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FEATURE

INVESTIGATION ETHICS

On or about March 4, 1948, Cecil G. Germain, 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 Heinl. Germain, as George Heinl, informed defendant that he operated a truck farm, 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 Germain professional advice.

Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (Minn. 1951). Was the bar association's ruse 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 "factual 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, candor, 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 honesty." 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 "offensive conduct." Before pledging to follow the Professionalism Aspirations, a lawyer should consider whether effective and otherwise legitimate investigative techniques may appear improper, or give offense, or be somewhat lacking in candor.

ADMIRABLE ZEAL AND INGENUITY? OR FORBIDDEN DECEIT?

Standards. Where does an investigating attorney draw lines between legitimate guile, zeal, and ingenuity, on one hand, and forbidden deceit on the other? Prohibitions on deceit arise both under ethics rules and statute. Rule 8.4(c) of the Minn. R. Prof. Conduct (MRPC) is the broadest of several ethics rules on truthfulness, forbidding "conduct involving 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 delay the attorney's client's suit with a view to the attorney's own gain, shall be guilty of a misdemeanor and in addition, to

punishment prescribed by law therefore, shall forfeit to the party injured treble damages, to be recovered in a civil action." Baker v. Ploetz, 616 N.W.2d 263 (Minn. 2000), held that this statute and its companion, Minn. Stat. § 481.07, apply only to deceit in judicial proceedings and not, for example, to fraud in a real estate matter.[1]

Posing. In 1948, when the bar association used an investigator to obtain facts through an elaborate impersonation, neither the bar nor the Minnesota Supreme Court raised an eyebrow at the deception involved. May a lawyer today safely follow the bar's example? Not in Minnesota, but some other courts have allowed posing and related deceit in certain circumstances.

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?

In 1985, the Minnesota Supreme Court reprimanded a collections lawyer and ordered him to take a law school ethics course for using deceptive techniques, including posing as "Mark Rose," and obtaining information from debtors by making false statements. In re Luther, 374 N.W.2d 720 (Minn. 1985). One of Luther's deceptive techniques was ingenious: he sent judgment debtors checks in nominal amounts that were ostensibly drawn on the account of a charitable foundation that, in fact, did not exist. When the checks were negotiated, Luther learned the location of debtors' accounts.

The Eighth Circuit also found deceit where a lawyer's investigator posed as a customer and secretly recorded conversations with store employees. Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc. 347 F. 3d 693 (8th Cir. 2003). The court condemned the conduct as a breach of basic ethics: "The duty to refrain from conduct that involves deceit or misrepresentation should preclude any attorney from participating in the type of surreptitious conduct that occurred here." What the bar association itself once did without evident hesitation, and the Minnesota Supreme Court reported without comment, Minnesota courts in more recent times have found to be deceitful.[2]

It is, however, difficult to agree that all posing should be prohibited as deceitful. How are lawyers in such areas as civil rights enforcement and trademark infringement to do their work without using poseurs? 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 Arizona Bar has opined, "[T]he use of 'testers' who employ some deceit is proper under the ethical rules to protect society from discrimination based upon disability, race, age, national origin, and gender." Arizona Bar Ethics Op. 99-11. At a minimum, a lawyer or investigator should not be prohibited from gathering information by means that do not involve false statements. When "posing" involves nothing more than going to a store and asking questions that any customer might ask of non-managerial employees, it should be permitted as an ordinary investigative activity. Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F.Supp.2d 119 (S.D.N.Y. 2000), took exactly this position, denying a motion to suppress evidence gained in such endeavors.[3]

The Oregon Supreme Court has wrestled most 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, 8 P.3d 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."[4]

Secret Taping. From 1974 to 2001, the ABA 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.[5] So long as a lawyer does not illegally intercept another's communications, a lawyer may secretly tape conversations to which the lawyer is party, at least in states, like Minnesota, where such conduct is not illegal.

The ABA cautions that it is almost always inadvisable, 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

a judge, but all of them will regard the taping as beneath professional standards, at least absent extremely unusual and compelling circumstances. Similarly, opportunities for eavesdropping arise from time to time and lawyers receive inadvertently produced materials in circumstances where transmittal was not so careless as to waive the attorney-client privilege. Although the ABA has again changed positions—under ABA Model Rule 4.4, as amended in 2002, the lawyer who receives inadvertently produced documents now must merely notify the sender of receipt—a lawyer receiving such materials should consider whether returning them unread is the professional thing to do.[6]

Courts have ruled variously on whether evidence gathered in violation of ethics rules may be introduced in civil or criminal proceedings.

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

MRPC 4.2 forbids a lawyer "to communicate about the subject of the representation with a party the lawyer knows to be 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., 347 F. 3d 693 (8th Cir. 2003), the court applied a much broader interpretation of Rule 4.2 than the Minnesota Office of Lawyers Professional Responsibility (OLPR) and most other authorities would use. The court broadly construed the Comment to Rule 4.2 that prohibits contact with an employee "whose statement may constitute an admission on the part of the organization." The court construed "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...."[7] Under this standard, almost all employees of a represented organization would be off-limits 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, ABA Model Rule 4.2 was amended in 2002 to delete the portion of the Comment referring to "admission" altogether, so as to prevent expansive interpretations, such as the Eighth Circuit's.

Although there is variety in interpretations of some portions of Rule 4.2 on most points there is agreement. There is no disagreement, for example, that Rule 4.2 forbids ex parte communications with a represented organization's high-level managers and with those employees whose act or omission 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 nuanced position on this point. FleetBoston Robertson Stephens, Inc. v. Innovex, 172 F.Supp.2d 1190, 1195, 2001 WL 1456081 (D. Minn.), and Olson v. Snap Products, Inc., 183 F.R.D. 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 not to reveal privileged information.

What if corporate counsel declares that she represents all employees and therefore opposing counsel may not contact any employees? In Minnesota, this declaration may be ignored. Wernz, *Communication with Represented Parties*, The Bench & Bar of Minnesota (Dec. 1987). A recent ethics opinion finds that corporate counsel has violated discipline rules by making the obviously false declaration that she 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, 600 N.W.2d 457 (Minn. 1999), excluded from a criminal proceeding evidence gained in violation of Rule 4.2. In contrast, Kantorowicz v. VFW Post No. 230, 349 N.W.2d 597, 600 (Minn. App. 1984), denied a motion for a new trial based in part on a 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, MRPC establishes a limit on intrusion, 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. Cargill Inc., 2004 WL 2203410, Civ. No. 01-2086 (D. Minn. Sept. 24, 2004), the court disqualified, plaintiffs' law firm for misconduct 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 salutary reminder that an investigating lawyer who gains access to an opponent's inside information may be playing with fire.

Investigation and Candor: The Unrepresented Party (Rule 4.3)

The investigating lawyer who determines that an information source is not represented by counsel must make additional ethics determinations 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."[8] For example, an employer's lawyer interviewing an employee who may be guilty of misconduct should state that the lawyer represents only the employer and that the employer's and employee's interests may be adverse. Must a lawyer deposing 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 File No. 97-2, the Office of Lawyers Professional Responsibility (OLPR) charged a violation in just such circumstances. However, a Lawyers 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 disclosure of adversity is not a great ice-breaker in eliciting useful information.

In addition, where the interviewee may believe that the lawyer represents, or is otherwise protecting, the interviewee, Rule 4.3(b) requires that the lawyer's role must be clarified. Rule 1.13(d) imposes a similar requirement in the organizational setting where confusion 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 where the interviewee's and client's interest are apt to be in conflict. In Panel File No. 97-2, 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 Lawyers 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 4.3 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. A 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 Admonitions," *Bench & Bar of Minnesota* (Apr. 2004).

Obstructing an Opponent's Investigation

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

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(f), MRPC. This prohibition does not apply where: "(1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." In Harlan v. Lewis, 982 F.2d 1255 (8th Cir. 1993), 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(f).

Responsibilities for Investigators and Clients

If a lawyer's investigative efforts are limited by ethics requirements, can the facts be gathered 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.[9] 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 instruct the investigator in the basics of lawyer ethics. If, 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 so 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 Aspiration II.A.5 states, "We will neither encourage nor cause clients to do anything that would be unethical or inappropriate if done by us."[9]

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 laws, 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 or falsity of statements made by a client or of

statements made by another party that are favorable to a client. "A lawyer ordinarily has no duty to initiate investigation of a client's affairs...." Comment to Rule 2.1. In a criminal prosecution of an attorney, there was substantial agreement between expert witnesses for the defense ("because of the duty of loyalty, lawyers 'tend to very strongly believe [their] clients'") and prosecution (attorneys may give clients the benefit of the doubt regarding veracity of their statements) that lawyers are not generally duty-bound to investigate their clients' statements. U.S. v. Kellington, 2000 WL 897749 (9th Cir. 2000). The Rules of Professional Conduct refer frequently to what a lawyer "knows" or "believes," but the Rules impose no general obligation on the lawyer to investigate so as to create belief or knowledge about others' statements.

Many commentators have criticized the American legal system for allowing lawyers to remain so habitually agnostic about the truth. However, the ethics rules themselves do not generally require lawyers to investigate the veracity of statements by clients or third parties. Even Rule 3.1, MRPC, which prohibits taking certain positions, "unless there is a basis for doing so that is not frivolous," applies only in "a proceeding." Many of the ethics rules, including Rule 3.3(a) and (b), governing "Candor Toward the Tribunal," apply only to the facts that the lawyer "knows," which is defined as "actual knowledge of the fact in question." It may be unwise or even poor lawyering to remain ignorant of the facts of a matter, but in most circumstances the ethics rules do not create an independent requirement that a lawyer investigate the accuracy of client and third-party representations.

Conclusion

Obtaining the facts of a matter is essential for effective lawyering. Obtaining the facts legally, ethically, and professionally is equally essential. Especially in informal discovery, however, a lawyer must know a wide range of civil, criminal, and ethics laws and the varying ways these laws have been applied at different times and in different forums. Methods that even the bar association once took for granted as proper have become the subject of condemnation, but may yet come to be recognized in the future as appropriate in certain circumstances. Before launching an investigation to obtain the facts, a prudent lawyer will carefully consider the ethics rules and other laws that authorize some investigative methods and forbid others.

[1] *See* State v. Casby, 348 N.W. 2d 736 (1984) (affirming criminal conviction under Minn. Stat. § 481.071 for attorney acquiescing in a criminal defendant's impersonation); In re Casby, 355 N.W. 2d 704 (1984) (public reprimand and probation for same misconduct).

[2] Writers on legal ethics routinely suppose that lawyers' ethical standards in earlier eras were higher than today's standards, but there is much evidence to the contrary. *See* Wernz, "Professionalism Lite: Aspiring to Civility, Idealizing the Past," *The Bench & Bar of Minnesota* (April 2001); and Wernz, "Does Professionalism Literature Idealize the Past and Over-Rate Civility? Is Zeal a Vice or Cardinal Virtue?" *The Professional Lawyer* (Fall 2001).

[3] Prosecutors themselves may not violate ethics rules, but prosecutors are not normally responsible for the investigative actions of law enforcement personnel. Matter of Pautler, 47 P.3d 1175, 1180 (Colo. 2002) disciplined a prosecutor who impersonated a public defender for the purpose of inducing the surrender of a man who had just murdered three people, stating "that even a noble motive does not warrant departure from the Rules of Professional Conduct.

[4] Oregon Code of Professional Responsibility 1-102(D): "Notwithstanding DR 1-102(A)(1), (A)(3) and (A)(4) and DR 7-102(A)(5), it shall not be professional misconduct for a lawyer to advise clients or others about or 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 disciplinary rules. '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." Oregon appears to allow a lawyer to "advise" or "supervise" regarding deceitful acts, but not to engage in them. Utah Bar Opinion 02-05 also allows government attorneys to be involved in deceitful undercover operations.

[5] ABA Formal Op. 01-422, "Electronic Recordings by Lawyers Without the Knowledge of All Participants." ABA Formal Opinion 337 (1974). Minnesota Lawyers Professional Responsibility Board Opinion 18 was repealed in 2002. Bateman, "Opinions of the Lawyers Board," *Bench & Bar of Minnesota* (Nov. 2002) at 13, n. 3. Minn. Stat. § 626A.02, Subd. 2(d) permits recording conversations where one party consents so long as recording is not for a criminal or tortious purpose. 18 U.S.C. § 2511 (2)(c) and (d) are parallel.

[6] "[T]he proper procedure upon receiving inadvertently disclosed privileged information is to notify the affected party that the information has been received. Assuming the lawyer has done nothing improper to come into possession of the information, determinations as to waiver, admissibility, or whether the information must be returned are legal issues for the trial court. This procedure represents a change from that previously recommended by the ABA in Ethics Opinion 92-363 [sic, should be 368] (1992), which admonished lawyers to refrain from reading the materials and to abide by the instructions of the sending lawyer as to disposition of the confidential materials." Kenneth L. Jorgensen, "Ethics Advisory Opinions," *Bench & Bar of Minnesota* (August 2003) at 12.

[7] Whether *Midwest Motor Sports* states the law of South Dakota, where the case arose, or the law of the Eighth Circuit, is somewhat unclear.

[8] This Minnesota rule has no counterpart in the ABA Model Rules. An MSBA proposal to amend Rule 4.3(a) to provide that adversity must be disclosed where the lawyer reasonably should know of it is pending before the Minnesota Supreme Court.

[9] Edward J. Cleary, "Summary of Admonitions," *Bench & Bar of Minnesota* (March 1998) at 20 (reporting admonition to criminal defense lawyer for instructing investigator to interview represented co-defendant). Note that the Rule 4.2 prohibition on communication with a represented party applies even without a showing that the party is adverse to one's client.

[10] This Aspiration appears to ignore that it is both ethical and professional for an attorney to encourage a client to communicate directly with a represented party, particularly where there are family or other personal considerations, and where limitation of legal fees is important. Wernz, "Communication with Represented Parties," *The Bench & Bar of Minnesota* (Dec. 1987) at 11.