The Ethics of Civil Practice Investigations - Part II

"Pretexting Ain't What It Used to Be"

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The premise of this two part article is that prior to starting an investigation in a civil matter a lawyer should ask three questions:

- Are the methods of investigation legal?
- Are the methods of investigation ethical?
- Are the methods of investigation smart?

Part I provided an overview of lawyer investigative competence and a brief review of the risks an incompetent investigation can create. This was followed by addressing the question "Are the methods of investigation legal?" Part I concluded with a review of the question "Are the methods of investigation ethical?" concerning the ethical issues a lawyer faces as an investigator. Part I appeared in the September 2007 issue of the *Bench & Bar* (Vol.71 No.5, page 31). It is available on Lawyers Mutual's Website at lmick.com on the Risk Management page/Bench & Bar Articles. If you have not read it, you may want to glance at it before reading this article.

Part II completes consideration of the question "Are the methods of investigation ethical?" by reviewing the ethics issues when a lawyer supervises an investigation. It then addresses the question "Are the methods of investigation smart?" Part II concludes with suggestions for investigation risk management. Not considered in this article are criminal or government investigations and those aspects of civil investigations covered by rules of civil procedure.

Are the Methods of Investigation Ethical? – Lawyer as Supervisor of Investigators

Lawyers often assign nonlawyer staff or hire private investigators to perform background investigations, conduct surveillance, look for assets, and locate and interview witnesses. At times these investigations are undercover or covert in nature. Lawyers must know the professional conduct rules that apply to these investigations, be familiar with the laws governing private investigators in Kentucky, and have an appreciation of how lawyers have gone awry in supervising investigators to avoid the same mistakes. The following paragraphs address each of these considerations.

The Rules: Several Kentucky Rules of Professional Conduct (KRPC)[1] factor on a lawyer's duties when supervising an investigation:

- KRPC 8.3, Misconduct, provides: "It is professional misconduct for a lawyer to: (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another …."

  A good example of the application of this Rule is an unpublished decision of the Kentucky Court of Appeals that upheld the disqualification of a lawyer who, when representing a client for wrongful termination, retained a reference check agency to investigate what kind of reference the represented former employer gave the client.[2] The investigator was to hold himself out to the former employer as a prospective employer seeking a reference on a job applicant and thereby get information on the client's job performance and about his termination. The trial court found that "[t]he contact with the former employer was a trick intended to find out if the former employer would give a bad reference." If so, that information would be used in the wrongful termination suit. The Court of Appeals found that the lawyer violated both KRPC 4.2, Communication with Person Represented by Counsel, and KRPC 8.3, Misconduct, by sending an investigator to do what the lawyer could not do directly. The Court concluded that the investigator's "contact with the [former employer] was clearly designed to elicit *ex parte* admissions against a represented party's interest and that Rule 4.2, when construed in conjunction with Rule 8.3, makes [the lawyer] responsible for [the investigator's] conduct in communicating with [the former employer] as if she had made the contact herself."[3]

- A lawyer's responsibility for professional conduct rule violations by supervised investigators is made even clearer in KRPC 5.3 (b), Responsibilities Regarding Nonlawyer Assistants: "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…."

  The Comment to the Rule specifically identifies investigators as covered by the Rule:

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

- KRPC 5.3 (c) makes a lawyer vicariously responsible for a nonlawyer's KRPC violation if:
    - the lawyer orders or with knowledge of the specific conduct ratifies the conduct; or
    - as a managing lawyer or a direct supervisor knows of the conduct in time to avoid or mitigate the harm, but took no reasonable remedial action.

  Comment [4] to KRPC 5.1 offers this guidance on vicarious responsibility for supervised lawyers that is applicable to supervised investigating nonlawyers as well:

  > Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

  KRPC 5.3 (c) requires actual knowledge by a supervising lawyer for vicarious responsibility to attach.[4] Willful blindness, studied ignorance, or plausible deniability tactics by a supervising lawyer will not relieve the lawyer from responsibility for an investigator's misconduct.[5]

- It is important to note that Kentucky has a Supreme Court rule outside the KRPCs specifically governing the activities of paralegals that must be read in conjunction with KRPC 5.3. SCR 3.700, Provisions Relating to Paralegals, is an extensive rule with detailed supporting comments. For the purposes of this article the primary import of the Rule is that a supervising lawyer is responsible for instructing a paralegal on the lawyer's professional responsibility and that the lawyer is responsible for all actions taken by the paralegal — which I read to include investigative assignments.

Private Investigators: Hiring private investigators is often the best way to conduct a thorough investigation, but carries with it the heavy burden for the responsible lawyer to assure that private investigators adhere to the law and the professional conduct rules governing lawyers. Failure to do so can result in both civil liability and bar discipline. Some lawyers have tried to finesse this obligation by what has been called "studied ignorance" or a "don't ask-don't tell" relationship with the private investigator, but the authorities uniformly agree that this is an ineffective defense.[6] Close supervision is not only the best practice, but the only way to operate.

The Kentucky Private Investigators Licensing Act[7] requires that private investigators in the state be licensed.[8] Fortunately for lawyers, the Act does not require licenses for "An attorney-at-law, or an attorney's bona fide employee, performing duties within the scope of the practice of law or authorized agent with duties limited to document and record retrieval or witness interviews; …."[9] The Act prohibits private investigators from knowingly making a material misrepresentation to the client (i.e., the supervising lawyer) regarding an investigation.[10] Ethical private investigators will follow lawyers' instructions and not mislead them about their methods. A review of KRS Chapter 329A, Private Investigators, is recommended professional reading.

Deceptive Investigations: In *Misrepresentation – Scandals Involving Investigators Ensnare Lawyers*[11] the author cites the article *Private Eyes*[12] in listing the following types of investigations using nonlawyer investigators that should not be problematic:

- Overt investigations in which investigators identify their roles and principals and do not mislead or deceive anyone.
- Public records searches.
- Physical observations, measurements and the like.
- Surveillance, even if covert, so long as investigators do not trespass or invade privacy.

The Indiana case *Allen v. International Truck and Engine*[13] is an ideal case to illustrate many of the ethical issues in supervising an investigation that involves deception. International Truck (IT) at its Indianapolis facility had racial problems and faced a pending suit over racial graffiti. IT's general counsel hired a private investigation company to "find out who the graffiti artist were" and prepare an overall report on the working environment at the plant.

Before and during the investigation the general counsel sought and received advice from IT's outside counsel on how to direct the investigation. That advice included that IT "should not identify [to the investigators] the plaintiff-employees in the current law suit and … give minimal practical direction to the investigators." Outside counsel "did not advise [IT] to affirmatively instruct the undercover investigators not to speak with named plaintiffs about the subject matter of the lawsuit or not to make false representations to named plaintiffs or employees generally." IT's general counsel, in fact, did not tell the investigators to avoid talking to plaintiffs about the lawsuit and did not instruct other house counsel to ensure that the investigators did not talk to plaintiffs.

The investigators posing as IT employees initiated contact with IT's employees, including plaintiffs. During the investigation, the general counsel became aware that investigators had talked to a plaintiff, but took no remedial action. Plaintiffs learned of the covert investigation and sought to depose the investigators. At the hearing to consider IT's motion to quash IT's outside counsel made a sweeping denial of giving any directions to the investigators and that firm lawyers had had no contact with the investigators.

As a result of one of those fluke occurrences that never cease to amaze, evidence fell into the plaintiffs' possession completely undermining IT's outside counsel's denial of direct involvement with the investigation. Inadvertently, IT included in a filed exhibit outside counsel's billing records. These records showed that several members of outside counsel's firm were actively involved in assisting and directing the covert investigation. They revealed that outside counsel lawyers reviewed summaries of investigation reports, prepared memorandum concerning them, met with IT's house counsel to discuss the reports, met with investigators, and on one occasion met with house counsel lawyers to discuss investigator contact with named plaintiffs.

Based on this information plaintiffs moved for sanctions claiming that five of IT's counsel violated Rules of Professional Conduct 4.2 (communication with person represented by counsel), 4.3 (dealing with an unrepresented party), 5.3 (responsibilities regarding nonlawyer assistants), and 8.4 (misconduct: doing indirectly what cannot be done directly and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). (*These rules are substantively the same as Kentucky's KRPCs 4.2, 4.3, 5.3, and 8.3*.)

Specifically, plaintiffs' lawyers alleged that IT lawyers:

> (1) failed to fully disclose the instance of an undercover investigation;
> (2) directed and/or caused the undercover investigators to have contact with represented parties and employees who were potential members of the class; and
> (3) allowed the investigators to give false information about who they were to the plaintiffs and other employees. …. [and] that counsel directed and/or caused the undercover investigators to have contact with named plaintiffs about the substance of the underlying litigation and other employees under false pretenses, in violation of these rules.

The Magistrate Judge, obviously appalled at how the investigation had been directed and the ethical behavior of IT's lawyers in and out of court, concurred with the plaintiffs' claims. He recommended that IT's lawyers be publicly reprimanded for violation of Rules 4.2, 4.3, 5.3, and 8.4 (*in Kentucky 8.3*). *Allen v. International Truck and Engine* is highly recommended professional reading.

Is Any Deception Permissible When Investigating?

KRPC 8.3(c) categorically forbids dishonesty, fraud, deceit or misrepresentation, seemingly closing out any exceptions for investigations. However, as one authority expressed it when offering guidance on ethical investigations: "The reality … is that some misrepresentation and overreaching are accepted and perhaps even required if one is to adequately represent a client. The rub is to define the boundary between the acceptable and the unacceptable."[14]

What is acceptable in some jurisdictions are covert civil litigation investigations seeking to gain information by misrepresentation or other subterfuge about unlawful activity. Examples are investigations in cases concerning copyright infringement, employment and housing illegal discrimination, suspected dishonest employees, employees disclosing trade secrets, and trademark infringement. Public policy, necessity, and socially desirable ends are offered in support of creating an exception to the absolute prohibition of the professional conduct rules on using deceit or misrepresentation in an investigation.[15] A recent example of this approach is the New York County Lawyers' Association Committee on Professional Ethics Formal Opinion No. 737 (5/23/2007):

> Digest: In New York, while it is generally unethical for a non-government lawyer to knowingly utilize and/or supervise an investigator who will employ dissemblance in an investigation, we conclude that it is ethically permissible in a small number of exceptional circumstances where the dissemblance by investigators is limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence. Even in these cases, a lawyer supervising investigators who dissemble would be acting unethically unless (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably and readily available through other lawful means; and (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the New York Lawyer's Code of Professional Responsibility (the "Code") or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. These conditions are narrow. Attorneys must be cautious in applying them to different situations. In most cases, the ethical bounds of permissible conduct will be limited to situations involving the virtual necessity of non-attorney investigator(s) posing as an ordinary consumer(s) engaged in an otherwise lawful transaction in order to obtain basic information not otherwise available. This opinion does not address the separate question of direction of investigations by government lawyers supervising law enforcement personnel where additional considerations, statutory duties and precedents may be relevant. This opinion also does not address whether a lawyer is ever permitted to make dissembling statements directly himself or herself.

What is clear is that covert investigations involving deceit and misrepresentation are inherently problematic for compliance with professional conduct rules. Douglass Richmond in his article *Deceptive Lawyering* offers this guidance when considering whether to employ a covert investigation:

> In summary, lines cannot be confidently drawn in this area; at best, lawyers must evaluate associated risks on a continuum from "clearly impermissible to clearly permissible conduct. In terms of practical guidance, lawyers considering an undercover investigation should first research the law in their jurisdiction relating to [Rule 8.3 (c)] …. If the investigation will take place in a jurisdiction other than that in which the lawyer practices, the lawyer should research the law in both jurisdictions. If a lawyer determines either that there is no law on point, or that lawyers may supervise undercover investigations without violating [Rule 8.3(c)] …, the lawyer may have to conduct additional research if the target of the investigation is an organization. If an organization is the target, the lawyer must research Rule 4.2 … to determine which employees are off limits. After that is done, the lawyer is prepared to plan the investigation. The planning must include careful instructions to investigators about to whom they can speak and what they can say. A target's employees should never be tricked into saying or doing things that they would not normally say or do when dealing with actual customers.
>
> As to lawyers misrepresenting their identities to gather information in civil cases, the rule is simple: "Never, Never, Never Lie." Any notion that lawyers may avoid discipline or sanctions for misrepresenting their identities because they are functioning as investigators rather than as lawyers is seriously misguided (*footnotes omitted*).[16]

The authors of *Modern Litigation and Professional Responsibility Handbook* similarly caution lawyers to avoid deceitful investigations unless "*it is clear that after the fact it will appear that deceit was necessary and appropriate to effectuate a legitimate end*.[17]

The Oregon Solution: An Oregon cases reflects the dilemma that lawyers face with the misconduct rule's apparent absolute prohibition of deceit and misrepresentation by lawyers when investigating. The case of *In re Gatti* concerned a lawyer who misrepresented himself to a chiropractor and a manager of a company performing medical reviews for insurance companies.[18]

Gatti was investigating whether fraud was involved in how medical reviews were prepared that enabled the insurance companies to deny benefits. Among other misrepresentations he misrepresented himself by stating that he was a chiropractor interested in working for the medical review company and gave fictitious qualifications. The fact of the misrepresentations was uncontested, but defended on the basis that public policy justified an exception for allowing investigators and discrimination testers to misrepresent their identify and purpose when they were investigating suspected unlawful conduct.

The Oregon Supreme Court refused to create an exception to the professional conduct prohibition on deceit and misrepresentation by judicial decree, holding that any exception must come by following the procedures for adopting and amending the professional conduct rules. Gatti was given a public reprimand.

As a result of the *Gatti* decision Oregon changed its Rule 8.4, Misconduct, by adding paragraph (b) that provides in pertinent part:

> … it shall not be professional misconduct for a lawyer to advise clients or others about or how to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity" as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

It is important to note that the Oregon rule does not permit lawyers to directly conduct covert activity – they may only supervise or advise.[19]

Are the Methods of Investigation Smart?

Even after concluding that the investigative methods to be used are legal and ethical, lawyers should pause and carefully consider whether it is smart to use them. Many judges, lawyers, jury members, and members of the general public find covert investigations repugnant regardless of whether they are legal and ethical. While some investigations are benign fact gathering ventures, others involve digging up the dirt, dumpster diving, secret tape recording, and deceiving unsuspecting persons. As the Hewlett-Packard scandal over pretexting shows, there can be considerable bad publicity once the deceitful actions are revealed – this hurts the client, the lawyers involved, and the targets of the investigation. It certainly did for all concerned at Hewlett-Packard.

The results of a 'not smart' investigation, in addition to bad publicity, can be evidence preclusion, mistrust by a judge and jury, as well as civil suits by offended persons. Before triggering an investigation using covert methods, get a second opinion on just how smart it is. This could save considerable embarrassment at a critical point in the proceedings.

Managing the Risk

The primary risk management tool is that before you begin an investigation answer the three questions that are the theme of this article – are the investigative methods contemplated legal, ethical, and smart. If the matter is multijurisdictional, you must answer these questions for all jurisdictions concerned. If in doubt about the ethics of the investigation, call the KBA Ethics Hotline for guidance before you begin the investigation.[20] Get a second opinion from a disinterested colleague if the investigation methods contemplated may have even remotely embarrassing or counter-productive unintended consequences. Be sure to keep the client fully informed of the investigation plan, progress, and costs. Get the client's concurrence when it is decided to terminate the investigation.

During my research I found two helpful risk management checklists. The *Modern Litigation and Professional Responsibility Handbook* includes these considerations in its Preventive Ethics Checklist for investigations:

Interviewing Witnesses and Potential Litigants

- Ask whether the person is represented by counsel on the matter at issue; if so, obtain consent before going further.
- Check ethics opinions in your jurisdiction (or ask for an opinion) before interviewing a present employee or an organization represented by counsel.
- Reveal you identity and purpose.
- Take someone with you as an observer (and potential witness).
- Obtain a written or recorded statement if possible.
- Do not tape the interview or record a phone conversation without the consent of all parties unless it is clear that you can ethically and legally do so.
- Do not interview the opposing party's treating physician or retained expert without consent or court order.

Supervising Investigators

- Inform the investigator of the limits on your conduct, and tell the investigator to abide by those limits.
- Inform the investigator that you want a report of what was learned and how it was learned.[21]

Robert L. Reibold in his article "*Hidden dangers of using private investigators*" recommends that lawyers should when hiring a private investigator:

- ensure that the investigator is duly licensed and has the proper business permit;
- interview the investigator about his or her practical experience;
- ask for and check business references of the investigator;
- determine which of he investigator's employees will be performing the work if the investigator is a company or organization;
- determine whether the investigator is a member of any established organization … which impose ethical guidelines upon members; and
- determine whether the investigator has appropriate liability insurance.[22]

In closing I can only continue to stress the sensitivity of both the legal and ethical issues involved when conducting a civil matter investigation. You must know what you are doing. Finally, I note that the Kentucky Rules of Professional Conduct are now being actively considered for revision by the Supreme Court. Perhaps the Oregon rule revision that provides guidance for permissible investigation covert activity would be a good fit for Kentucky. What do you think?

ENDNOTES

1. SCR 3.130.
2. *Babbs v. Minton, Huddleston and R.C. Components Inc.,* Court of Appeals of Kentucky No. 2004-CA-000332-OA (6/18/2004); Not reported in S.W.3d, 2004 WL 1367621 (Ky. App.).
3. Another example of a violation of this Rule is an Oregon case in which a lawyer was given a public reprimand for "directing a private investigator to pose as a journalist to interview a party to a potential legal dispute." The Oregon Supreme Court found misconduct because the ruse was a misrepresentation by nondisclosure within the meaning of the rule that a lawyer should not knowingly assist or induce another to violate disciplinary rules. *In re Ositis*, 40 P.3d 500 (Or., 2002).
4. *See* SCR 3.130 Terminology (5).
5. *E.g.*; *In re Cohen*, 847 A.2d 1162 (D.C., 2004); Formal Advisory Opinion 05-10, Supreme Court of Georgia (4/25/2006).
6. Rogers, *Misrepresentation – Scandals Involving Investigators Ensnare Lawyers*, ABA/BNA Lawyers' Manual On Professional Conduct, Current Reports, Vol. 22, No. 21, p.507, 513 (10/18/06).
7. KRS 329A.010 to 329A.090.
8. KRS 329A.015.
9. KRS 329A.070 Scope of KRS 329A.010 to 329A.090.
10. KRS 329A.055 Prohibited acts. (4).
11. Rogers, *Misrepresentation – Scandals Involving Investigators Ensnare Lawyers*, ABA/BNA Lawyers' Manual On Professional Conduct, Current Reports, Vol. 22, No. 21, p.507, 511 (10/18/06).
12. Caragozian, *Private Eyes*, Los Angeles Law. 31 (December 2004) (not available to me).
13. Not Reported in F. Supp.2d, 2006 WL 2578896 (S.D. Ind.).
14. Fortune, Underwood, Imwinkelreid, *Modern Litigation and Professional Responsibility Handbook*, 2d Ed. 2002, § 5.7, p. 230, Interviewing Witnesses.
15. Id. at 231.
16. Richmond, *Deceptive Lawyering,* 74 U. Cin. L. Rev. 577, 598 (2005).
17. Fortune, Underwood, Imwinkelreid, *Modern Litigation and Professional Responsibility Handbook*, 2d Ed. 2002, § 5.7, p. 233, Interviewing Witnesses.
18. 8 P.3d 966 (Or., 2000).
19. In Richmond, *Deceptive Lawyering,* 74 U. Cin. L. Rev. 577, 606 (2005), the author recommends that other states follow Oregon' example and provides model language similar to Oregon's.
20. SCR 3.530 (2).
21. Fortune, Underwood, Imwinkelreid, *Modern Litigation and Professional Responsibility Handbook*, 2d Ed. 2002, § 5.13, p. 257, Preventive Ethics Checklist.
22. Reibold, "*Hidden dangers of using private investigators," 17 South Carolina Lawyer 18 at p. 29 (July 2005).*