INVESTIGATION ETHICS

On or about March 4, 1948, Cecil G. German, a private investigator employed by plaintiffs' members of the Committee on Practice of Law of the Ramsey County Bar Association to obtain information as to whether defendant was engaged in the practice of law, went to the office of defendant under the assumed name and identity of an alleged taxpayer, George H. Reed. German, as George H. Reed, informed defendant that he operated a tax chart that he had come to have his income tax return prepared, and that he needed help with certain questions. For a cash consideration, defendant prepared the income tax return and gave German professional advice.

Gandnho v. Commy, 234 Minn. 468, 48 N.W.2d 788 (Minn. 1955). Was the bar association's role deceitful? Unethical? What rules apply to informal investigations outside the Rules of Civil Procedure that govern formal discovery?

Investigation is obviously a requirement of good lawyering. Rule 11 of the Rules of Civil Procedure requires pre-litigation "inquiry" sufficient for an attorney to certify that "material contentions have evidentiary support" or are likely to have such support after "further investigation." Informal investigation is often necessary for learning key facts, whether in litigation or other legal representation.

The Rules of Professional Conduct, the civil law, and the criminal law govern, but they govern informal discovery in ways that are sometimes unclear and variable. This article will consider regulations on investigative activities that involve several important issues arising primarily under ethics rules: deceit, intrusion, candid, obstruction, responsibility for agents, and investigation of a lawyer's own client.

In addition to obligations of law and ethics rules, lawyers should consider the Professionalism Aspirations adopted by the Minnesota Supreme Court and endorsed by the MSBA and various courts. The Aspirations do not directly address standards for investigation. The Aspirations do, however, state general principles that are relevant in determining the propriety of certain investigative techniques. For example, Aspiration I.B. states, "We will conduct our affairs with candor and fairness." Aspiration I.E. states, "We will always endeavor to conduct ourselves in such a manner as to avoid even the appearance of impropriety." Aspiration II.A.4. includes a pledge to refrain from "enforcement conduct." Before pleading to follow the Professionalism Aspirations, a lawyer should consider whether effective and otherwise legitimate investigative techniques may appear improper, or give offense, or be something lacking in candor.

ADMIRABLE ZEAL AND INGENUITY? OR FORBIDDEN DECENCY?

Standards. "Where does an investigating attorney draw lines between legitimate, guilt, trial, and indignity, on one hand, and forbidden deceit on the other? Prohibitions on deceit arise both under ethics rules and statute. Rule 5.4(c) of the Rules of Professional Conduct (MPREC) is the broadest of several ethics rules on truthfulness, forbidding "committing dishonesty, fraud, deceit or misrepresentation." Minn. Stat. § 481.071 provides, "Every attorney or counselor at law who shall be guilty of any deceit or collusion, or shall consent thereto, with intent to deceive the court or any party, or shall defy the attorney's client with a view to the attorney's own gain, shall be guilty of a misdemeanour and in addition, to
If prosecutors can benefit from law enforcement’s aggressive investigative efforts, should criminal defense attorneys and their investigators not have similar methods available to them?

The Oregon Supreme Court has wrestled more extensively with these issues, in the wake of a lawyer discipline case in which law enforcement representatives appeared as amici for the respondent lawyer, who was nonetheless reprimanded. In re Gatti, 887 P.2d 966 (Or. 2000). In 2002, after extensive study, the Court amended DR 1-102(D), Oregon Code of Professional Responsibility, to provide that lawyers may advise and even supervise certain “covert activity,” when necessary to detect “unlawful activity”—even “through the use of misrepresentations or other subterfuge.”

Secret Taping. From 1974 to 2001, theABA Standing Committee on Ethics and Professional Responsibility regarded secret tape-recording by lawyers as deceitful and therefore unethical. However, in 2001, the ABA reversed field, and the Minnesota Lawyers’ Board followed the ABA’s reversal, just as it had followed the prior ABA prohibition. So long as a lawyer does not illegally intercept and then use those conversations, a lawyer may use audio recordings of conversations to which the lawyer is party, at least in states, like Minnesota, where such conduct is not illegal. The ABA caution that it is almost always inadmissible, however, to make such secret recording of conversations with clients. Surely here, however, professionalism concerns must be considered. A lawyer will not be disciplined in Minnesota for taping conversations with opposing counsel, a client, or even

The provision, however, is not a complete panacea. Defense attorneys and their investigators may not be able to benefit from the same investigative tactics that law enforcement officers and their agents use. This disparity may be due to the lack of access to certain investigative tools, such as electronic surveillance or confidential informants, which are available to law enforcement agencies. However, it is important to note that an attorney’s ability to conduct an effective investigation is not limited to the tools available to law enforcement agencies. Defense attorneys may have access to a variety of investigative techniques, including interviewing witnesses, reviewing evidence, and conducting surveillance.

In the absence of specific regulations regarding the use of investigatory techniques, defense attorneys and their investigators must rely on their own judgment and discretion to determine the appropriate use of investigative tools. This requires a thorough understanding of the law and the rules of professional conduct, as well as a commitment to ethical and professional standards. Ultimately, the goal of an effective investigation is to secure a just and fair outcome, and defense attorneys must work to ensure that their clients receive a fair trial, regardless of the tools available to them.
Courts have ruled variously on whether evidence gathered in violation of ethics rules may be introduced in civil or criminal proceedings.

The Represented Party and Protected Evidence (Rules 4.2, 4.4)

MPRC 4.2 forbids a lawyer "to communicate about the subject of the representation with a party (or former party) who is represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." With which individuals related to a represented organization may a lawyer communicate? Again, there is variety among the authorities.

In Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc., 377 F. 3d 693 (6th Cir. 2003), the court applied a much broader interpretation of Rule 4.2 than the Minnesota Office of Lawyer Professional Responsibility (OLPR) and most other authorities would use. The court broadly construed the Committee to Rule 4.1 that prohibits contact with an employee "whose statement may constitute an admission on the part of the organization." The court viewed "admission" to refer to the hearsay exception under Rule of Evidence 801(d)(2)(D), which includes all statements "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship...." Under this standard, almost all employees of a represented organization would be at issue under Rule 4.2. In contrast, the OLPR and most authorities interpret "admission" to mean "binding admission," and therefore to protect only very high-level employees. Similarly, the ABA Model Rule 4.2 was amended in 2002 to delete the portion of the Committee regarding to "admission" altogether, so as to present exiguous interpretations, such as the Eighth Circuit's.

Although there is variety in interpretation of some portions of Rule 4.2 on most points there is agreement. There is no disagreement, for example, that Rule 4.2 forbids in part communications with a represented organization's high-level managers and with those employees whose acts or omissions might be imputed to the organization for liability purposes. It is also generally agreed that Rule 4.2 does not apply to former employees, although local federal courts have taken a somewhat mixed position on this point. Boardman v. Donnelly, 680 F. 2d 379 (3d Cir. 1982), and Olson v. Snap Products, Inc., 183 F. 3d 539, 544-45 (D. Minn. 1998), adopt a "flexible approach," finding that where a former employee (including a former CEO and board chair) is not asked to disclose privileged information and does not do so, there is no Rule 4.2 Violation. The best practice, when communicating with former high-level employees, is to give them a witnessed or written notice of non-involvement and privilege information.

What if corporate counsel declares that all represents employees and therefore opposing counsel may not contact any employees? In Minnesota, this declaration may be ignored. Wern v. Community with Reprised Parties, The French & Bar of Minnesota (Dec. 1987). A recent ethics opinion finds that corporate counsel has violated discipline rules by making the obviously false declaration that the represents all employees. Utah Bar Op. 04-06.

Courts have ruled variously on whether evidence gathered in violation of ethics rules may be introduced in civil or criminal proceedings. In Midwest Motor Sports, the court affirmed a ruling suppressing evidence gained in violation of Rule 4.2. Similarly, State of Minnesota v. Miller, 602 N.W.2d 457 (Minn. 1999), excluded from a criminal proceeding evidence gained in violation of Rule 4.2. In contrast, Kaznowicz v. WFP Pub. No. 330, 349 N.W.3d 597, 602 (Minn. App. 1998), denied a motion for a new trial based in part on Rule 4.2 violation, stating, "The function of the Code of Professional Responsibility is to regulate attorney conduct and has no bearing on the admissibility of evidence." Like Rule 4.2, Rule 4.4, MPRC enforces a limit an interest, by forbidding a lawyer to "use methods of obtaining evidence that violate the legal rights" of a third party. This rule forbids a lawyer to obtain evidence by trespassing, opening another's mail, or otherwise violating a third party's legal rights. In Arnold et al. v. Cassell Inc. 2004 WL 223410, Civ. No. 01- 286 (D. Minn. Sept. 24, 2004), the court disallowed plaintiffs' law firm for macroscopic including improperly obtaining, reviewing, and retaining defendant's privileged documents, in violation of Rules 4.2 and 4.4. Although the firm denied that it had substantively reviewed the documents, it acknowledged that it had received the documents from a former high- level employee, reviewed them at least to a degree necessary to segregate privileged and unprivileged documents, and retained copies of many privileged documents for a period of approximately 18 months. Arnold is a salutory reminder that an investigating lawyer who gains access to an opponent's inside information may be playing with fire.
INVESTIGATION AND CANDIDATE: THE UNPRESENTED PARTY (Rule 4.3)

The investigating lawyer who determines that an indentation source is not represented by counsel must make additional checks demographics before and during the interview of the source. The first of these arises under Rule 4.3(a), MRPC, which provides, "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall clearly disclose whether the client's interests are adverse to the interests of such person and shall not state or imply that the lawyer is disinterested." For example, in employing a lawyer interviewing an employee who may be guilty of misconduct should state that the lawyer represents only the employer and that the employee's and employee's interests may be adverse. Must a lawyer depositing a non-party, whose interests are or may be adverse, give notice of adversity? Read narrowly, Rule 4.3(a) might be thought to require such notice and in Panel No. 97, 2nd Office of Lawyer's Professional Responsibility charged a violation in just such circumstances. However, a lawyer's board panel rejected the charge after trial. Note, in any event, that Rule 4.3(a) does not require specification of the adverse interests, only disclosure whether there is adversity. Nonetheless, the discussion of adversity is now a greatice ice-breaker in eliciting useful information.

In addition, where the interviewee may believe that the lawyer represents, or is otherwise protecting, the interview, Rule 4.3(b) requires that the lawyer's role must be clarified. Rule 1.3(c) imposes a similar requirement in the organizational setting where action regarding house counsel's role is especially likely to occur. Finally, Rule 4.3(c) provides that the lawyer may not furnish legal advice to an interviewee. The interviewee's and client's interests are apt to be in conflict. In Panel No. 97, the OLPR charged an attorney with the following purported offense: "Respondent's conduct in failing to advise an unrepresented person to seek legal advice from her own attorney violated Rule 4.3(c)." A lawyer's Board panel rejected this charge because Rule 4.3(c) is permissive—the lawyer may inform the interviewee that retaining counsel is desirable.

Two examples of discipline for Rule 3 violations may be instructive. In re Nelson, 470 N.W.2d 111 [Minn. 1991], imposed a public reprimand when an attorney for a personal representative attempted to induce estate beneficiaries to compromise their interests without disclosing that he was also representing the personal representative's individual interests. The lawyer received a private admonition for asking an unrepresented party to a dispute, "What is your position?" The lawyer had implied that he was disinterested and did not disclose that he represented the other party to the dispute. Kenneth L. Jorgensen, "Summary of Admissions," Bench & Bar of Minnesota (Apr. 1984).

OBSTRUCTING AN OPONENT'S INVESTIGATION

A lawyer may thwart an opponent's investigation by means such as

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**FEURINGING:** Josephine Ocheltree, M.D., Jayne Wilborn, Clinical and Forensic Psychologist; Paul R pakistan, Inc., Director of Community and Clinical Services; John Davis, Director of Community and Clinical Services; Terri Keeling, Director of Community and Clinical Services; Susan Wilkie, Director of Community and Clinical Services; Tim Wilson, Director of Community and Clinical Services.

The Basics of Adoption Law -- Plus Update on Current Changes

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- A discussion of current issues in adoption law. 
- A discussion of current issues in adoption law. 
- A discussion of current issues in adoption law. 
- A discussion of current issues in adoption law.

**FEURINGING:** Susan Gray, attorney at law (court clerk); Judith Voskanian, Vincent Law Office
privilege and work product, and invoking the protections of Rules 4.2 and 4.4 against certain intrusions. However, a lawyer may not "request a person other than a client to refrain from voluntarily giving relevant information to another party." Rule 3.4(b), MRPC. This prohibition does not apply where: "(1) the person is a relative or an employee of one of the clients; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." In Hyman v. Lewis, 302 F.2d 1255 (9th Cir. 1963), a defense lawyer was fined for trying to induce a fact witness and an expert witness not to communicate with the plaintiff's lawyer, conduct which would violate Rule 3.4(b).

RESPONSIBILITIES FOR INVESTIGATORS AND CLIENTS

If a lawyer's investigative efforts are limited by ethics requirements, can the task be performed by investigators or clients who are not similarly constrained? The answer depends on how the investigator or client interacts with the lawyer.

If the investigator is "employed or retained by or associated with a lawyer," then "the lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Rule 5.3, MRPC. A lawyer who instructs an investigator to engage in conduct that is prohibited by ethics rules, such as interviewing a represented party, is subject to discipline. In addition, a lawyer may not hire an investigator to discover the facts and be indifferent to the investigator's means of inquiry. The lawyer generally has an affirmative obligation to inspect the investigator in the basics of lawyer ethics. On the other hand, the investigator is hired by the client, and the lawyer does not direct the investigation, the investigator is constrained only by the civil and criminal law and by the investigator's own professional standards.

If the client, wishing to be free of the burden of lawyer ethical standards, undertakes to investigate for itself, the lawyer may advise regarding the client's rights and regarding the constraints of the civil and criminal law. If, however, the lawyer instructs the client to

particularly that the client is the agent of the lawyer's investigative undertaking, the lawyer may be violating Rule 8.4(a), MRPC. "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." In addition, Professionalism Appraisal II.A.5 states, "We will neither encourage nor urge clients to do anything that would be unethical or inappropriate if done by us."

INVESTIGATING ONE'S OWN CLIENT

What ethical duty does a lawyer have to investigate the truth of factual assertions by clients or others? Special duties may be created by law, such as Rule 11 (and its ethics counterpart, Rule 3.1, MRPC), securities laws, and the like. In situations where no substantive law applies, is there an ethical duty to investigate?

In general, a lawyer does not have a duty to investigate the truth of falsity of statements made by a client or of


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