduct-based analysis of attorney behavior

A second approach, adopted by neither Olympia nor Columbia but explained in the *Brant* opinion, is to evaluate conduct-based analysis of attorney behavior where misrepresentation or deception is involved. This approach utilizes four factors to determine whether an attorney has violated his ethical obligations. (1) the directness of the lawyer's involvement in the deception; (2) the significance and depth of the deception; (3) the necessity of the deception and the existence of alternative means to discover the evidence; and (4) whether the conduct is otherwise illegal or unethical under other Rules of Professional Conduct. Because all four of these factors favor a finding that Attorney Nelson's proposal would be unethical, it should also be disallowed if Franklin chooses to adopt this approach to the Rules.

The first factor considers the directness of the lawyer's involvement in the deception. Here, Attorney Nelson's conduct is quite comparable to that of the attorney in *Brant*. If the deception by her legal assistant occurs, it will be beacuse she came up with the idea and directed her employee to take a certain action. The attorney's involvement is immediate, and therefore meets this initial prong.

The second factor looks at the significance and depth of the deception. In *Brant*, the court suggested that this factor is not met if what the action does is disclose information that is freely available. The example that it gave of conduct that would be but a "minor deception" woudl be an attorney who visits a dealership to verify what products are being sold, as part of a contract dispute. One might argue that because the witness's social networking pages are open to the public, the action by the witness can be directly analogized. Such an interpretation is misleading, however. While the witness has stated that she generally does friend persons who request it, the attorney also knows that the witness does not desire to be her friend, and therefore that deception is required to obtain access. A social networking site that is protected by security and requires affirmative permission by the person on the site to access is significantly different from a retail store that is actually open to the entire public without requiring permission first.

Factor three looks at the necessity of the deception and the existence of alternative means to discover the evidence. As discussed in Part I of this memorandum, there are alternative means of obtaining the evidence. During discovery, the attorney could subpoena or request access to the site. It might be argued that this is a situation similar to that in *Brant*, where the court concluded that a deception was necessary to obtain information crucial to a case, as this witness's testimony may be. In *Brant*, an attorney was investigating claims that a condominium owner was discriminatory against minorities in giving access to housing. Therefore, he had two of his employees, both minorities, pose as interested buyers in order to obtain evidence. In that case, proving discriminatory intent was extraordinarily difficult because it is easy to simply disclaim any intent without a clear trail of the perpetrator's actions. This case is not comparable, however. The issue is not showing a pattern of behavior that is difficult to perceive. Instead, attorney Nelson only needs access to a site whose content will clearly show what she wants to prove. In that case, deception is not necessary; other discovery alternatives are plainly available in the regular course of litigation.

The final factor considers whether the conduct is otherwise illegal or unethical under other Rules of Professional Conduct. Because, as discussed in Part I, this conduct would vioaltes Rules 4.1 and 8.4, it is plainly otherwise unethical.

III. Approach 3: status-based analysis of attorney behavior

The final approach, adopted by the Supreme Court of Columbia in its *Brant* opinion, is a status-based analysis that "focus[es] on the importance and nature of the role that the attorney plays in advancing the interests of justice." Under this approach as well, Attorney Nelson's conduct is a

violation of FRPC.

In *Brant*, the court concluded that an attorney had not violated the Rules of Professional Conduct by having two employees misrepresent themselves as actual buyers to a condominium owner in order to determine whether that owner was discriminating against potential buyers on the basis of race. It ultimately concluded that such conduct was not a violation, but otherwise, "it would be virtually impossible to collect evidence of unfair housing practices," as such practices would never be explicitly admitted. It noted that the "type of misrepresentation at issue here - one that would be common to a great many cases which seek to root out violations of civil rights - is not one that goes to the core of the integrity of the profession and adversely reflects on the fitness to practice law." Attorneys must fulfill their professional responsibilities through the pursuit of justice.

However, even the court in *Brant* recognized that only some conduct should be subject to this broad exemption. It identified three areas, civil rights violations, intellectual property infringement, and crime prevention, as areas of the law where misrepresentations would not constitute a violation of the Rules, and explicitly emphasized that "we limit our reading of permissible actions of this sort only to these circumstances and extend it to no others."

Attorney Nelson proposes to engage in misrepresentation that is intended to impeach a witness in a routine tort action. While her misrepresentation may be crucial and it is important that attorney have means to discover such dishonesty and "expose a lying witness," as Mr. Hamm has suggested, this thrid approach clearly would not categorize the misrepresentation as permissible under the Rules of Professional Conduct. Here, attorney Nelson is not seeking to protect a client against a violation of his civil rights, an infringement of his intellectual property, or prevent a crime. And attorney Nelson does not face a situation where evidence necessary to show such a violation is otherwise impossible to obtain. As discussed above, exposing the witness's deceit is possilbe through the normal channels of discovery. Allowing the misrepresentation would not be "no harm, no foul," because allowing it would greatly narrow the reach of the Rules of Professional Conduct in a manner that has not been recognized by other jurisdictions with the same Rules of Professional Conduct. Instead, it would permit these representations without any consequences to the attorneys who engage it -- precisely the compromise of the integrity of our profession that the Olympia Supreme Court wisely warns us against in *Rose*.

Conclusion

Therefore, because even under the third and most permissive approach, adopted by Columbia

in *Brant*, attorney Nelson's proposal would be a violation of the Rules, our advisory opinion should not permit her proposed action. It would be contrary to FPRC under any of the three recognized approaches.

END OF EXAM

MEMORANDUM

TO: Bert H. Ballentine
FROM: Examinee
DATE: July 26, 2011

RE: Social Networking Inquiry

You have asked me to discuss why the proposed conduct from the inquiry received by the committee yesterday would violate the Franklin Rules of Professional Conduct. This is a case of first impression under Franklin Rules, so there is no binding precedent on point. However, the neighboring jurisdictions of Olympia and Columbia, both also from the Fifteenth Circuit, have ruled on issues involving the applicable sections of the Rules of Professional Conduct, and because their Rules are identical to Franklin's with regard to the applicable sections, their ruling provides persuasive authority that provides guidance on this issue. These cases have set forth three different kinds of analyses for issues similar to the instant case, and the proposed course of conduct violates all three tests for the reasons stated below.

I. The Proposed Course of Conduct Violates the Strict Plain Language Approach Advocated by the Olympia Supreme Court in *Devonia Rose*

In *Devonia Rose*, the Olympia Supreme Court held that a district attorney violated the Professional Rules of Conduct by impersonating a public defender to convince a suspected killer to release his hostages and turn himself over to law enforcement authorities. The suspect had confessed to police and repeatedly asked for a lawyer before he surrendered. *Id.* The attorney in question, Ms. Rose, offered to impersonate a public defender, and had a lieutenant introduce her as such to the suspect on the telephone. *Id.* She represented to him that she was his attorney by responding that she would "be there" when he asked whether his lawyer would be present. *Id.* In finding a violation to Rule 8.4(c) that it is "professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, or deceit," the court strictly construed the statute, stating that "even a notive motive does not warrant departure from the Rules." *Id.* The court refused to craft an exception even for "imminent public harm" because the circumstances of the case did not warrant such an exception--as the court stated, the attorney "had options other than acting deceptively." *Id.*

In the instant case, the proposed course of conduct does not even involve a situation as

severe as the circumstances present in *Devonia Rose*. The instant case involves a negligence action--a civil suit, where money damages are sought. The lives of two innocent people were at stake in *Devonia Rose*, and the court still held that that did not excuse violations of the Rules of Professional conduct. It may be argued that the case is distinguishable because it involved a district attorney who, admittedly, owes a significantly high duty to the public. However, the *Devonia Rose* court expressly stated that "[t]he level of ethical standards to which our profession holds *all attorneys*," especially prosecutors, leaves no room for deception." *Id.*

II. The Proposed Course of Conduct Violates the Status-Based Approach Advocated by the Columbia Supreme Court in *Hartson Brant*

In *Hartson Brant*, the Columbia Supreme Court held that it was not a violation of the Rules of Professional Conduct for general counsel of a non-profit organization to send two assistants undercover to pose as a minority couple to determine whether housing discrimination was occuring. *Id.* The attorney had the assistants construct false background stories, finances, and references to tell to the sales agent. *Id.* In finding that the conduct did not violate the Rules, the court stated that in cases involving violation of civil rights, sometimes, minor deception is the only way to vindicate such rights. The court adopted a status-based analysis "focusing on the importance and the nature of the role that the attorney plays in advancing the interests of justice." *Id.* The court emphasized that "in the absense of this type of evidence gathering, it would be virtually impossible to collect evidence of unfair housing practices." *Id.* In addition, the court expressly limited its holdings to cases involving civil rights violates, intellectual property infringement, or crime prevention.

Here, none of the above three situations are met. This is not a civil rights case, nor does it involve discovering material that cannot be discovered in any other way. She is not using deception to father evidence of a crime or prevent civil rights infringement. Additionally, Ms. Nelson has the option of using other means of discovery to find out whether the plaintiff was drinking that night. She can interview other witnesses. She can depose the plaintiff. She does not need to infringe on the privacy of the nonparty witness here do accomplish this and doing so would violate the spirit of the rules. The interests of justice simply do not require this. Thus, even if the strict adherence test advocated in *Devonia Rose* was not adopted, this test demonstrates that the attorney's conduct violates the Rules.

III. The Proposed Course of Conduct Violates the Conduct-Based Approach Stated in *Hartson Brant* and Advocated by Commentators

The proposed course of conduct violates a third test, which has not been adopted by any court, but was mentioned in *Hartson Brant* and proposed by commentators in the field. This test

involves a conduct-based approach to violations involving this issue. The proponents have set forth a four prong test to determine whether there has been a violation: "(1) the directness of the lawyer's involvement in the deception, (2) the significance and depth of the deception, (3) the necessity of the deception and the alternative means to discover the evidence, and (4) the relationship with any other of the Rules of Professional Conduct, that is, whether the conduct is otherwise illegal or unethical." Were the Committee to adopt this approach, Ms. Nelson's conduct would run afoul of the Rules as well. To begin with, were Ms. Nelson to pursue this course of conduct, she would be the one directly involved in the deception because she is instructing a subordinate (her assistant) to carry out her instructions. Some may argue that because she herself is not the one conducting the deception, she is not directly involved. However, this argument is precluded by the plain language of Rule 8.4 of the Franklin Rules of Professional Conduct, which states that "[i]t is professional misconduct for a lawyer to: ... "knowingly assist or induce another to [violate or attempt to violate the Rules], or do so through the conduct of another." As the Comment to Rule 8.4 states, "[l]awyers are subject to discipline "when they request or instruct an agent" to violate the Rules on the lawyer's behalf. Thus, Ms. Nelson would not be able to use her assistant to shield her involvement in the deception.

With regard to the second factor, it may be argued that what Ms. Nelson proposes to do is "a minor deception, which posses little, if any, harm to the deceived party" because the nonparty witness in question would grant access to just about anyone who requested it. *Hartson Brant*. This argument, however, misses the point entirely. The witness' privacy is at issue here. Concealing the identity and purpose of the assistant is what would enable Ms. Nelson to get access to the information. She herself admitted that were she to attempt to "friend" the witness, that attempt would be denied. Access to the site is limited because the individual has chosen to limit it. This situation is not analogous to the *Hartson Brant* court's example that an attorney in a contract dispute suit who visits an applicance dealership to verify the product lines being sold without disclosing that he is acting on his client's behalf. In the latter situation, the access is not restricted--any member of the public can go into the store, and the attorney is a member of the public. He did not have to conceal his identity to do so--there was no individual acting as a proverbial gatekeeper. Here, the social networking site is not public--rather, the individual has taken steps to require people to request her permission before gaining access to her personal information. Thus, there is harm to the party--a violation of her privacy--and a deception that is decidedly not "minor"--the lawyer knows that were she to request admission herself, her "friend request" would be denied."

The third factor also counsels in favor of finding that the proposed course of conduct violates the disciplinary rules. There are alternative means to discover the evidence--the attorney in question recently participated in it: the discovery process. The attorney deposed the witness. She could depose the witness again, asking the desired questions in particularity. She can interview friends, family, and acquaintances of the witness. She can ask the plaintiff in a deposition whether the plaintiff had been

drinking that evening. She could also send out Requests for Admissions on that very issue. Ms. Nelson is not limited to the deception to discover the information she seeks. As the *Hartson Brant* court stated, "an attorney's misrepresentation or deception to obtain more information which could also be obtained through standard discovery tools, such as a subpoena, is more likely to constitute an ethical violation."

The fourth and final factor also demonstrates a violation because the conduct is not only unethical under Rule 8.4, but also under Rule 4.1, which states that "[i]n the course of representing a client a lawyer should not knowingly make a false statement of material fact or law to a third person." The Comment to Rule 4.1 clearly states that "[m]isrepresentations can also occur by ... omissions that are the equivalent of affirmative false statements." Ms. Nelson's proposed conduct is also generally unethical because "[t]he level of ethical standards to which our profession holds all attorneys" is very high and cannot be disregarded at will. *Devonia Rose*.

IV. Conclusion

Regardless of what test the Committee applies, Ms. Nelson's proposed course of conduct violates the Franklin Rules of Disciplinary Procedure.

END OF EXAM

TO: **Franklin State Bar Association-Professional Guidance Committee**

FROM: **Applicant**

DATE: **July 26, 2011**

RE: ***Social Networking Inquiry***

MEMORANDUM

This memorandum responds to a recent inquiry received by the Committee with respect to the ethical propreity under the Franklin Rules of Professional Conduct (the Rules) of having a non-attorney staff member access a nonparty wintess's social networking site to gain information relevant to a civil case. This is a case of first impression in Franklin, though both Olympia and Columbia, which have identical professional conduct rules to the Rules, have addressed the issue. These cases have developed guidance in the form of three approaches applicable to the facts presented by the inquiry, and point to the conclusion that the conduct in question would violate the Rules under all three approaches. Each approach will be discussed in turn.

I. AN ATTORNEY CANNOT COMPROMISE HER INTEGRITY AND THAT OF OUR PROFESSION, REGARDLESS OF THE CAUSE

In *In the Matter of Devonia Rose, Attorney Respondent*, from the Olympia Supreme Court, the court affirmed a finding of a prosecutor's ethical violation for misrepresenting herself as a public offender to a man taking hostages. The court noted that "even a noble motive does not warrant departure from the Rules." In what was later termed as the plain language approach (*Hartson Brant*), the *Devonia Rose* court declined to craft an exception for cases involving the possibility of "imminent public harm." Essentially, Rose argued that her conduct in pretending to be the criminal's public defender that he had asked for was necessary to dispel an immediate emergency situation invovling hostages. Even in the face of

such a crisis, the court noted that other options were available to Rose, and looked disfavorably on the fact that no attempt to pursue any other options which would not violate the Rules was made. The court stated that the Rules and their attendant ethical standards "leave no room for deception . . . regardless of the cause."

The facts as presented in Ms. Nelson's inquiry are very distant from the facts as presented in *Devonia Rose.* The case presented by Ms. Nelson is a civil case, involves no criminal activity or emergency situtation involving hostages or crime. A Franklin court, in looking at the facts as presented by Ms. Nelson, and comparing them to the factual situation as presented in *Devonia Rose*, would assuredly conclude that Ms. Nelson should seek alternative methods of gathering information. That is the standard Rose failed to meet, and she was acting with what the court termed a sincere belief that she was protecting the public. Conversly, Ms. Nelson is acting with a sincere belief that this information would help a negligence cause, and in particuar, would be helpful to her opponent, and thus, likely detrimental to her. A breach of the Rules, if not allowed by Olympia to dispel a hostage situation without first taking other action, would, at least in comparison, receive less warm reception.

II. A MISREPRESENTATION THAT GOES TO THE CORE OF THE INTEGRITY OF THE PROFESSION AND ADVERSELY REFLECTS ON THE FITNESS TO PRACTICE LAW

____Under this test, advanced by Goldring & Bass in *Undercover Investigation and the Rules of Professional Conduct*, and cited the Columbia Supreme Court in *In re Hartson Brant*, the court should look at four factors in the form of a conduct-based analysis of attorney behavior when misrepresentation, dishonesty, or deception prohibited by the Rules is at issue. The court noted that this test deviated from it termed the plain-language approach in *Devonia Rose*, and sought a less rigid approach, hinging on the comment to Rule 8.4, which the court considered as looking at whether the conduct goes to the core of the integrity of the profession and adversly reflects on the fitness to practice law. The court termed this approach as content-based approach involved the assesment of four factors, though the court decided the issue on a status-based approach. Each of the factors in the content-based

approach, however, will be discussed here.

1. *The directness of the lawyer's involvement in the deception.*

The *Hartson Brant* court began its discussion noting that under Rule 5.3(c)(1), an attorney is responsible as if he himself had acted if the lawyer orders or ratifies another's conduct in violation of the Rules. Though the court did not discuss this further under this prong, the Rules are clear on their face that the conduct proposed by Ms. Nelson, in having her assistant "friend" the witness is effectively ordering the associate's conduct.

2. *The significance and depth of the deception.*

Under this factor, the court looked at whether the deception poses a major or minor harm to the party being deceived. The *Hartson Brant* court noted that if an attorney visits an applicance dealership to verify product being sold, he has made a minor deception to the applicance store. Here, under the facts as Ms. Nelson's inquiry presents them, her assistant would make a "friend request" like any other person in the public could do, just as any other person in the public could walk into an applicance store. The difference, here, however, is that all information that the witness does not make public until a friend request is accepted then becomes public, whereas somebody walking into an applicance store as any member of the public does not immediately gain access to such information. Though the non-attorney would use only truthful information, but would not disclose affiliation with Ms. Nelson or the purpose for making the friend request, the true nature of the reason behind the "friend" request would remain hidden from the witness.

3. *The necessity of the deception and the existence of alternative means to discover the evidence.*

Under this factor, the *Hartson Brant* court impliedly indicated that a deception may be termed more necessary when there exist very few other means to discover the evidence. In particular, the court pointed to traditional methods of discovery, and noted that if the

information "could be obtained through standard discovery tools, such as a subpoena," it was more likely to constitute an ethical violation. That is the situation as presented here. Ms. Nelson was deposing the witness and could have asked questions regarding the content of the witness's social networking pages, but choose not to. Even after the deposition, there are likely other methods of traditional discovery that Ms. Nelson could avail herself of. This is the same conclusion that the *Devonia Rose* court came to: if alternative methods are available to the attorney to gain the information, a misrepresentation amounting to a breach of ethical conduct, is not allowed, even in cases involving an immediate threat to the safety of the public. Here, in a civil negligence action, no such emergency is imaginable, and certainly, not presented in the inquiry. Even if it is worthwhile to expose a lying witness, a court would likely hold that if it were not sufficiently worthwhile to preent

4. *The relationship with any other of the Rules of Professional Conduct.*

Though the *Hartson Brant* court did not provide much elaboration on this prong, it did begin its analysis noting the interplay between Rules 5.3(c)(1) (regarding nonattorneys acting at the discretion of attorneys), 4.1(a) (knowingly making a false statement of material fact to a third person), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). These three rules are at work in the present fact situation as well, which compares well to the one presented in *Hartson Brant*, because both used nonattorneys to make a misrepresentation of their identities to a third person in order to gain information. Both use nonattorneys to obtain information from a third party that is helpful to their case, without disclosing to the third party the true motive or interest of the "concealed" associate.

III. THE IMPORTANCE AND NATURE OF THE ROLE THAT THE ATTORNEY PLAYS IN ADVANCING THE INTEREST OF JUSTICE

____Under this test, advanced by the Columbia Supreme Court in *In re Hartson Brant* as a status-based approach, the court recommends looking at whether, in the absence of fact-gathering that includes a misrepresentation, whether it would be "virtually impossible to collect evidence." In that case, the court dealt with a nonprofit attorney who sent two assistants of a

minority race to try to purchase a condominium from an association suspected of unfair housing discrimination. The court emphasized that, unique to cases which seek to root out that which is inherently hidden-such as civil rights violations, the misrepresentation was essential to the collection of evidence. Noting repeatedly that this approach was meant to be construed narrowly, the court also enumerated two other instances where such investigation would necessitate mispresentations, including (1) when a prosecutor misleads an alleged criminal to root out corruption or organized crime, or (2) when an attorney investigates trademark counterfeiting. All three of these narrow instances involve inherently deceptive crimes or civil rights violations, which by their nature, are usually concealed, and can not be prevented or prosecuted without disclosure. The inquiry presented by Ms. Nelson represents the opposite. She seeks to discover information regarding a civil negligence case, not regarding a crime or a civil rights violation. In fact, the information Ms. Nelson seeks could likely "be ontained through standard discovery tools, such as a subpoena," which the *Hartson Brant* court particularly characterized as "more likely to constitute an ethical violation." From her inquiry, Ms. Nelson admitted that she did not ask the witness in the deposition the content of her pages, and undoubedtly, a court reviewing this conduct, would likely consider the deposition or other discovery methods as satisfactory to gain this information.

CONCLUSION

____In conclusion, the actions as presented in the inquiry we received represent violations of ethical conduct under the Rules, and the committee should respond accordingly to Ms. Nelon's inquiry. The profession must keep pace with technology and ensure that our behavior, while techology may entice us to acquire information in a faster or easier way, that our ethical guidelines remain steadfast and unwavering. Seeking to access a nonparty witness's social networking sites, which are not available for ready public viewing, through the use of an assistant hiding her true motivation and alliance, amounts to a misrepresentation and is unethical under all three tests, (1) the plain language approach, (2) the content-based approach, and (3) the status-based approach, advanced in other jurisdictions with rules identical to the Rules. Thus, the committee should respond to Ms. Nelson's inquiry by informing her such conduct, especially in a civil case involving negligence, is an ethical

breach.

END OF EXAM