

# **Ethical Issues Associated with Use of Private Investigator**

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## **Investigations Still Critical Tool**

- Obtain information for contemplated or ongoing litigation
- Evaluate settlement compliance
- Infringement detection
- Internal investigations

## Investigations Still Present Risk

- Bar investigations/sanctions for attorneys
  - Use of private investigator to conduct sham interview of judge's former law clerk to investigate suspected judicial bias against client resulted in disbarment of involved counsel.
    - *In re Crossen*, 880 N.E.2d 352 (Mass. 2008)
    - *In re Curry*, 880 N.E.2d 388 (Mass. 2008)
  - Attorney received public reprimand for posing as doctor while investigating potentially fraudulent practices of insurance medical review company.
    - *In re Gatti*, 8 P.3d 966 (Or. 2000)

## Investigations Still Present Risk

- Court sanctions (for attorneys and clients)
  - Exclusion of evidence
    - *Midwest Motor Sports, Inc., v. Arctic Cat Sales, Inc.*, 144 F. Supp.2d 1147 (S.D.S.D. 2001)
  - Disqualification of attorneys
    - *Camden v. The State of Maryland*, 910 F. Supp. 1115 (Dist. Md. 1996)
    - *MMR/Wallace Power & Industrial, Inc. v. Thames Associates*, 764 F. Supp. 712 (Dist. Conn. 1991)
    - *Maldonado v. State of New Jersey*, 225 F.R.D. 120 (Dist N.J. 2004)
  - Dismissal of case
    - *Stephen Slesinger, Inc. v. Walt Disney Co.*, 155 Cal.App.2 Dist. 736 (Cal. Ct. App. 2007).

## Investigations Still Present Risk

- Potential liability (for attorneys and clients)
  - Investigator misconduct
    - *Stephen Slesinger, Inc. v. Walt Disney Co.*, 155 Cal.App.2d Dist. 736 (Cal. Ct. App. 2007)
    - *Singletary v. Fridley*, 762 So.2d 692 (La.App. 2000)
    - *Kirschenbaum v. Rehfield*, 530 So.2d 12 (Fla.App. 1989)
    - *Liability of One Hiring Private Investigator or Detective for Tortious Acts Committed in Course of Investigation*, 73 A.L.R.2d 1175 (1976)
  - Running afoul of law (privacy, consumer protection, wiretapping, impersonating law enforcement, etc.)
    - Fair Credit Reporting Act (*e.g.*, *Bakker v. McKinnon*, 152 F.3d 1007 (8<sup>th</sup> Cir. 1998) (lawyer violated FCRA by obtaining credit report of defendant to determine whether it had assets to satisfy judgment))

## Investigations Still Present Risk

- Bad publicity & more
  - Oct. 2006: indictment for alleged wrongdoing in internal investigation to identify “leak”
    - Allegation: pretexting (use of false pretenses to obtain phone records and SS #s)
    - Plea agreements – charges dropped after completing community service and paying restitution (no contest plea to misdemeanor)

## **What Are the Major Issues?**

- Who a lawyer/PI can contact
  - Current vs. former employees
  - Control group vs. those who can “bind” a party
- Whether lawyer/PI can use “pretexting”
- Permissibility of “recording”
- Acquisition of privileged information

## **Pertinent Rules? Supervision**

- Lawyer cannot do indirectly – e.g., through PI – what lawyer cannot do directly
  - Rules 8.4(a), 5.3

## Pertinent Rules? Anti-Contact

- Rule 4.2: The anti-contact rule (dealing with represented persons)
  - Prohibits contact with represented person absent lawyer's consent
  - Applies when the lawyer/investigator is
    - representing a client
    - seeking to communicate about the subject of the representation
    - with someone known to be represented by another lawyer in the matter

## Pertinent Rules? Anti-Contact

- The difficulty of artificial entities (e.g., corporations or governments, etc.)
  - Rule 1.13: client is the organization acting through authorized agents
  - Variance in identifying "agents" for purposes of anti-contact rule
    - ABA: prohibits contact with managerial employees or any present employee who may legally bind the organization with respect to the matter in question
    - "Control group" test as defined in *Upjohn v. United States*
    - Federal court divergence from state rules (or rule comments)

## **Pertinent Rules? Anti-Contact**

- Current employee
  - Within defined group?
- Former employees
  - More generally fair game
  - Care relative to defined group

## **Pertinent Rules? Pretexting**

- Rule 4.1: prohibiting false statement of fact
- Rule 4.3: prohibiting statement or implication of disinterest
- Rule 4.4: prohibiting use of methods of obtaining evidence that violate the legal rights of a person
- Rule 8.4(c): prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation

## Pertinent Rules? Pretexting

- ABA Formal Op. 01-422 (June 24, 2001)  
(considering electronic recordings)
  - abstained from addressing when investigative practice involving misrepresentations of identity and purpose may be ethical

## Pertinent Rules? Pretexting

- Cases recognizing limited pretexting
  - *Apple Corps. Ltd. v. International Collectors Society*, 15 F. Supp. 2d 456 (D.N.J. 1998)
    - denial of sanctions for use of staff and investigator to call and place order for stamps from defendants who agreed to sales restrictions under terms consent order
  - *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999)
    - refusal to exclude evidence obtained through use of an investigator posing as a customer to detect trademark infringement

## Pertinent Rules? Pretexting

- Recognized pretexting: efforts to detect ongoing wrongful conduct
  - housing or employment discrimination
  - law enforcement
  - violation of court orders or agreements
  - infringement
- Rejected: efforts to “manufacture evidence”
  - eliciting “admissions” or damaging statements about past conduct

## Pertinent Rules? Pretexting

- Rationale when limited pretexting allowed (identity/purpose):
  - Rule 4.1: Not “material” misstatement of fact
  - Rule 4.2: Contact with low level employees not prohibited
  - Rule 4.3: Not acting as “lawyers” in testing compliance
  - Rule 4.4: Does not threaten attorney-client privilege
  - Rule 8.4(c): Not on par with dishonesty, fraud, and deceit; does not reflect on fitness to practice law

## Pertinent Rules? Pretexting

- Rationale (cont'd)
  - Anti-contact rule preserves the proper functioning of the attorney-client relationship
    - Pretext investigation does not interfere - not an "end-run" around privilege
    - Rule should not immunize corporations from liability for unlawful activity, while not effectuating any of the purposes behind the rule
  - Difficulty of detection through other means
    - Minor deception in favor of greater good

## Pertinent Rules? Pretexting

- Rationale (cont'd)
  - Public or private lawyer's use of an undercover investigator to detect *ongoing violations of the law* is not deceitful conduct
  - OK to act as members of the general public - to engage in ordinary business transactions with low-level employees of a represented corporation
  - Even if violation of rules occurred, exclusion of evidence is not required

## Pertinent Rules? Recording

- Tape recordings
  - 2001 ABA Formal Op. 01-422 (June 24, 2001)  
("Electronic Recordings By Lawyers Without the Knowledge of All Participants")
  - State-specific LEOs, statutes, etc.

## Pertinent Rules? Privileged Materials

- Inadvertent receipt of privileged materials
  - 2005 ABA Formal Op. 5-437
    - Cites 1992 addition of Rule 4.4(b) to ABA Model Rules (*only* requirement of a lawyer who received inadvertently sent documents is to notify the sender, NOT to refrain from reading the document or follow the instructions of opposing counsel)
    - State-specific LEOs, statutes, etc.

## **If you want to investigate . . . What to Do?**

- Make sure the “contact” is permitted
  - Represented party?
  - Check applicable jurisdiction’s version of the anti-contact rule (Rule 4.2) and whether it uses the “control group” or other test focused on who may “bind” the corporation (or provide “admissions”)

## **If you want to investigate . . . What to Do?**

- Pick the right PI
  - Licensing/permitting requirements (endorsements, certifications, associations, etc.)
  - Bonded/insured?
  - Experience/credentials match?
  - References
  - Familiarity with restrictions, ethical issues
  - Familiarity with confidentiality and privilege concerns

## **If you want to investigate . . . What to Do?**

- PI engagement letter should:
  - Identify client of PI
    - E.g., law firm, law firm on behalf of client, client
  - Identify purpose / scope of engagement
  - Anticipate privilege issues
    - Note anticipation of litigation, if applicable
    - Identify whether PI may or may not be “consulting” or “testifying” expert

## **If you want to investigate . . . What to Do?**

- PI engagement letter should:
  - Put PI on notice of expectation/obligation to treat information (define) confidentially and protect privilege, if applicable
    - Address any concerns about whether PI’s process or systems are sufficient to ensure confidentiality
    - Address return of any information
    - Address process for handling subpoenas for information
  - Put PI on notice not to publicize engagement without permission

## **If you want to investigate . . . What to Do?**

- PI engagement letter should:
  - Require PI to be licensed/permitted as required by applicable law
  - Require PI to act in accordance with applicable laws (recording, data protection)

## **If you want to investigate . . . What to Do?**

- PI engagement letter should:
  - Put PI on notice of and require PI to act in accordance with applicable ethics
    - Confidentiality
    - Who can/cannot be contacted
    - Fairness to Opposing Party and Counsel
      - Instruct PI what to do if privileged information is inadvertently obtained
    - Interaction with Other Persons

## **If you want to investigate . . . What to Do?**

- PI engagement letter should:
  - Establish fees/expenses
  - Require PI to be bonded/insured
  - Seek indemnification for PI misconduct, negligence, non-compliance with law, etc.
  - Address use of subcontractors